



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE *MW*

FROM: COMMISSION SECRETARY

DATE: OCTOBER 7, 2008

SUBJECT: COMMENT ON DRAFT AO 2008-11
Lawrence Martin E. Brown

Transmitted herewith is a timely submitted comment from Alan R. Swendiman, General Counsel, on behalf of United States Agency for International Development, regarding the above-captioned matter.

Proposed Advisory Opinion 2008-11 is on the agenda for Wednesday, October 8, 2008.

Attachment



USAID
FROM THE AMERICAN PEOPLE

FEDERAL ELECTION
COMMISSION
SECRETARIAT

2008 OCT -7 A 8: 58

October 6, 2008

Mary W. Dove
Commission Secretary
Federal Elections Commission
999 E Street NW
Washington, DC 20463

Dear Ms. Dove:

The Federal Election Commission (FEC) is currently considering a request for an advisory opinion on the status of United States Agency for International Development (USAID) personal services contractors (PSCs) with respect to the Federal Election Campaign Act (FECA). In a letter dated August 19, 2008, a PSC at USAID named Lawrence Brown sought an advisory opinion regarding whether USAID PSCs should be considered contractors or employees for the purpose of FECA implementation, in light of USAID's unique PSC authorities. Mr. Brown's request for an advisory opinion has been designated AO 2008-11. On October, 3, 2008, the FEC posted Draft Advisory Opinion 2008-11 for public comment. USAID submits these comments for the FEC's consideration pursuant to the procedural guidance given in that Draft Advisory Opinion, whereby comments will be accepted until 12:00pm on October 7, 2008.

The concern Mr. Brown raised is that, despite the fact that USAID PSCs are considered employees in almost all other respects, FECA as implemented currently appears to treat PSCs as contractors. As a result, they are subjected to a much more severe restriction against political activity than other USAID employees. Specifically, FECA bars USAID PSCs from making any political contributions. See 2 U.S.C. § 441c.

The Office of General Counsel joins in Mr. Brown's request for a final opinion on whether USAID PSCs should be treated as employees or as contractors for the specific purpose of the Federal Election Campaign Act. This letter documents the fact that USAID has treated its PSCs as employees except as expressly prohibited in its organic statute.

USAID has express statutory authorities, as well as "notwithstanding" authorities, to hire PSCs to perform inherently governmental activities. Additionally, we have over the years accumulated several letter determinations from different agencies agreeing or confirming that USAID PSCs are employees for purposes of various government-wide programs or policies they administer. Mr. Brown's request seeks a similar determination from your Commission.

USAID's organic statute gives this Agency express authority to "contract[] with individuals for personal services abroad" and appropriations statutes have given USAID express authority to "employ . . . personal services contractors in the United States, notwithstanding any other

provision of law. . . .” 22 USC § 2396(A)(3); P.L. 110-161, § 634(a). The only stated restriction with respect to PSCs’ employment status is that they “shall not be regarded as employees of the United States Government for the purpose of any law administered by the [Office of Personnel Management].” 22 USC § 2396(A)(3). USAID has developed benefits for its PSCs that are analogous to those administered by OPM. Accordingly, PSCs receive FICA, salary increases, allowances and differentials, and annual and sick leave. PSCs abroad also receive 401(k) benefits. PSCs are eligible for employee status for programs administered by agencies other than OPM, such as equal treatment for IRS purposes, and coverage for worker’s compensation under the Federal Employees’ Compensation Act.

USAID PSC employees are authorized to perform inherently governmental functions; they are not subject to the general restrictions against contracting for inherently governmental functions. The Office of Management and Budget (OMB) has stated this in an opinion letter to USAID. Discussing OMB Policy Letter 92-1, which says that inherently governmental activities must be performed by Government employees, the Associate Administrator for Federal Procurement Policy wrote,

[USAID] is correct . . . that the Policy Letter [92-1] does not apply to Agency for International Development (AID) personal service contracts authorized by Congress. . . .

In paragraph 12 of the preamble to the final Policy Letter in the Federal Register, . . . we stated that “*Personal service contracts that are really personal appointments are excluded from the coverage of the policy letter.*” (57 Fed. Reg. 45097 (September 30, 1992)). . . . [U]nder the applicable authorities relating to AID’s use of personal service contractors, [as USAID’s letter describes,] “the contractors are considered US Government employees for most purposes other than those explicitly excluded by statutes . . .”. We thus do not think the Policy Letter is applicable to the AID personal service contracts in question.

Letter from Allen V. Berman, Administrator, OFPP (OMB), to John Mullen, Acting General Counsel, USAID (March 15, 1993) (emphasis added).¹

In addition to being considered Government employees for purposes of inherently governmental activities, USAID PSCs are considered Government employees for tax purposes. In a letter determination to USAID, an Associate Chief Counsel for the Internal Revenue Service (IRS), wrote,

[Internal Revenue Code] § 912 . . . provides:

The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:

- (1) Foreign area allowances [under chapter 9 of title I of the Foreign Service Act of 1980 or title II of the Overseas Differentials and Allowances Act]
- (2) Cost-of-living allowances . . . (other than amounts received under title II of the Overseas Differential and Allowances Act). . . .

Section 102(a)(5) of [the Foreign Service Act] provides that

“employee” (except [family members hired because of their spouse’s foreign posting]) means, when used with respect to an agency or to the Government generally, an officer or employee (including a member of the Service) or a member of the Armed Forces

[This] definition . . . is broad enough to cover the individuals under contract to the Agency for International Development.

Letter from Michael F. Patton, Associate Chief Counsel, IRS, to the General Counsel for USAID, pp. 1-4 (January 26, 1988).ⁱⁱ Similarly, the IRS approved of USAID establishing a 401(k) plan for USAID PSCs. “[W]e conclude that [USAID] . . . is authorized to establish a 401(k) plan for its [PSCs] who are employees.” Letter Ruling from John C. Riddle, IRS to General Counsel for USAID, (January 24, 2001).ⁱⁱⁱ

The Department of Labor has also found that USAID PSCs are Government employees. In a letter determination to USAID regarding the Federal Employees’ Compensation Act, the then-Acting Director for Federal Employees’ Compensation wrote:

The employer/employee relationship for U.S. citizens hired under PSCs to work within the United States is virtually identical to that of foreign nationals and U.S. citizens similarly hired to work abroad. Therefore, we find that U.S. citizens hired by the USAID under a PSC to work within the U.S. would be covered under the Federal Employees’ Compensation Act (FECA) for work-related injuries, if the conditions of their employment [reflect an employer/employee relationship].

Letter from Nancy L. Ricker, Acting Director for Federal Employees’ Compensation, Department of Labor, to USAID Office of the General Counsel (September 28, 1999).^{iv} Thus, USAID PSCs are covered under Workers’ Compensation laws. *See, e.g. Markova v. United States*, 201 F.3d 110, 115 (2d Cir. 2000)(ballerina who received Workers’ Compensation benefits could not then claim to be an independent contractor in order to sue the Kennedy Center for a later injury).

Likewise, the Office of Government Ethics (OGE) considers USAID PSCs Government employees subject to the Standards of Conduct for Employees of the Executive Branch . In a letter determination to USAID, the Acting Director of the Office of Government Ethics wrote,

[W]e concur in your determination that persons providing services to the Agency for International Development under personal services contracts pursuant to 22 USC § 2396 (Section 636(a)(3)) of the FAA) are employees for purposes of the post-employment criminal statute at 18 USC § 207 and 5 CFR § [2637, the ethics regulations based on that statute].

Letter from Donald E. Campbell, Acting Director, US Office of Government Ethics, to USAID Office of the General Counsel (November 6, 1987).^v Hence, in all contracts for PSC employment, USAID includes a standard clause stating,

The contractor shall, during his/her tour of duty under this contracts, be considered an “employee” . . . for the purposes of, and shall be subject to, the provisions of 18 USC § 202(a) and the USAID General Notice entitled “Employee Review of the New Standards of Conduct” pursuant to 5 CFR part 2635.

USAID Acquisition Regulation (AIDAR) App. D § 12, cl. (2)(c); AIDAR App. J § 12, cl. 2(c).^{vi} As employees for the purpose of the ethics rules, USAID PSCs are required to file financial disclosure statements pursuant to the Ethics in Government Act (25 USC § 1043, as implemented by 5 CFR Part 2634).

The restrictions on political activity contained in the Hatch Act (5 U.S.C. § 7321 *et seq.*) likewise govern Federal employee behavior even outside of the workplace. The Office of Special Counsel has not issued any opinion on the status of USAID PSCs, but long-standing USAID policy does not distinguish between Civil Service, Foreign Service, or PSC employees – all are subject to the restrictions of the Hatch Act. See USAID Agency Notice 0222 (February 7, 2008).^{vii} This policy reflects the seamless nature of the USAID workforce and avoids confusion to the public that would result from some USAID employees engaging in political activities from which other USAID employees are prohibited. Out of approximately 8,000 USAID employees worldwide, only around 200 are US citizen PSC employees based in the United States. Though they are a small number of the Agency’s staff overall, they are indistinguishable from other employees in terms of work functions or any other outside appearance (including identification badges). At the same time, they are distinct from contractors for services; USAID PSCs are hired on an individual basis, are generally paid consistently with the GS scale, and are directly incorporated into the USAID workplace without any third-party intermediaries. Just as with any employee, if USAID PSCs were to conduct political activities that are prohibited by the Hatch Act, there would be a high risk of appearance of Government endorsement of a political candidate.

The differences which distinguish USAID PSCs from appointed federal employees are expressly limited to certain programs. The relevant statutory authority describes these express differences, stating that USAID PSCs “shall not be regarded as employees of the United States Government for the purpose of any law administered by the [Office of Personnel Management].” 22 USC § 2396(a)(3). Thus, USAID PSCs do not participate in OPM-administered programs such as the Thrift Savings Plan, retirement pension programs, and the federal health insurance plan. However, for programs or statutory provisions falling under the purview of other entities, those entities must make an independent determination of USAID PSCs’ employment status. In doing so, they review their own distinct definitions of the term “employee,” the respective purposes of the programs they administer, USAID’s unique authorities, and the functions USAID PSCs perform. As shown above, the different Executive branch agencies that have reviewed the issue have found that USAID PSCs should be treated as employees.

In light of the foregoing, the USAID Office of the General Counsel joins Mr. Brown in requesting a determination from the Federal Election Commission.

If you have any further questions or need additional information from USAID, please contact Warren Leishman at 202 712-1757.

Sincerely,

Alan R. Swendiman
General Counsel

Cc: Office of General Counsel
Federal Elections Commission
999 E Street NW
Washington, DC 20463

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- ⁱ Enclosure A
 - ⁱⁱ Enclosure B
 - ⁱⁱⁱ Enclosure C
 - ^{iv} Enclosure D
 - ^v Enclosure E
 - ^{vi} Enclosure F (available at www.usaid.gov/policy/ads/300/aidar.pdf, pp. 124-145 (accessed August 2008))
 - ^{vii} Enclosure G

ENCLOSURE A



OFFICE OF FEDERAL
PROCUREMENT POLICY

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

→ Ken T: 105
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March 15, 1993

Mr. John Mullen
Acting General Counsel
U. S. International Development Cooperation Agency
Agency for International Development
Washington, D.C. 20523

Dear Mr. Mullen:

This is in response to former General Counsel Fry's letter of November 4, 1992, concerning Office of Federal Procurement Policy Policy Letter 92-1, "Inherently Governmental Functions". A copy of that letter is enclosed for your convenience.

First, the letter inquires as to the effect of the change made in the Policy Letter eliminating the proposed definition of service contract. The change makes the Policy Letter applicable to personal service contracts. The letter is correct, however, that the Policy Letter does not apply to Agency for International Development (AID) personal service contracts authorized by Congress.

The proposed version of the Policy Letter defined a service contract as a nonpersonal service contract and prohibited the performance of inherently governmental functions by service contractors. The final version of the Policy Letter eliminated the definition of a service contract and, in section 6(a)(1), prohibits the use of service contracts for the performance of inherently governmental functions. Thus, the Policy Letter is applicable to personal service contracts in view of the Federal Acquisition Regulation (FAR) definition of a service contract at FAR 37.101.

In paragraph 12 of the preamble to the final Policy Letter in the Federal Register, however, we stated that "Personal service contracts that are really personnel appointments are excluded from the coverage of the policy letter." (57 Fed. Reg. 45097 (September 30, 1992)). As the Fry letter states on page 2, under the applicable authorities relating to AID's use of personal service contractors, "the contractors are considered U.S. Government employees for most purposes other than those explicitly excluded by the statutes . . .". We thus do not think the Policy Letter is applicable to the AID personal service contracts in question. Note, however, that our opinion regarding AID's interpretation of its own authorities does not go beyond

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the narrow issue of the applicability of the Policy Letter. Nor would we necessarily defer in the case of other agencies with different missions, applicable authorities, and agency regulations.

With regard to the second point in the November 4, 1992, letter, we agree that service contractors may participate as voting members on source evaluation boards. We changed the final version of the Policy Letter to make a distinction between participating as a voting member of a source selection board (prohibited in Appendix A, section 12(b) as inherently governmental) and as a nonvoting or voting member of a source evaluation board (permitted in Appendix B, section 14, as not inherently governmental). As the letter correctly concluded, the vital distinction here is between actions that bind the Government and those that result in recommendations to Government officials. Our change in the wording of proposed section 14(b) of Appendix A was intended to make this distinction clear.

Please contact Richard Ong of my staff at (202) 395-7209, if your office has any further questions regarding the Policy Letter.

Sincerely,



Allan V. Burman
Administrator

Enclosure

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UNITED STATES INTERNATIONAL DEVELOPMENT COOPERATION AGENCY
AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20523

NOV - 4 1992

GENERAL COUNSEL

Mr. Richard A. Ong
Deputy Associate Administrator
Office of Federal Procurement Policy
725 17th Street, N.W., Ste. 9001
Washington, DC 20503

Re: OFPP Policy Letter 92-1:
Inherently Governmental
Functions

Dear Mr. Ong:

This is in response to the subject policy letter, which was issued in final form on September 30, 1992. 57 Fed.Reg. 45096 (September 30, 1992). The U.S. Agency for International Development (A.I.D.) wishes to raise two important issues. First, the final version contains a major change that was not part of the proposed text previously made available for public comment. The policies in the policy letter, including the prohibition on performance of inherently governmental functions by service contractors, have been extended to apply to some personal as well as nonpersonal services contractors. The scope of this change, in the view of the U.S. Agency for International Development (A.I.D.), is unclear. This letter notes A.I.D.'s understanding of the intent of the change and requests OMB, in the event our understanding is incorrect, to reconsider or clarify the relevant provisions. Second, it is our view that subsection 12(b) of Appendix A of the policy letter is too restrictive. I will address each point in turn below.

The proposed text of Policy Letter 92-1 was published in late 1991. 56 Fed.Reg. 65279 (December 16, 1991). Among its provisions was a prohibition on the performance of inherently governmental functions by service contractors. §6(b). The draft defined "service contract" as "a 'nonpersonal service contract'". 5(a). Personal services contractors were excluded from the prohibition. Accordingly, it was clear that under the policy letter as originally drafted, only nonpersonal services contractors, and not personal services contractors, were prohibited from performing inherently governmental functions.

The final version deletes the definition of "service contract". This change appears to expand the coverage of the policy letter, and its associated prohibition, to certain personal as well as

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nonpersonal services contracts. The September 30 rulemaking notice explains this change as follows:

"Three commenters questioned why the policy letter applies only to nonpersonal services contracts. Upon consideration, we have accordingly deleted the definition of 'service contract' in section 5. No useful purpose is served by defining 'personal services' differently from the FAR and no harm arises from having the policy letter apply to the minimal number of true personal service contracts. Personal service contracts that are really personnel appointments are excluded from the coverage of the policy letter. Thus, FAR 37.102(b) need not be amended as a result of this policy letter."

Although we agree that it is not necessary to amend the FAR definitions, we believe that the deletion of the narrower definition of "service contract" results in uncertainty as to the scope of the policy letter. The explanation quoted above seems to distinguish between two types of personal services contracts, those that "are really personnel appointments" and those that are not. The policy letter does not apply to the former, as indicated in §3 of the guidance. This section states that "Services obtained by personnel appointments and advisory committees are not covered by this policy letter."

A.I.D. awards personal services contracts under several statutory authorities, including §636(a)(3) of the Foreign Assistance Act of 1961, as amended, and a number of laws authorizing provision of assistance "notwithstanding any other provision of law". Under these authorities, the contractors are considered U.S. Government employees for most purposes other than those explicitly excluded by the statutes (for example, §636(a)(3) personal services contractors may not be considered as Government employees for purposes of any law administered by the Office of Personnel Management). Such contractors are selected through a procurement process, and are not appointed as direct-hire employees. The A.I.D. Office of General Counsel has determined that personal services contractors may perform inherently governmental functions subject to certain limitations imposed as a matter of policy and sound administration. This determination has been recorded in the A.I.D. Acquisition Regulation. 48 CFR Chapter 7, App. D, §4(b)(3).

Flexible and extensive use of personal services contractors is essential to the achievement of the objectives of the U.S. foreign assistance program. When necessary, A.I.D. has--with appropriate monitoring, supervision, and other safeguards--utilized personal services contractors for performance of inherently governmental functions. For example, during temporary periods between assignments of direct-hire personnel in remote or otherwise difficult locations, we have brought in personal

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services contractors to serve as Controllers, Executive Officers, and even Contracting Officers.

Our understanding of the intent of the final version of the policy letter is that personal services contractors are not covered by the guidance, including the prohibition on contractor performance of inherently governmental functions, if they are treated or regarded as U.S. Government employees for most purposes. This is how we interpret the reference in the September 30, 1992 rulemaking notice to personal services contracts "that are really personnel appointments". Under this interpretation, A.I.D. personal services contracts awarded under the authority of §636(a)(3) of the 1961 Act, the various "notwithstanding" authorities, and other similar statutes, are not subject to the provisions of the policy letter, including the inherently governmental functions prohibition.

We request OFPP's concurrence with our interpretation. If OFPP does not concur, we request that the policy letter be revised to exclude personal services contractors or that A.I.D. be granted a deviation to continue our present practices as outlined above.

A second point we would like to raise concerns the list of inherently governmental functions in Appendix A of the policy letter. Section 12(b) of the Appendix states that "participating as a voting member on any source selection boards" is an inherently governmental function. Appendix B's list of non-inherently governmental functions, on the other hand, includes, as section 14, "Contractors participating as nonvoting members of, or technical advisors to, a source selection board or source evaluation board."

The above-quoted provisions do not seem consistent with each other. Appendix A limits contractors only if two elements are present: (a) the contractors must be on source selection boards, and (b) they must be voting members. Appendix B, however, seems to imply that contractors may not participate as voting members of either source selection or source evaluation panels.

A.I.D. assumes that by "source selection board" OFPP is referring to the type of procedure used in some agencies in which a board makes a binding selection of the contractor. In such cases, we fully agree with that this should be regarded as an inherently governmental function. However, A.I.D., like a number of other agencies (see FAR 15.612), utilizes "technical evaluation panels" that are limited to technical evaluation, and advisory only; the Contracting Officer is solely responsible for making the final selection decision. We are not sure if this is what OMB is referring to as a "source evaluation board". If so, we do not think that contractors should be prohibited, across the board, from participating as voting members.

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On occasion, we consider utilizing contractor personnel (and, much more frequently, personal services contractors) to assist the technical evaluation panel, and see no reason to exclude them completely from voting on evaluation recommendations. In our bilateral foreign aid projects, it is also common to have recipient government or local private sector personnel serve on panels to ensure their input and active involvement in the project. In our view, such practices are consistent with the FAR, particularly FAR 15.413-2, which recognizes that proposals may be disclosed outside the U.S. Government with appropriate safeguards. Permitting contractor and other non-direct hire personnel to participate as voting members in evaluation panels also seems to be within the spirit of section 8 of Appendix B, which categorizes "technical evaluation of contract proposals" as not inherently governmental.

Finally, we note that the wording of the Appendix A "source selection board" provision was changed from the originally proposed version ("Participating as a voting member on any boards or in any meetings regarding evaluation of contractor proposals, to include final source selection"). This change narrowed the scope of the function deemed to be inherently governmental, in a way that implies that OFPP is concerned with fundamental decision-making rather than participation in the process as an advisor.

We would appreciate OFPP's concurrence with our view that the carefully considered and appropriate use of other than direct-hire personnel on technical evaluation panels, as described above, is not contracting out, or otherwise inappropriately providing for, performance of an inherently governmental function.

Please let me know if you would like any further information concerning this issue. I appreciate your attention to this matter.

Sincerely,



Howard M. Fry

ENCLOSURE B

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Index Number: 0912.00-00

Organization: USAID

[Redacted]

Person to Contact:

[Redacted]
Telephone Number:

[Redacted]
Refer Reply to:

CC:INTL-863-87

Date:

JAN 26 1988

X - [Redacted]

"This document may not be used or cited as precedent. Section 6110(j)(3) of the Internal Revenue Code."

Dear [Redacted]

This responds to your letter dated November 19, 1987, requesting a ruling that personal service contract employees hired by the X in accordance with the Foreign Assistance Act of 1961 (hereinafter FAA), P.L. 87-195 (Sept. 8, 1961), 22 U.S.C. §§ 2151-2429a, and with Executive Order No. 11223 (May 12, 1965), 30 Fed. Reg. 6635, may exclude from their gross incomes, under I.R.C. § 912, certain amounts paid to these employees under the FAA, § 636(a)(3). You also request a ruling that certain other benefits and allowances paid to the contract employees are excludible from their gross incomes under section 912.

I.R.C. § 61(a) and section 1.61-1(a) of the Treasury Regulations provide that, except as otherwise provided by law, gross income means all income from whatever source derived.

Section 912, in part, provides:

The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:

(1) Foreign area allowances.--In the case of civilian officers and employees of the Government of the United States, amounts received as allowances or otherwise (but not amounts received as post differentials) under--

(A) chapter 9 of title 1 of the Foreign Service Act of 1980,

(B) section 4 of the Central Intelligence Agency Act of 1949, as amended (50 U.S.C., sec. 403e),

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(C) title II of the Overseas
Differentials and Allowances Act,
or

(D) subsection (e), or (f) of the
first section of the Administra-
tive Expenses Act of 1946, as
amended, or section 22 of such Act.

(2) Cost-of-living allowances.--In the
case of civilian officers or employees of the
Government of the United States stationed
outside the continental United States (other
than Alaska), amounts (other than amounts
received under title II of the Overseas
Differential and Allowances Act) received as
cost-of-living allowances in accordance with
regulations approved by the President....

You argue that allowances and other benefits paid to X's
employees under the FAA qualify for section 912 exclusion by
virtue of section 625(d) of the FAA, 22 U.S.C. § 2385(d), which
provides as follows:

For the purpose of performing functions under this
Act outside the United States, the President may employ
or assign individuals, or may authorize the employment
or assignment of officers or employees by agencies of
the United States Government which are not authorized
to utilize the Foreign Service personnel system, who
shall receive compensation at any of the rates provided
for under section 402 or section 403 of the Foreign
Service Act of 1950, or under chapter 53 of title 5,
United States Code, or at any other rate authorized by
law, together with allowances and benefits under the
Foreign Service Act of 1950. Individuals so employed
or assigned shall be entitled, except to the extent
that the President may specify otherwise in cases in
which the period of employment or assignment exceeds
thirty months, to the same benefits as are provided by
section 310 of that Act for individuals appointed to
the Foreign Service.

I.R.C. § 912(1) was enacted as section 116(j) of the 1939
Code by section 125 of the Revenue Act of 1943, P.L. 235, 78th
Cong., 2d Sess. (1943). The Finance Committee Report on the
legislation states that "[t]he committee bill provides a new
subsection to section 116 of the Internal Revenue Code to exempt
from gross income the cost-of-living allowances granted personnel
of the Government assigned foreign duty" and that

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[U]nder present regulations inclusion of these allowances is required and the income tax thus nullifies in large measure the efficacy of the allowance to meet official expenses incurred by personnel on foreign assignment, and granted in order to meet official requirements.

S. Rep. No. 627, 78th Cong., 2d Sess., 1944 C.B. 973, 992.

It is our position that section 912(1) was intended to apply only to differentials and allowances paid to civilian employees of the U.S. government in foreign areas under the provisions of law specifically enumerated therein. This position is reflected in Rev. Rul. 71-414, 1971-2 C.B. 272, in which the IRS considered whether amounts received pursuant to section 502(d)(3) of Part V of the Foreign Assistance Act of 1969 are exempt from federal taxation under I.R.C. § 912. In the Revenue Ruling, the taxpayer was transferred from a federal agency by which he was employed to an international organization outside the U.S. but after only a few months, he was reemployed by the federal agency. Pursuant to section 502(d)(3) of Part V of the FAA, the taxpayer was paid an amount which equaled the difference between the pay, allowances, post differential, and other monetary benefits paid by the international organization and the pay, allowances, post differential, and other monetary benefits that would have been paid by the federal agency had he been detailed to the international organization under section 3343, Title 5, U.S. Code, which provides for the assignment or loan of an employee to an international organization without a change of position from the agency by which he is employed to an international organization. The Revenue Ruling concludes that the amount received by the taxpayer was not received under one of the statutes enumerated in section 912(1) or under regulations approved by the President as set forth in section 912(2) and, therefore, that the amount is not excluded from gross income under section 912.

Section 912(1)(A) provides an exclusion from gross income for amounts received as allowances or otherwise (but not amounts received as post differentials) under chapter 9 of title I of the Foreign Service Act of 1980, P.L. 96-465 (Oct. 17, 1980). This exclusion is available only to civilian officers and employees of the United States Government. Section 102(a)(5) of P.L. 96-465 provides that

"employee" (except as provided in section 1002(8)) means, when used with respect to an agency or to the Government generally, an officer or employee (including a member of the Service) or a member of the

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Armed Forces of the United States, the commissioned corps of the Public Health Service, or the commissioned corps of the National Oceanic and Atmospheric Administration....

Section 1002(8) of P.L. 96-465 provides a definition of "employee" for purposes of Chapter 10 of the Foreign Service Act (i.e., Labor-Management Relations). The definition of "employee" in Section 102(a)(5) of P.L. 96-465 is broad enough to cover the individuals under contract to the Agency for International Development.

I.R.C. § 912(1)(A) is specific that the exclusion is only for the allowances provided in chapter 9 of title I of the Foreign Service Act of 1980. Chapter 9 contains the following sections:

- Sec. 901. Travel and related expenses.
- Sec. 902. Loan of household effects.
- Sec. 903. Required leave in the United States.
- Sec. 904. Health care.
- Sec. 905. Representation expenses.

It is our position that to be excludible from gross income under I.R.C. § 912(1)(A), the allowance must be received under one of the above-listed sections in chapter 9 of title I of P.L. 96-465.

Section 625(d) of the FAA, on which you rely, authorizes the payment of the contract employees in issue at "the rates provided for under section 402 or section 403 of the Foreign Service Act of 1980, ... together with allowances and benefits under the Foreign Service Act of 1980." To the extent that the contract employees in issue are paid, pursuant to section 625(d) of the FAA, allowances or benefits under sections 901 through 905 of the Foreign Service Act of 1980, the allowances or benefits are excludible under I.R.C. § 912(1)(A). However, the amounts received by the contract employees, pursuant to section 625(d) of the FAA, under sections 402 and 403 of the Foreign Service Act of 1980 are not covered by the I.R.C. § 912(1)(A) exclusion or by any other exclusion under I.R.C. § 912.

Section 402 of the Foreign Service Act of 1980, entitled Salaries of the Senior Foreign Service, authorizes the President to prescribe salary classes for the Senior Foreign Service; section 403, entitled Foreign Service Schedule, authorizes the President to establish a Foreign Service Schedule consisting of nine salary classes which shall apply to members of the Foreign Service who are citizens of the U.S. and for whom salary rates are not otherwise provided for by chapter 4 (Compensation) of the Foreign Service Act of 1980. Clearly, amounts received under sections 402 and 403 of the Foreign Service Act of 1980 are basic salary/compensation.

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In Rev. Rul. 59-407, 1959-2 C.B. 19, the Service set forth guidelines to distinguish between the two types of allowances or differentials paid by the U.S. Government to its civilian employees stationed outside the continental U.S. One type is excludible from gross income; the other type is fully taxable in the same way that basic salary is taxable. Sections 4.01 through 4.04 of the revenue ruling define excludible cost-of-living allowances as "an allowance based on living costs substantially higher than the cost-of-living in the District of Columbia and granted to enable employees to render more complete and efficient service in carrying out their official assignments." See also section 4.05 of Rev. Rul. 84-19, 1984-1 C.B. 179, which distinguishes includible cost-of-living allowances from those that are excludible under I.R.C. § 912. One basis for identifying includible amounts is their compensatory character and amounts which are

- (1) granted by reason of conditions of environment which differ substantially from conditions of environment in the United States and warrant additional compensation as a recruitment incentive, (2) considered as a part of the compensation in fixing salary, or (3) granted by reason of the location of the post of duty.

The payments received by the contract employees in issue, pursuant to section 625(d) of the FAA, under sections 402 and 403 of the Foreign Service Act of 1980, are compensation and are closely analogous to the compensatory nature of the post differential which is expressly proscribed from the exclusion provided in section 912(1) and is expressly held to be includible in gross income in section 6.01 of Rev. Rul. 59-407.

What you are seeking for the contract employees in issue, with respect to the basic compensation paid to them by X under the salary schedules in sections 402 and 403 of the Foreign Service Act of 1980, is an I.R.C. § 911(a)(1) exclusion for foreign earned income. Section 911(a)(1) allows an individual an exclusion from gross income of foreign earned income. Subsection (b) defines "foreign earned income". Similar exclusions are provided by sections 931(a) and 933(1) for the income of individuals who are bona fide residents of Guam, American Samoa, the Northern Mariana Islands, and Puerto Rico. However, each of these sections expressly states that amounts received for services performed as an employee of the U.S. or any agency thereof are not excludible from gross income merely because of bona fide residence or presence in a foreign country or in a possession of the U.S. or in Puerto Rico. See I.R.C. §§ 911(b)(1)(B)(ii), 931(d)(1), and 933(1).

Accordingly, to the extent the contract employees in issue receive payments, pursuant to section 625(d) of the FAA, under sections 402 and 403 of the Foreign Service Act of 1980, the

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payments are not excludible from the gross income of the recipients under I.R.C. § 912(1). However, to the extent that the contract employees receive payments or benefits under chapter 9 of title I of the Foreign Service Act of 1980, sections 901 through 905, the payments or benefits are excludible from the gross income of the recipients under I.R.C. § 912(1)(A).

In addition to the payments and benefits provided in section 625(d) of the FAA, your letter states that the contract employees in issue may also receive:

- 1) Foreign transfer allowances, 5 U.S.C. § 5924(2), "for extraordinary, necessary, and reasonable expenses, not otherwise compensated for, incurred by an employee incident to establishing himself or herself at any post of assignment in a foreign area including costs incurred in the United States prior to departure for a post in a foreign area...."
- 2) Separate maintenance allowances, 5 U.S.C. § 5924(3), "to assist an employee (U.S. citizen) who is compelled or authorized because of dangerous, notably unhealthful, or excessively adverse living conditions at the employee's post of assignment in a foreign area or for the convenience of the government, or who requests such allowance because of special needs or hardship involving the employee or the employee's spouse or dependents to meet the additional expense of maintaining, elsewhere than at the post, the employee's spouse or dependents, or both."
- 3) Foreign travel per diem allowances, secs. 901(1), (2) and (3) of the Foreign Service Act of 1980.
- 4) Temporary lodging allowances, 5 U.S.C. § 5923(1), "for the reasonable cost of temporary quarters incurred by the employee and his or her family (A) for a period not in excess of 3 months after first arrival at a new post of assignment in a foreign area or a period ending with the occupation of residence quarters, whichever is shorter, and (B) for a period of not more than 1 month immediately before final departure from the post after the necessary evacuation of residence quarters."

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- 5) Living quarters allowances, 5 U.S.C. § 5923(2), "whenever free government quarters are not provided, 'A living quarters allowance for rent, heat, light, fuel, gas, electricity, and water....'"
- 6) Post allowances, 5 U.S.C. § 5924(1), "to offset the difference between the cost of living at the post of assignment in a foreign area and the cost of living in the Washington, D.C. area."
- 7) Supplementary post allowances, 5 U.S.C. § 5924(1) and (2), "for extraordinary, necessary, and reasonable expenses, not otherwise compensated for, incurred by an employee incident to establishing himself/herself at a post of assignment in a foreign area..." or to compensate an employee for excessive living costs in a foreign area.
- 8) Education allowances and educational travel, 5 U.S.C. § 5924(4), "to assist any employee with the extraordinary and necessary expenses, not otherwise compensated for, incurred because of his or her service in a foreign area or foreign areas in providing adequate education for his or her dependents...."
- 9) Post differentials, 5 U.S.C. § 5925, "...on the basis of conditions of environment which differ substantially from conditions of environment in the continental United States and warrant additional pay as a recruitment and retention incentive...."
- 10) Danger pay allowances, sec. 2311 of the Foreign Service Act of 1980 and 5 U.S.C. § 5928, "...a danger pay allowance on the basis of civil insurrection, civil war, terrorism, or wartime conditions which threaten physical harm or imminent danger to the health or well-being of the employee."
- 11) Representation allowances, sec. 905 of the Foreign Service Act of 1980, "...for official receptions and ... entertainment and representational expenses ... to provide for the proper representation of the United States and its interests."

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- 12) Official residence expenses, 5 U.S.C. § 5913, for the purpose of defraying the unusual expenses incident to the operation and maintenance of official residences suitable for the chief representatives of the United States at such posts and such other senior officials of this government in foreign countries as the (Secretary) may designate.
- 13) Compensatory time off, 5 U.S.C. § 5926.
- 14) Home service transfer allowances, 5 U.S.C. § 5924(2) and sec. 901(14) of the Foreign Service Act of 1980, "...for extraordinary, necessary, and reasonable expenses, not otherwise compensated for, incurred by an employee incident to establishing himself/herself at a post of assignment in the United States."
- 15) Evacuation payments, 5 U.S.C. §§ 5521-5527 and sec. 2303 of the Foreign Service Act of 1980, for up to 180 days payment of salaries, post differential, and allowances in the event of an emergency evacuation or authorized departure of employees or their dependents, or both, from duty stations for military, or other reasons or because of imminent danger to their lives."

The payments and benefits enumerated in items 3, 11, and 14, ^{*} above, are made under the authority of provisions in chapter 9, title I, of the Foreign Service Act of 1980. Thus, payments and benefits under these provisions may be excluded from gross income under I.R.C. § 912(1)(A). ³

I.R.C. § 912(1)(C) provides an exclusion from gross income for allowances or otherwise (but not amounts received as post differential) under title II of the Overseas Differentials and Allowances Act, P.L. 86-707 (1960), subchapter III of chapter 59 of title 5 of the United States Code, 5 U.S.C. §§ 5921-5928. Thus, the allowances and benefits enumerated in items 1, 2, 4, 5, 6, 7, 8, and 13, above, that are made under the authority of provisions in title II of the Overseas Differentials and Allowances Act, are excludible from the recipient's gross income under I.R.C. § 912(1)(C). However, the post differential in item 9, above, and paid pursuant to 5 U.S.C. § 5925, is specifically excepted from the I.R.C. § 912 exclusion. As to this item, it is clear from the legislative history of the Overseas Differentials and Allowances Act that the post differential exception in I.R.C. § 912(1) was intended to continue existing IRS revenue ruling position to the effect that additional compensation paid as a ⁴

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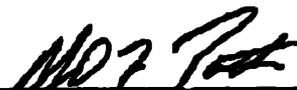
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recruitment incentive was not within the scope of the I.R.C. § 912 exclusion. See S. Rep. No. 1647, 86th Cong., 2d Sess. 13 (1960). The IRS revenue ruling position referred to in such legislative history includes Rev. Rul. 59-407, *supra*. Similarly, item 10, above, (danger pay allowance paid pursuant to 5 U.S.C. § 5928), although paid under a provision in title II of the Overseas Differentials and Allowances Act, is compensatory in nature and paid as a financial incentive for employment under adverse conditions and is not excludible from income under section 912.

As to item 12, above, (official residence expenses paid under 5 U.S.C. § 5913), these allowances fall within the excludible category, because these benefits are intended to cover actual expenses incurred by the recipient for the convenience of the Government. As to item 15, above, (evacuation payments made under 5 U.S.C. §§ 5521-5527 and sec. 2303 of the Foreign Service Act of 1980), the excludibility of a payment depends on the character and purpose for which the payment is made (*i.e.*, the payments are made for salaries, post differentials, and other allowances as the result of the evacuation of the employee or his dependents).

This is a ruling and is directed only to the taxpayer named above. Section 6110(j)(3) of the Internal Revenue Code provides that this ruling may not be used or cited as precedent by any other taxpayer. Furthermore, this ruling only addresses the issue of whether the enumerated benefits and allowances are subject to the federal income tax and does not address the issue of whether the benefits and allowances are wages for Federal Insurance Contributions Act (FICA) purposes.

Sincerely,


MICHAEL F. PATTON
Chief, Branch No. 1
Associate Chief Counsel
(International)

ENCLOSURE C

P.02

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JAN-24-2001 10:14

Internal Revenue Service

Department of the Treasury

Washington, DC 20220

Uniform Issue List Number: 401,29-00

Contact Person: Robert Murray
ID #50-05183
Telephone Number:
In Reference to: (202) 283-9643
Date: T:EP:KA:T4

Singleton B. McAllister
General Counsel
U.S. Agency for International Development
1300 Pennsylvania Avenue, N.W.
Washington, DC 20523

Legend:

- Agency A = United States Agency for International Development (USAID)
- Group B Members = Personal Service Contractors of USAID
- Statute T = Foreign Assistance Act of 1961, 22 U.S.C. sec. 23196(a)

Dear Ms. McAllister:

This is in response to your May 17, 1999, request for a private letter ruling, as supplemented by correspondence dated October 26, 2000, concerning whether Agency A may establish a 401(k) plan for the benefit of Group B Members who are employees of Agency A. The following facts and representations have been submitted in support of your ruling.

Agency A is an agency of the Federal Government which contracts with individuals (Group B Members) for personnel services abroad. The basic authority for the employment of Group B Members by Agency A is Statute T.

Based on the foregoing, you request the following ruling:

That Agency A, as an entity of the Federal Government, is authorized to establish a 401(k) plan for its Group B Members who are employees of Agency A.

Section 401(k)(4)(B)(ii) of the Internal Revenue Code (the Code) provides, in part, that a cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement if it is part of a plan maintained by a State or local government or political subdivision thereof, or any agency or instrumentality thereof.

The Code specifies the governmental employers (that is, State or local governments, or political subdivisions, agencies or instrumentalities thereof) that are not eligible to maintain 401(k) plans for the benefit of their employees. Accordingly, with respect to your ruling request, we conclude that Agency A, as an entity of the Federal Government, is authorized to establish a 401(k) plan for its Group B Members who are employees of Agency A.

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U.S. Agency for International Development

You have not requested, and we express no opinion in this ruling as to whether the Group B Members are employees of Agency A under the relevant provisions of the Code.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

Sincerely yours,

John G. Riddle, Jr.

John G. Riddle, Jr., Manager
Employee Plans Technical Group 4
Tax Exempt and Government Entities Division

Enclosures:
Notice of Intention to Disclose
Deleted copy of Letter Ruling

ENCLOSURE D

U.S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Federal Employees' Compensation
Washington, D.C. 20210



SEP 28 1999

File Number:

Jan Miller
U.S. Agency for International Development
Office of General Counsel
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20523

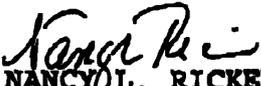
Dear Mr. Miller:

Thank you for your August 27 response to Ms. Williams' letter of August 3, concerning U.S. citizens employed by the U.S. Agency for International Development (USAID) under personal services contracts (PSCs) to work within the United States.

We have reviewed the materials you sent. The employer/employee relationship for U.S. citizens hired under PSCs to work within the United States is virtually identical to that of foreign nationals and U.S. citizens similarly hired to work abroad. Therefore, we find that U.S. citizens hired by the USAID under a PSC to work within the U.S. would be covered under the Federal Employees' Compensation Act (FECA) for work-related injuries, if the conditions of their employment are essentially identical to those outlined in the sample.

Please let me know if you have any further questions on this matter.

Sincerely,


NANCY L. RICKER
Acting Director for
Federal Employees' Compensation

ENCLOSURE E



**United States
Office of Government Ethics**
P.O. Box 14108
Washington, D.C. 20044

~~SECRET~~
→ © CARL

NOV - 6 1987

**Jan W. Miller
Assistant General Counsel
and Deputy Ethics Officer
Office of the General Counsel
Agency for International Development
Washington, D.C. 20523**

Dear Mr. Miller:

In response to your October 19, 1987 letter, we concur in your determination that persons providing services to the Agency for International Development under personal services contracts pursuant to 22 U.S.C. § 2396 (Section 636(a)(3) of the Foreign Assistance Act of 1961) are employees for purposes of the post-employment criminal statute at 18 U.S.C. § 207 and regulations at 5 C.F.R. Part 737. We think it fully appropriate that you adopt procurement regulations to this effect.

Sincerely,

Donald E. Campbell

**Donald E. Campbell
Acting Director**

ENCLOSURE F

APPENDIX A -- [RESERVED]

APPENDIX B -- [RESERVED]

APPENDIX C -- [RESERVED]

**APPENDIX D--DIRECT USAID CONTRACTS WITH
A U.S. CITIZEN OR A U.S. RESIDENT ALIEN
FOR PERSONAL SERVICES ABROAD**

1. General.

See also CIB 99-15, Resident Hires and Deviations

(a) Purpose. This appendix sets forth the authority, policy, and procedures under which USAID contracts with a U.S. citizen or U.S. resident alien for personal services abroad.

(b) Definitions.

(1) Personal services contract (PSC) means a contract that, by its express terms or as administered, make the contractor personnel appear, in effect, Government employees (see FAR 37.104).

(2) Employer-employee relationship means an employment relationship under a service contract with an individual, which occurs when, as a result of the contract's terms or the manner of its administration during performance, the contractor is subject to the relatively continuous supervision and control of a Government officer or employee.

(3) Non-person services contract means a contract under which the personnel rendering the services are not subject either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.

(4) Independent contractor relationship means a contract relationship in which the contractor is not subject to the supervision and control prevailing in relationships between the Government and its employees. Under this relationship, the Government does not normally supervise the performance of the work, control the days of the week or hours of the day in which it is to be performed, or the location of performance.

(5) Resident hire means a U.S. citizen who, at the time of hire as a PSC, resides in the cooperating country as a spouse or dependent of a U.S. citizen employed by a U.S. government agency or under any U.S. government-financed contract or agreement, or for reasons other than for employment with a U.S. government agency or under any U.S. government-financed contract or agreement. A U.S. citizen for purposes of this definition also includes persons who at the time of contracting are lawfully admitted permanent residents of the United States.

(6) U.S. resident alien means a non-U.S. citizen lawfully admitted for permanent residence in the United States.

(7) Abroad means outside the United States and its territories and possessions.

(8) USAID direct-hire employees means civilian employees appointed under USAID Handbook 25 procedures or superseding Automated Directive System (ADS) Chapters.

2. Legal Basis.

(a) Section 635(b) of the Foreign Assistance Act of 1961, as amended (hereinafter referred to as the "FAA") provides the Agency's contracting authority.

(b) Section 636(a)(3) of the FAA (22 U.S.C. 2396(a)(3)) authorizes the Agency to enter into personal services contracts with individuals for personal services abroad and provides further that such individuals " * * * shall not be regarded as employees of the U.S. Government for the purpose of any law administered by the Civil Service Commission." \1\

\1\ The Civil Service Commission is now the Federal Office of Personnel Management.

3. Applicability.

(a) This appendix applies to all personal services contracts with U.S. citizens or U.S. resident aliens to provide assistance abroad under Section 636(a)(3) of the FAA.

(b) This appendix does not apply to:

(1) Non-personal services contracts with U.S. citizens or U.S. resident aliens; such contracts are covered by the basic text of the FAR (48 CFR Chapter 1) and the AIDAR (48 CFR Chapter 7).

(2) Personal services contracts with individual Cooperating Country Nationals (CCNs) or Third Country Nationals (TCNs). Such contracts are covered by Appendix J of this chapter.

(3) Other personal services arrangements covered by USAID Handbook 25--Employment and Promotion or superseding ADS Chapters.

(4) Interagency agreements (e.g., PASAs and RSSAs covered by ADS 306--Interagency Agreements.

4. Policy

See AAPD 06-12, Homeland Security Presidential Directive-12 (HSPD-12) Implementation;

AAPD 06-11, Home Leave and Revised General Provision 5, Leave and Holidays (August 2006);

AAPD 06-10, PSC Medical Payment Responsibility;

AAPD 06-07, AIDAR, Appendix D: Contract Budget, Salary Determination and Salary Increases;

AAPD 05-08, Annual Health Insurance Costs;**AAPD 04-15, Cash Awards;****AAPD 04-13, Classification of USPSCs;****CIB 99-15, Resident Hires and Deviations;****CIB 98-11, Determining a Market Value for PSCs**

(a) **General.** USAID may finance, with either program or operating expense (OE) funds, the cost of personal services contracts as part of the Agency's program of foreign assistance by entering into a direct contract with an individual U.S. citizen or U.S. resident alien for personal services abroad.

(1) **Program funds.** Under the authority of Section 635(h) of the FAA, program funds may be obligated for periods up to five years where necessary and appropriate to the accomplishment of the tasks involved.

(2) **Operating Expense Funds.** Pursuant to USAID budget policy, OE funded salaries and other recurrent cost items may be forward funded for a period of up to three (3) months beyond the fiscal year in which these funds were obligated. Non-recurring cost items may be forward funded for periods not to exceed twenty-four (24) months where necessary and appropriate to accomplishment of the work.\2\

(b) **Limitations on Personal Services Contracts.** (1) Personal services contracts may only be used when adequate supervision is available.

(2) Personal services contracts may be used for commercial activities. Commercial activities provide a product or service which could be obtained from a commercial source. See Attachment A of OMB Circular A-76 for a representative list of such activities.

(3) Notwithstanding any other provision of USAID directives, regulations or delegations, U.S. citizen personal services contractors (USPSCs) may be delegated or assigned any authority, duty or responsibility delegable to U.S. citizen direct-hire employees (USDH employees) except that:

a. They may not supervise U.S. direct-hire employees of USAID or other U.S. Government agencies. They may supervise USPSCs and non-U.S. citizen employees.

b. They may not be designated as Contracting Officers or delegated authority to sign obligating or sub-obligating documents.

c. They may represent the agency, except that communications that reflect a final policy, planning or budget decision of the agency must be cleared by a USDH employee.

d. They may participate in personnel selection matters, but may not be delegated authority to make a final decision on personnel selection.

e. Exceptions to the limitations in this paragraph (b)(3) must be approved by the Assistant Administrator for Management (AAM).

(c) **Withholdings and Fringe Benefits.** (1) Personal services contractors (PSCs) are Government employees for purposes of the Internal Revenue Code (Title 26 of the United States Code) and are, therefore, subject to social security (FICA) and Federal income tax (FIT) withholdings. As employees, they are ineligible for the "foreign earned

income" exclusion under the Internal Revenue Service (IRS) regulations (see 26 CFR 1.911-3(c)(3)).

(2) Personal services contractors are treated on par with other Government employees, except for programs based on any law administered by the Federal Office of Personnel Management (e.g., incentive awards, life insurance, health insurance, and retirement programs covered by 5 CFR Parts 530, 531, 831, 870, 871, and 890). While PSCs are ineligible to participate in any of these programs, the following fringe benefits are provided as a matter of policy:

(i) The employer's FICA contribution for retirement purposes.

(ii) A contribution against the actual cost of the PSC's annual health and life insurance costs. Proof of health and life insurance coverage and its actual cost to the PSC shall be submitted to the Contracting Officer before any contribution is made. (See also paragraph 4(c)(3) of this Appendix.)

(A) The contribution for health insurance shall not exceed 50% of the actual cost to the PSC for his/her annual health insurance, or the maximum U.S. Government contribution for a direct-hire employee, as announced annually by the Office of Personnel Management, whichever is less. If the PSC is covered under a spouse's health insurance plan, where the spouse's employer pays some or all of the health insurance costs, the cost to the PSC for annual health insurance shall be considered to be zero.

(B) The contribution for life insurance shall be up to 50% of the actual annual costs to the PSC for life insurance, not to exceed \$500.00 per year.

(iii) PSCs shall receive the same percentage pay comparability adjustment as U.S. Government employees subject to the availability of funds.

(iv) PSCs shall receive a 3% annual salary increase subject to satisfactory performance documented in their annual written evaluation. Such increase may not exceed 3% without a deviation. This 3% limitation also applies to extensions of the same service or negotiations for a new contract for the same or similar services unless a deviation has been approved.

(v) PSCs shall receive the following allowances and differentials provided in the State Department's Standardized Regulations (Government Civilians Foreign Areas) on the same basis as U.S. Government employees (except for U.S. resident hires, see paragraph 4(d) and Section 12, General Provisions, Clause 22, "U.S. Resident Hire Personal Services Contractors"):

(A) Temporary lodging allowance (Section 120),\3\

(B) Living quarters allowance (Section 130),\3\

(C) Post allowance (Section 220),\3\

(D) Supplemental post allowance (Section 230),\3\

\2\ If there is a need, these contracts may be written for 5 years also but funded only as outlined in paragraph 4(a) of this Appendix.

\3\ Mission Directors may authorize per diem in lieu of these allowances.

(E) Separate maintenance allowance (Section 260),\4\

(F) Education allowance (Section 270),\4\

(G) Educational travel (Section 280),\4\

(H) Post differential (Section 500),

(I) Payments during evacuation/authorized departure (Section 600), and

(J) Danger pay (Section 650).

(vi) Any allowance or differential that is not expressly stated in paragraph 4(c)(2)(v) is not authorized for any PSC unless a deviation is approved. The only exception is a consumables allowance if authorized for the post under Handbook 22 or superseding ADS Chapter.

(vii) Health room services may be provided in accordance with the clause of this contract entitled "Physical Fitness and Health Room Privileges."

(viii) PSCs are eligible to receive benefits for injury, disability, or death under the Federal Employees' Compensation Act since the law is administered by the Department of Labor not the Office of Personnel Management.

(ix) PSCs are eligible to earn four hours of annual leave and four hours of sick leave for each two week period. However, PSCs with previous PSC service (not previous U.S. Government civilian or military service) earn either six hours of annual leave for each two week period if their previous PSC service exceeds 3 years (including 10 hours annual leave for the final pay period of a calendar year), or eight hours of annual leave for each two week period if their previous PSC service exceeds 15 years.

(3) A PSC who is a spouse of a current or retired Civil Service, Foreign Service, or Military Service member and who is covered by their spouse's Government health or life insurance policy is ineligible for the contribution under paragraph 4(c)(2)(ii) of this appendix.

(4) Retired U.S. Government employees shall not be paid additional contributions for health or life insurance under their contract (since the Government will normally have already paid its contribution for the retiree) unless the employee can prove to the satisfaction of the Contracting Officer that his/her health and life insurance does not provide or specifically excludes coverage overseas. If coverage overseas is excluded, then eligibility as cited in paragraph 4(c)(3) applies.

(5) Retired U.S. Government employees may be awarded Personal Services Contracts without any reduction in or offset against their Government annuity.

(d) U.S. Resident Hire Personal Services Contractors. U.S. resident-hire PSCs are not eligible for any fringe benefits (except contributions for FICA, health insurance, and life insurance), including differentials and allowances unless such individuals can demonstrate to the satisfaction of the Contracting Officer that they have received similar benefits and allowances from their immediately previous employer in the cooperating country, or the Mission Director may determine that payment of such benefits would be consistent with the Mission's policy and practice and would be in the best interests of the U.S. Government.

(e) Determining Salary for Personal Services Contractors. (1) There are two separate and distinct methods of establishing a salary for personal services contractors. Use of method number 1 is required unless justified and approved as provided for in paragraph (e)(1)(ii).

W) These allowances are not authorized for short tours (i.e., less than a year).

(i) Method 1: Salaries for Personal Services Contractors shall be established based on the market value in the United States of the position being recruited for. This requires the Contracting Officer in coordination with the Technical Officer to determine the correct market value (a salary range) of the position to be filled. This method is required in establishing salary for all PSCs unless method 2 is authorized as provided for in paragraph (e)(1)(ii). Contract Information Bulletin (CIB) 96-8 dated

February 23, 1996 provides a guide, which contains information concerning Preparation of Scopes of Work, Determination of Salary Class Grade, Salary Class Bench Marks and Salary Class Review. The market value of the position then becomes the basis along with the applicants' certified salary history on the SF 171, "Personal Qualifications Statement" for salary negotiations by the Contracting Officer. The SF 171 must be retained in the permanent contract file. Any position, which is determined to be above the GS-13 equivalent and exceeds six months in duration must be classified by M/HR/POD. The crucial point is the establishment of a realistic and reasonable market value for a job. The final determination regarding the reasonableness of a salary level rests with the Contracting Officer. Paying salaries using this method avoids "rank in person" salaries, which are in excess of the value of the job being contracted for.

(ii) Method 2: If approved in writing by the Mission Director or the cognizant Assistant Administrator, based on written justification, salary may be negotiated based on the applicant's current earnings adjusted in accordance with the factors set out in paragraphs (e)(1)(ii) (A) through (C). This approval requirement cannot be re-delegated. Current earnings must be certified by the contractor on the SF 171, (see paragraph 6(b)(3) of this appendix). This is guidance for establishing initial salaries, not subsequent increases, for the same contractor performing the same function.

(A) As a rule, up to a 3 percent increase above current earnings may be given. However, a 3 percent increase is awarded only to a PSC whose earnings are based on a period of twelve months or more; 2 percent for established earnings of less than twelve months but not less than four months; or 1 percent for established earnings during the past four months.

(B) Additional percentages may be given for the following factors. If a PSC has worked in a developing country for more than two years, an additional 1 percent may be awarded. Education related to the area of specialization and above the minimum qualification required may warrant an additional 1 percent, and those specialties for which there is keen competition in the employment market or a serious shortage category nationwide may be awarded an additional 2 percent. In addition, related technical experience over 5 years may increase the percentage by 1 and over ten years by 3.

(C) All requests for an initial rate of pay above 10 percent over current earnings must be approved in writing by the appropriate Assistant Administrator or Mission Director. Current earnings are actual earnings for work reasonably related to the position for which the applicant is being considered. Paragraphs 4(e)(1)(ii) (A) through (C) apply only to salary setting method number 2 in paragraph 4 (e)(1)(ii).

(2) When an applicant has no current earnings history (e.g., a person returning to the workforce after an absence of a number of years) or when an applicant's current earnings history doesn't accurately reflect the applicant's job market worth (e.g., a Peace Corps volunteer), every effort should be made to establish a market value for the position as a basis for negotiation, notwithstanding the lack of a current earnings history, provided that the applicant has the full qualifications for the job and could command a similar salary in the open job market.

(3) This Appendix applies the "USAID Contractor Salary Threshold (USAID CST)" policy in Automated Directives System (ADS) Chapter 302.3.6.8 to salaries for U.S. PSCs. Salaries in excess of the USAID CST, which is equivalent to the maximum rate for Federal agencies without a certified SES performance appraisal system, must be approved by the M/OAA Director in accordance with the approval procedures in ADS 302.3.6.8(e). This approval cannot be re-delegated.

(f) Incentive Awards. U.S. PSCs are not eligible to receive monetary awards. They are eligible for non-monetary awards such as certificates.

(g) Annual Salary Increase. PSC contracts written for more than one year should provide for a 3% annual increase based on satisfactory performance documented in their annual written evaluations.

(h) Pay Comparability Adjustment. PSCs shall receive the same percentage pay comparability adjustment as that received by U.S. Government employees subject to the availability of funds.

(i) Subcontracting. PSCs are U.S. Government employees and may not be called upon (or permitted) to subcontract out any part of their work. Funds for subcontracting have no place in the budget of a personal services contract. Support services, equipment, and supplies (e.g., typing and report preparation, paper, pens, computers, and furniture) should be furnished to PSCs just as they would be to direct-hire employees. To the extent that direct-hire personnel may be authorized to purchase supporting services or supplies under a travel authorization, so may PSCs; otherwise, contracts for personal services should not contain any funds for procurement.

5. Soliciting for Personal Services Contracts.

See also AAPD 05-02, PSCs with Performance Exceeding Five Years;

CIB 01-09, PSCs with US Citizens for Support of HIV/AIDS and Infectious Disease Initiatives;

CIB 01-07, PSC Extension/Renewal Policy;

CIB 98-14, Change in Application Form for PSCs;

CIB 98-12, Advertisement of PSCs and Evaluating Applications;

CIB 97-19, Advertising for Short-Term PSC;

CIB 97-16, Class Justification for PSCs and for Overseas Contracts of \$250,000 or Less

(a) Technical Officer's Responsibilities. The Technical Officer will prepare a written detailed statement of duties and a statement of minimum qualifications to cover the position being recruited for. The statement shall be included in the procurement request (the Acquisition & Assistance Request Document) e.g., the request shall also include the following additional information as a minimum:

- (1) The specific foreign location(s) where the work is to be performed, including any travel requirements (with an estimate of frequency);
- (2) The length of the contract, with beginning and ending dates, plus any options for renewal or extension;
- (3) The basic education, training, experience, and skills required for the position;
- (4) An estimate of what a comparable GS/FS equivalent position should cost, including basic salary, allowances, and differentials, if appropriate; and
- (5) A list of Government or host country furnished items (e.g., housing).

(b) Contracting Officer's Responsibilities. (1) The Contracting Officer will prepare the solicitation for personal services, which shall contain:

- (i) Three sets of SF 171s and SF 171As. (Upon receipt, one copy of each SF 171 and SF 171A shall be forwarded to the Project Officer.)
- (ii) A detailed statement of duties or a completed position description for the position being recruited for.
- (iii) A copy of the prescribed contract Cover Page, Contract Schedule, General Provisions as appropriate, as well as the FAR Clauses to be incorporated in full text and by reference.
- (iv) A copy of the USAID General Notice entitled "Employee Review of the New Standards of Conduct".

(2) The Contracting Officer shall comply with the requirements of (48 CFR) AIDAR 706.302-70(c) as detailed in paragraph 5(c) except those recruited from the U.S.

(c) Competition. (1) Under (48 CFR) AIDAR 706.302-70(b)(1), Personal Services Contracts (except those recruited from the U.S.) are exempt from the requirements for full and open competition with two limitations that must be observed by Contracting Officers:

- (i) Offers are to be requested from as many potential offerors as is practicable under the circumstances, and
- (ii) A justification supporting less than full and open competition must be prepared in accordance with FAR 6.303.

(2) PSCs With United States Citizens or Resident Aliens Recruited from Outside the Cooperating Country. Solicitations for PSCs recruited outside the cooperating country must be publicized via the Agency's External Home Page on the Internet under the caption "Business & Procurement, USAID Procurements." Instructions regarding how to access the External Internet and the information to be provided have been approved and included in a CIB. A justification under FAR 6.303 is not required when this procedure is followed.

(3) A class justification was approved by the USAID Procurement Executive to satisfy the requirements of (48 CFR) AIDAR 706.302-70(c)(2) for a justification in accordance with FAR 6.303. This class justification for Personal Services Contracts with U.S. Citizens may only be used for those who are recruited locally subject to the following conditions:

- (i) The position was publicized locally in accordance with established Mission policy or procedure, or the procedures in paragraph 5(c)(ii) was followed;
- (ii) As an alternative to the procedures in paragraphs 5(c) (i) and (ii), at least 3 individuals were considered by consulting source lists (e.g., applications or resumes on hand) or conducting other informal solicitation.
- (iii) Extensions or renewals with the same individual for continuing services do not need to be publicized.

- (iv) A copy of the class justification (which was distributed to all USAID Contracting Officers via Contract Information Bulletin) must be included in the contract file, together with a written statement, signed by the Contracting Officer, that the contract is being awarded pursuant to (48 CFR) AIDAR 706.302-70(b)(1); that the conditions for use of this class justification have been met; and that the cost of the contract is fair and reasonable.

(4) If the appropriate competitive procedure in paragraph 5(3) is not followed, the Contracting Officer must prepare a separate justification as required under (48 CFR) AIDAR 706.302-70(c)(2).

(5) Since the award of a Personal Services Contract is based on technical qualifications, not price, and since the SF 171, "Personal Qualifications Statement", and SF 171A, "Continuation Sheet for Standard Form 171", are used to solicit for such contracts, FAR subparts 15.4 and 15.6 and FAR parts 52 and 53 are inappropriate and shall not be used. Instead, the solicitation and selection procedures outlined in this Appendix shall govern.

6. Negotiating a Personal Services Contract.

See also AAPD 06-12, Homeland Security Presidential Directive-12 (HSPD-12) Implementation;

CIB 98-12, Advertisement of PSCs and Evaluating Applications;

CIB 97-17, PSCs with US Citizens or US Resident Aliens

Negotiating a Personal Services Contract is significantly different from negotiating a non-personal services contract because it establishes an employer-employee relationship; therefore, the selection procedures are more akin to the personnel selection procedures.

(a) **Technical Officer's Responsibilities.** The Technical Officer shall be responsible for reviewing and evaluating the applications (i.e., SF 171s) received in response to the solicitation issued by the Contracting Officer. If deemed appropriate, interviews may be conducted with the applicants before the final selection is submitted to the Contracting Officer.

(b) **Contracting Officer's Responsibilities.** (1) The Contracting Officer shall forward a copy of each SF 171 received under the solicitation to the Project Officer for evaluation.

(2) On receipt of the Technical Officer's recommendation, the Contracting Officer shall conduct negotiations with the recommended applicant. Normally, the Contracting Officer shall negotiate only the salary (see the salary setting coverage in paragraph 4(e) of this Appendix). The terms and conditions of the contract, including differentials and allowances, are not negotiable or waivable without a properly approved deviation (see (48 CFR) AIDAR 701.470). If the Contracting Officer can negotiate a salary that is fair and reasonable, then the award shall be made.

(3) The Contracting Officer shall use the certified salary history on the SF 171 as the basis for salary negotiations, along with the market value of the position being recruited for (unless approval not to use market value has been granted under paragraph 4(e)(1)(ii)), and the Technical Officer's cost estimate.

(4) The Contracting Officer will obtain two copies of IRS Form W-4, "Employee's Withholding Allowance Certificate", from the successful applicant. (Upon receipt, the Contracting Officer will forward one copy of the W-4 to the Office of the Controller.)

(5) Security clearance is required for all U.S. citizens entering into USAID PSCs. The Contracting Officer will obtain four sets of SF 86, "Security Investigation Data for Sensitive Position", from the successful applicant and forward them to the Office of Security. PSCs may receive a preliminary clearance and be placed under contract prior to receipt of clearance provided the appropriate paper work has been completed,

reviewed by IG/SEC/PSI and acknowledged as a "no objection" to the appropriate Mission. See General Provision 24 in section 12 of this Appendix.

7. Executing a Personal Services Contract.

See also AAPD 06-10, PSC Medical Payment Responsibility;

AAPD 03-07(revised), CO/AO Role in Debt Collection Process;

CIB 01-10, Revision of Medical Clearance Process

Contracting Officers or Heads of Contracting Activities, whether USAID/W or Mission, may execute Personal Services Contracts, provided that the amount of the contract does not exceed the contracting authority that has been redelegated to them. In executing a Personal Services Contract, the Contracting Officer is responsible for insuring that:

(a) The proposed contract is within his/her delegated authority;
 (b) A Request Number covering the proposed contract has been received;
 (c) The position has been classified by either the Mission or M/HR/POD (see CIB 96-8) and the classification is in the contract file;

(d) The proposed Statement of Duties is contractible, contains a statement of minimum qualifications from the technical office requesting the services, and is suitable to the use of a Personal Services Contract in that:

(1) Performance of the proposed work requires or is best suited for an employer-employee relationship, and is thus not suited to the use of a non-personal services contract;

(2) The Statement of Duties does not require performance of any function normally reserved for Federal employees (see paragraph 4(b) of this Appendix); and

(3) There is no apparent conflict of interest involved (if the Contracting Officer believes that a conflict of interest may exist, the question should be referred to the cognizant legal counsel);

(e) Selection of the contractor is documented and justified. (48 CFR) AIDAR 706.302-70(b)(1) provides an exception to the requirement for full and open competition for Personal Services Contracts abroad (see paragraph 5(c) of this Appendix);

(f) The standard contract format prescribed for Personal Services Contracts (Sections 10, 11, 12 and 13 to this Appendix) is used; or that any necessary deviations are processed as required by (48 CFR) AIDAR 701.470.

(Note: The prescribed contract format is designed for use with contractors who are residing in the U.S. when hired. If the contract is with a U.S. citizen residing in the cooperating country when hired, contract provisions governing physical fitness and travel/transportation expenses, and home leave, allowances, and orientation should be suitably modified (see paragraph 4(d) of this Appendix)). These modifications are not considered deviations subject to (48 CFR) AIDAR 701.470. (Justification and explanation of these modifications is to be included in the contract file);

(g) Orientation is arranged in accordance with General Provision 23 in section 12 of this Appendix;

(h) The contractor has submitted the names, addresses, and telephone numbers of at least two persons who may be notified in the event of an emergency (this information is to be retained in the contract file);

- (i) The contract is complete and correct and all information required on the contract Cover Page (USAID Form 1420-36A) has been entered;
- (j) The contract has been signed by the Contracting Office and the contractor, and fully executed copies are properly distributed;
- (k) The following clearances, approvals and forms have been obtained, properly completed, and placed in the contract file before the contract is signed by both parties;
 - (1) Evidence of job classification in the file by the Mission except for grade equivalents above GS-13. For those positions with grade equivalent above GS-13, evidence of job classification done by M/HR/POD;
 - (2) Security clearance, including the completed SF 86, to the extent required by USAID Handbook 6, Security or superseding ADS Chapter, (see General Provisions 14 and 24 in section 12 of this Appendix);
 - (3) Mission, host country, Human Resources Office, and technical office clearance, as appropriate;
 - (4) Medical examinations and certifications as required by the contract general provision entitled "Physical Fitness and Health Room Privileges";
 - (5) One original executed IRS Form W-4 entitled "Employee's Withholding Allowance Certificate", and one copy, shall be obtained. The original shall be sent to the Controller of the paying office and one shall be placed in the contract file;
 - (6) Evidence of DAA/HR clearance that the position may be filled by PSC.
 - (7) The approval for any salary in excess of the "USAID Contractor Salary Threshold (USAID CST)", which is equivalent to the maximum rate for Federal agencies without a certified SES performance appraisal system, in accordance with approval procedures in ADS 302.3.6.8(e) as required in Section 4.(e)(3);
 - (8) A copy of the class justification or other appropriate explanation and support required by (48 CFR) AIDAR 706.302-70, if applicable;
 - (9) Any deviation to the policy or procedures of this appendix, processed and approved under (48 CFR) AIDAR 701.470;
 - (10) A fully executed SF 171, and a copy of the position classification, and approved deviation, if appropriate;
 - (11) The Memorandum of Negotiation; and
 - (12) The Contracting Officer's signed certification that competition requirements have been satisfied as described in paragraph 5(c) of the policy text of this Appendix. The certification shall be a part of the Memorandum of Negotiations.
- (l) Funds for the contract are properly obligated to preclude violation of the Anti-Deficiency Act, 31 U.S.C. 1341 (the Contracting Officer ensures that the contract has been properly recorded by the appropriate accounting office prior to its release for the signature of the selected contractor);
- (m) The contractor receives and understands the USAID General Notice entitled "Employee Review of the New Standards of Conduct" and a copy is attached to each contract as provided for in paragraph (c) of General Provision 1, section 12;
- (n) Agency conflict of interest requirements as set out in the General Notice "Employee Review of the New Standards of Conduct" are met by the contractor prior to his/her reporting for duty;
- (o) A copy of a Checklist for Personal Services contractors which may be in the format set out in this section or another format convenient for the Contracting Officer, provided that a memorandum containing all of the information described in this section 7 shall be prepared for each PSC and placed in the contract file;
- (p) The contractor understands that he/she is an employee of the United States for purposes of the Foreign Assistance Act of 1961, as amended, and the Internal Revenue Code (Title 26 of the United States Code). This subjects the employee to

withholding for both FICA and Federal Income Tax and precludes the employee from receiving the Federal Earned Income Tax exclusion of 26 U.S.C. Section 911. See Special Note on the Cover Page of USAID Form 1420-36.

(q) The contractor also understands that he/she may commence work prior to the completion of the security clearance. However, until such time as clearance is received, the contractor may not have access to classified or administratively controlled materials. Failure to obtain clearances will constitute cause for termination.

8. Post Audit.

The Inspector General, or his/her designee, audits the Personal Services Contracts of all contracting activities for the purpose of ensuring conformance to applicable policy and regulations.

9. Contracting Format.

The prescribed Contract Cover Page, Contract Schedule, General Provisions, and appropriate Federal Acquisition Regulations (FAR) clauses for Personal Services Contracts covered by this appendix are included as follows:

10. Form USAID 1420-36, "Cover Page" and "Schedule".
11. Optional Schedule With a U.S. Citizen or U.S. Resident Alien.
12. General Provisions.
13. FAR Clauses to be Incorporated in Full Text in Personal Services Contracts.
14. FAR Clauses to be incorporated by reference in Personal Services Contracts.

10. Form USAID 1420-36, "Cover Page" and "Schedule".

Contract With a U.S. Citizen or U.S. Resident Alien for Personal Services Abroad--Form AID 1420-36A (11/96) (Cover Page)

PRIVACY ACT STATEMENT

This information is provided pursuant to Public Law 93-579 (Privacy Act of 1974), December 31, 1974, for individuals who complete this form.

The Executive Office of the President, Office of Management and Budget has required that all departments and agencies comply with the reporting requirements of Section 6041 of the Internal Revenue Code, Section 6041 states that all departments and agencies making payments totaling \$600 or more in one year to a recipient for services provided must be reported to the Internal Revenue Service (IRS). The SSN and all financial numbers will be disclosed to U.S. Agency for International Development (USAID) payroll office personnel and personnel in the Department of the Treasury, Division of Disbursements. USAID will use this SSN to complete Form W-2 of the Code on employee compensation. Disclosure by the personal services contractor of the SSN is necessary to obtain the services, benefits or processes provided by this contract. Disclosure of the SSN may be made outside USAID (a) pursuant to any applicable routine use listed in USAID's Notice for implementing the Privacy Act as published in the Federal Register or (b) when disclosure by virtue of a contract being a public document after signatures is authorized under the Freedom of Information Act.

SCHEDULE

(The Illustrated Schedule consists of this Table of Contents--

Articles I-VI, and the General Provisions.)

TABLE OF CONTENTS

Article I	—	Statement of Duties
Article II	—	Period of Service Overseas
Article III	—	Contractor's Compensation and Reimbursement in U.S. Dollars
Article IV	—	Costs Reimbursable and Logistic Support
Article V	—	Precontract Expenses
Article VI	—	Additional Clauses

GENERAL PROVISIONS

The following provisions numbered as shown below omitting number(s) _____, are the General Provisions (GPs) of this Contract:

1. Definitions
2. Laws and Regulations Applicable Abroad
3. Physical Fitness and Health Room Privileges
4. Workweek and Compensation (Pay Comparability Adjustments)
5. Leave and Holidays
6. Differential and Allowances
7. Social Security, Federal Income Tax and Foreign Earned Income
8. Advance of Dollar Funds
9. Insurance
10. Travel and Transportation Expenses
11. Payment
12. Conversion of U.S. Dollars to Local Currency
13. Post of Assignment Privileges
14. Security Requirements
15. Contractor-Mission Relationships
16. Termination
17. Release of Information
18. Notices
19. Reports
20. Use of Pouch Facilities
21. Biographical Data
22. Resident Hire PSC
23. Orientation and Language Training
24. Conditions for Contracting Prior to Receipt of Security Clearance
25. Medical Evacuation Services
26. Governing Law

For each tour of duty, attach the applicable General Provisions.

Schedule: (Note: Use of the following Schedule Articles are not mandatory. They are intended to serve as guidelines for contracting offices in drafting contract schedules. Article language may be changed to suit the needs of the particular contract).

Article I—Statement of Duties

(The statement of duties shall include:

- A. General statement of the purpose of the contract.
- B. Statement of duties to be performed.

C. Any USAID consultation or orientation.)

Article II--Period of Service Overseas

Within _____ days after written notice from the Contracting Officer that all clearances, including the doctor's statement of medical opinion required under General Provision Clause 4, have been received or unless another date is specified by the Contracting Officer in writing, the contractor shall proceed to _____ where he/she shall promptly commence performance of the duties specified above. The contractor's period of service overseas shall be approximately _____ in _____. (Specify time of duties in each location as well as authorized stopovers with purpose of each.)

Article III--Contractor's Compensation and Reimbursement in U.S. Dollars

A. Except to the extent reimbursement is payable in the currency of the Cooperating Country pursuant to Article IV, USAID shall pay the contractor compensation after it has accrued and reimburse him/her in U.S. dollars for necessary and reasonable costs actually incurred by him/her in the performance of this contract within the categories listed in paragraph C, below, and subject to the conditions and limitations applicable thereto as set out herein and in the attached General Provisions (GP).

B. The amount budgeted and available as personal compensation to the contractor is calculated to cover a calendar period of approximately _____ (days) (weeks) (months) (years) which is to include:

- (1) vacation, sick, and home leave which may be earned during the contractor's tour of duty (GP Clause 5);
- (2) _____ days for authorized travel (GP Clause 10); and
- (3) _____ days for orientation and consultation in the United States (GP Clause 23).

C. Allowable Costs: 1. Compensation at the rate of \$ _____ per (year) (month) (week) (day). Adjustments in compensation (pay) for periods when the contractor is not in compensable pay status shall be calculated as follows:

Rate of \$ _____ per (day) (hour).

Contingency for Compensation (Pay Comparability) Adjustments. \$ _____.

Annual Salary Increase (3%) \$ _____.

2. Overtime (Unless specifically authorized in the Schedule of this contract, no overtime hours shall be allowed hereunder.) \$ _____.

* 3. Overseas Differential (Ref. GP Clause No. 6.)

Rate \$ _____ and Contingency \$ _____ = Total \$ _____.

** 4. Allowances in Cooperating Country (Ref. GP Clause 6.)

\$ _____.

** 5. Travel and Transportation (Ref. GP Clause 10.) (Includes the value of GTRs furnished by the Government, not payable to contractor).

a. United States \$ _____

b. International \$ _____

c. Cooperating and Third Country \$ _____ Subtotal Item 5

\$ _____

** 6. Subsistence or Per Diem (Ref. GP Clause 10.)

a. United States \$ _____

b. International \$ _____

c. Cooperating and Third Country \$ _____

Subtotal Item 6 \$ _____

7. Other Direct Costs.

a. Health and Life Insurance \$ _____

- b. Precontract Costs, passport, visa, inoculations, etc. (Ref. GP Clause 8.) \$ _____
- c. Physical Examination (Ref. GP Clause 3.) \$ _____
- d. Communications, Miscellaneous. \$ _____ Subtotal Item 7

\$ _____

8. F.I.C.A.-U.S.G. Contribution (not payable to contractor).
\$ _____

D. Maximum U.S.-Dollar Obligation:

In no event shall the maximum U.S.-dollar obligation under this contract exceed \$ _____. Contractor shall keep a close account of all obligations he/she incurs and accrues hereunder and promptly notify the Contracting Officer whenever in his/her opinion the said maximum is not sufficient to cover all compensation and costs reimbursable in U.S. dollars, which he/she anticipates under the contract.

Article IV—Costs Reimbursable and Logistic Support

A. General: The contractor shall be provided with or reimbursed in local currency (_____) for the following:

[Complete]

B. Method of Payment of Local Currency Costs: Those contract costs which are specified as local currency costs in paragraph A above, if not furnished in kind by the cooperating government or the Mission, shall be paid to the contractor in a manner adapted to the local situation, based on vouchers submitted in accordance with General Provision Clause 11. The documentation for such costs shall be on such forms and in such manner as the Mission Director shall prescribe.

* If post differential is applicable to the assigned post, a contingency for the adjusted amount of differential resulting from compensation (pay comparability) adjustment should be included.

** Do not include the value of any costs to be paid or reimbursed in local currency.

Article V—Pre-contract Expenses

No expense incurred before execution of this contract will be reimbursed unless such expense was incurred after receipt and acceptance of a pre-contract expense letter issued to the contractor by the Contracting Officer, and then only in accordance with the provisions and limitations contained in such letter. The rights and obligations created by such letter shall be considered as merged into this contract.

Article VI—Additional Clauses

(Additional Schedule Clauses may be added such as the implementation of General Provisions or Additional Clauses.)

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

See also AAPD 06-08, AIDAR, Appendices D And J: Using the Optional Schedule to Incrementally Fund Contracts

A U.S. Citizen or a U.S. Resident Alien PSC Contract No. _____

TABLE OF CONTENTS

(Optional Schedule)

(Use of the Optional Schedule is not mandatory. It is intended to serve as an alternate procedure for OE funded U.S. PSCs or U.S. Resident Alien PSCs. The Schedule is for use when the Contracting Officer anticipates incremental recurring cost funded contracts.)

Use of the Optional Schedule eliminates the need to amend the contract each time funds are obligated. However, the Contracting Officer is required to amend each contract not less than twice during a 12 month period to ensure that the contract record of obligations is up to date and agrees with the figures in the master funding document.)

The Schedule on pages _____ thru _____ consists of this Table of Contents and the following Articles:

Article I – Statement of Duties

Article II – Period of Service Overseas

Article III – Contractor's Compensation and Reimbursement in U.S. Dollars

Article IV – Costs Reimbursable and Logistic Support

Article V – Pre-contract Expenses

Article VI – Additional Clauses

General Provisions:

The following provisions, numbered as shown below, omitting number(s) _____, are the General Provisions (GP) of this Contract:

1. Definitions
2. Laws and Regulations Applicable Abroad
3. Physical Fitness and Health Room Privileges
4. Workweek and Compensation (Pay Comparability Adjustments)
5. Leave and Holidays
6. Differential and Allowances
7. Social Security and Federal Income Tax
8. Advance of Dollar Funds
9. Insurance
10. Travel and Transportation Expenses
11. Payment
12. Conversion of U.S. Dollars of Local Currency
13. Post of Assignment Privileges
14. Security Requirements
15. Contractor-Mission Relationships
16. Termination
17. Release of Information
18. Notices
19. Reports
20. Use of Pouch Facilities
21. Biographical Data
22. Resident Hire PSC
23. Orientation and Language Training
24. Conditions for Contracting Prior to Receipt of Security Clearance
25. Medical Evacuation Services
26. Governing Law

For each tour of duty, attach the applicable General Provisions.

Article I--Statement of Duties.

(The statement of duties shall include:

- A. General statement of the purpose of the contract.
- B. Statement of duties to be performed.
- C. Any USAID consultation or orientation.)

Article II--Period of Service Overseas.

Within _____ days after written notice from the Contracting Officer that all clearances, including the doctor's statement of medical opinion required under General Provision Clause 3, have been received or unless another date is specified by the Contracting Officer in writing, the contractor shall proceed to _____ where he/she shall promptly commence performance of the duties specified above. The contractor's period of service overseas shall be approximately _____ in _____. (Specify time of duties in each location as well as authorized stopovers with purpose of each.)

Article III--Contractor's Compensation and Reimbursement in U.S. Dollars.

A. Except to the extent reimbursement is payable in the currency of the Cooperating Country pursuant to Article IV, USAID shall pay the contractor compensation after it has accrued and reimburse him/her in U.S. dollars for necessary and reasonable costs actually incurred by him/her in the performance of this contract within the categories listed in paragraph C, below, and subject to the conditions and limitations applicable thereto as set out herein and in the attached General Provisions (GP).

B. The amount budgeted and available as personal compensation to the contractor is calculated to cover a calendar period of approximately _____ (days) (weeks) (months) (years), which is to include:

1. Vacation, sick, and home leave that may be earned during the contractor's tour of duty (GP Clause 5);
2. _____ days for authorized travel (GP Clause 10); and
3. _____ days for orientation and consultation in the United States (GP Clause 23).

C. Allowable Costs: 1. The following illustrative budget details allowable costs under this contract and provides estimated incremental recurrent cost funding in the total amount shown. Additional funds for the full term of this contract will be provided by the preparation of a master PSC funding document issued by the Mission Controller for the purpose of providing additional funding for a specific period. The master PSC funding document will be attached to this contract and will form a part of the executed contract while also serving to amend the budget.

2. Compensation at the rate of \$_____ per (year)(month)(week)(day).

Adjustments in compensation (pay) for periods when the contractor is not in compensable pay status shall be calculated as follows:

Rate of \$_____ per (day) (hour).

Contingency for Compensation (Pay Comparability Adjustments.) \$_____

Annual Salary increase (3%) \$_____

3. Overtime (Unless specifically authorized in the Schedule of this contract, no overtime hours shall be allowed hereunder.)\$_____

- * 4. Overseas Differential (Ref. GP Clause No. 6.)

Rate \$_____ and Contingency \$_____ = Total \$_____

- ** 5. Allowances in Cooperating Country (Ref. GP Clause 6.)

- \$ _____.
- ** 6. Travel and Transportation (Ref. GP Clause 10.) (Includes the value of GTRs furnished by the Government, not payable to contractor).
 - a. United States \$ _____
 - b. International \$ _____
 - c. Cooperating and Third Country \$ _____
 - Subtotal Item 6 \$ _____
- ** 7. Subsistence or Per Diem (Ref. GP Clause 10.)
 - a. United States \$ _____
 - b. International \$ _____
 - c. Cooperating and Third Country \$ _____
 - Subtotal Item 7 \$ _____
- ** 8. Other Direct Costs
 - a. Health and Life Insurance (Ref. GP Clause 9.) \$ _____
 - b. Pre-contract Costs, passport, visa, inoculations, etc. (Ref. GP Clause 8.) \$ _____
 - c. Physical Examination (Ref. GP Clause 3.) \$ _____
 - d. Communications, Miscellaneous \$ _____
 - Subtotal Item 8 \$ _____
- 9. F.I.C.A.--U.S.G. contribution (not payable to contractor).
 - \$ _____

D. Maximum U.S.-Dollar Obligation: In no event shall the maximum U.S.-dollar obligation under this contract exceed \$ _____.

E. Salary changes and personnel-related contract actions will be made by processing the same forms as used in making such changes and actions for direct-hire employees. When issued by the Contracting Officer, the forms utilized will be attached to the contract and will form a part of the contract terms and conditions.

* If post differential is applicable to the assigned post, a contingency for the adjusted amount of differential resulting from compensation (pay comparability) adjustment should be included.

** Do not include the value of any costs to be paid or reimbursed in local currency.

F. Any adjustment or increase in the compensation granted to direct-hire employees will be allowed for in PSCs subject to the availability of funds. Such an adjustment will be effected by a mass pay adjustment notice from the Contracting Officer, which will be attached to the contract and form a part of the executed contract.

G. At the end of each year of satisfactory service, PSC contractors will be eligible to receive an increase equal to 3% pending availability of funds provided their services have been satisfactory. Such increase will be effected by the execution of an SF-1126, payroll change slip which is to be attached to each contract and each action forms a part of the official contract file.

H. The master PSC funding document may not exceed the term or estimated total cost of this contract. Notwithstanding that additional funds are obligated under this contract through the issuance and attachment of the master PSC funding document, all other contract terms and conditions remain in full effect.

Article IV--Costs Reimbursable and Logistic Support

A. General: The contractor shall be provided with or reimbursed in local currency (_____) for the following:

[Complete]

B. Method of Payment of Local Currency Costs: Those contract costs which are specified as local currency costs in paragraph A above, if not furnished in kind by the cooperating government or the Mission, shall be paid to the contractor in a manner adapted to the local situation, based on vouchers submitted in accordance with General Provision Clause 12. The documentation for such costs shall be on such forms and in such manner as the Mission Director shall prescribe.

Article V—Pre-contract Expenses

No expense incurred before execution of this contract will be reimbursed unless such expense was incurred after receipt and acceptance of a pre-contract expense letter issued to the contractor by the Contracting Officer, and then only in accordance with the provisions and limitations contained in such letter. The rights and obligations created by such letter shall be considered as merged into this contract.

Article VI—Additional Clauses

(Additional Schedule Clauses may be added such as the implementation of General Provisions or Additional Clauses.)

12. General Provisions

See also AAPD 04-15, Cash Awards for USPSCs and TCNs;

CIB 96-23, Unauthorized Provision in PSCs

Contract With a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad

The following clauses are to be used (when applicable), for both tours of duty of less than 1 year as well as 1 year or more.

INDEX OF CLAUSES

- 1. Definitions**
- 2. Compliance with Laws and Regulations Applicable Abroad**
- 3. Physical Fitness and Health Room Privileges**

**See also AAPD 06-10, PSC Medical Payment
Responsibility**

- 4. Workweek and Compensation (Pay Comparability Adjustments).**

[Complete]

B. Method of Payment of Local Currency Costs: Those contract costs which are specified as local currency costs in paragraph A above, if not furnished in kind by the cooperating government or the Mission, shall be paid to the contractor in a manner adapted to the local situation, based on vouchers submitted in accordance with General Provision Clause 12. The documentation for such costs shall be on such forms and in such manner as the Mission Director shall prescribe.

Article V—Pre-contract Expenses

No expense incurred before execution of this contract will be reimbursed unless such expense was incurred after receipt and acceptance of a pre-contract expense letter issued to the contractor by the Contracting Officer, and then only in accordance with the provisions and limitations contained in such letter. The rights and obligations created by such letter shall be considered as merged into this contract.

Article VI—Additional Clauses

(Additional Schedule Clauses may be added such as the implementation of General Provisions or Additional Clauses.)

12. General Provisions

See also AAPD 04-15, Cash Awards for USPSCs and TCNs;

CIB 96-23, Unauthorized Provision in PSCs

**Contract With a U.S. Citizen or a U.S. Resident Alien
for Personal Services Abroad**

The following clauses are to be used (when applicable), for both tours of duty of less than 1 year as well as 1 year or more.

INDEX OF CLAUSES

- 1. Definitions
- 2. Compliance with Laws and Regulations Applicable Abroad
- 3. Physical Fitness and Health Room Privileges

See also AAPD 06-10, PSC Medical Payment Responsibility

- 4. Workweek and Compensation (Pay Comparability Adjustments)

See also AAPD 06-11, Home Leave and Revised General Provision 5, Leave and Holidays (August 2006);

CIB 94-09, Sunday Pay for USPSCs

- 5. Leave and Holidays
- 6. Differential and Allowances
- 7. Social Security, Federal Income Tax, and Foreign Earned Income

- 8. Advance of Dollar Funds
- 9. Insurance
- 10. Travel and Transportation Expenses

See also CIB 89-29, Transportation of HHE, UAB, and POV

- 11. Payment
- 12. Conversion of U.S. Dollars to Local Currency
- 13. Post of Assignment Privileges
- 14. Security Requirements

See also AAPD 06-12 Homeland Security Presidential Directive-12 (HSPD-12) Implementation;

CIB 98-23, Classified Contract Security

- 15. Contractor-Mission Relationships
- 16. Termination
- 17. Release of Information
- 18. Notices
- 19. Reports
- 20. Use of Pouch Facilities
- 21. Biographical Data
- 22. U.S. Resident Hire Personal Services Contractor
- 23. Orientation and Language Training
- 24. Conditions for Contracting Prior to Receipt of Security Clearance
- 25. Medical Evacuation (MEDEVAC) Services
- 26. Governing Law

1. DEFINITIONS (June 1990)

- (a) "USAID" shall mean the Agency for International Development.
- (b) "Administrator" shall mean the Administrator or the Deputy Administrator of USAID.
- (c) "Contracting Officer" shall mean a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.
- (d) "Contractor" shall mean the individual engaged to serve under this contract.
- (e) "Cooperating Country" shall mean the foreign country in or for which services are to be rendered hereunder.
- (f) "Cooperating Government" shall mean the government of the Cooperating Country.
- (g) "Government" shall mean the United States Government.
- (h) "Local currency" shall mean the currency of the Cooperating Country.
- (i) "Mission" shall mean the United States USAID Mission, or principal USAID office, in the Cooperating Country, or USAID/Washington (USAID/W).
- (j) "Mission Director" shall mean the principal officer in the Mission in the Cooperating Country, or his/her designated representative.

- (k) "Technical Officer" shall mean the USAID official to whom the contractor reports, and who is responsible for monitoring the contractor's performance.
- (l) "Tour of duty" shall mean the contractor's period of service under this contract and shall include orientation in the United States (less language training), authorized leave, and international travel.
- (m) "Traveler" shall mean—
 - (1) The contractor in authorized travel status or
 - (2) Dependents of the contractor who are in authorized travel status.
- (n) "Dependents" means:
 - (1) Spouse.
 - (2) Children (including step and adopted children) who are unmarried and under 21 years of age or, regardless of age, are incapable of self-support.
 - (3) Parents (including step and legally adoptive parents) of the employee or of the spouse, when such parents are at least 51 percent dependent on the contractor for support.
 - (4) Sisters and brothers (including step or adoptive sisters or brothers) of the contractor, or of the spouse, when such sisters and brothers are at least 51 percent dependent on the contractor for support, unmarried and under 21 years of age, or regardless of age, are incapable of self-support.
- (o) "U.S. Resident Alien", as used in this contract, shall mean an alien immigrant, legally resident in the United States, the Commonwealth of Puerto Rico, or the possessions of the United States, and having a valid "Alien Registration and Receipt Card" (Immigration and Naturalization Service forms I-151 or I-551).
- (p) "U.S. Resident Hire Personal Services Contractor" ("PSC") means a U.S. citizen who, at the time of hiring as a PSC, resides in the Cooperating Country:
 - (1) As a spouse or dependent of a U.S. citizen employed by a U.S. Government Agency or under any U.S. Government-financed contract or agreement, or
 - (2) For reasons other than for employment with a U.S. Government Agency or under any U.S. Government-financed contract or agreement. A U.S. citizen for purposes of this definition also includes a person who at the time of contracting, is a lawfully admitted permanent resident of the United States.

2. COMPLIANCE WITH LAWS AND REGULATIONS APPLICABLE ABROAD (July 1993)

- (a) Conformity to Laws and Regulations of the Cooperating Country. Contractor agrees that, while in the cooperating country, he/she as well as authorized dependents will abide by all applicable laws and regulations of the cooperating country and political subdivisions thereof.
- (b) Purchase or Sale of Personal Property or Automobiles. To the extent permitted by the cooperating country, the purchase, sale, import, or export of personal property or automobiles in the cooperating country by the contractor shall be subject to the same limitations and prohibitions which apply to Mission U.S.-citizen direct-hire employees.
- (c) Code of Conduct. The contractor shall, during his/her tour of duty under this contract, be considered an "employee" (or if his/her tour of duty is for less than 130 days, a "special Government employee") for the purposes of, and shall be subject to, the provisions of 18 U.S.C. 202(a) and the USAID General Notice entitled "Employee Review of the New Standards of Conduct" pursuant to 5 CFR part 2635. The contractor

acknowledges receipt of a copy of these documents by his/her acceptance of this contract.

3. PHYSICAL FITNESS AND HEALTH ROOM PRIVILEGES (Apr 1997)

See also AAPD 06-10, PSC Medical Payment Responsibility

(a) Physical Fitness.

(1) For all assignments outside of the United States the contractor and any authorized dependents shall be required to be examined by a licensed doctor of medicine, and the contractor shall obtain from the doctor a statement of medical opinion that, in the doctor's opinion, the contractor is physically able to engage in the type of activity for which he/she is to be employed under the contract, and the contractor and any dependents are physically able to reside in the Cooperating Country. A copy of the statement(s) shall be provided to the Contracting Officer prior to the contractor's departure for the Cooperating Country, or for a U.S. resident hire, before he/she starts work under the contract.

(2) For assignments of 60 days or more in the Cooperating Country, the Contracting Officer shall provide the contractor and all authorized dependents copies of the "USAID Contractor Employee Physical Examination Form". This form is for collection of information; it has been reviewed and approved by OMB, and assigned Control No. 0412-0536. Information required by the Paperwork Reduction Act (burden estimate, points of contract, and OMB approval expiration date) is printed on the form. The contractor and all authorized dependents shall obtain a physical examination from a licensed physician, who will complete the form for each individual. The contractor will deliver the physical examination form(s) to the Embassy health unit in the Cooperating Country. A copy of the doctor's statement of medical opinion at the end of the form which identifies the contractor or dependent by name may be used to meet the requirement in (a)(1) above.

(3) For end-of-tour the contractor and his/her authorized dependents are authorized physical examinations within 60 days after completion of the contractor's tour-of-duty.

(b) Reimbursement.

(1) As a contribution to the cost of medical examinations required by paragraph (a)(1) of this clause, USAID shall reimburse the contractor not to exceed \$100 for each physical examination, plus reimbursement of charges for immunizations.

(2) As a contribution to the cost of medical examinations required by paragraph (a)(2) of this clause the contractor shall be reimbursed in an amount not to exceed half of the cost of the examination up to a maximum USAID share of \$300 per examination plus reimbursement of charges for immunizations for himself/herself and each authorized dependent 12 years of age or over. The USAID contribution for authorized dependents under 12 years of age shall not exceed half of the cost of the examination up to a maximum share of \$120 per individual plus reimbursement of charges for immunizations. The contractor must obtain the prior written approval of the Contracting Officer to receive any USAID obligations higher than these limits.

(c) **Health Room Privileges.** Routine health room services may be available, subject to post policy and in accordance with the requirements of paragraph (a) of this clause, to U.S. citizen contractors and their authorized dependents (regardless of citizenship) at the post of duty. These services do not include hospitalization or pre-departure examinations. The services normally include such medications, as may be

ENCLOSURE G



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Date: 02/07/2008

Subject: Political Activity of USAID Employees

Type: Information

Agency Notice Message:

INFORMATION

USAID/General Notice
GC/EA
02/07/2008

Subject: Political Activity of USAID Employees

With the advent of the election season, we wish to remind all USAID employees of the restrictions on political activity by Federal employees under the Hatch Act. In addition to this notice, we will be providing training throughout the Agency, as well as individual guidance upon request.

"Political activity," as defined by the Hatch Act, means an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group (partisan means related to a political party). It includes any committee, club, or other organization that is affiliated with a political party or candidate for public office in a partisan election, or organized for a partisan purpose, or which engages in partisan political activity.

The following guidelines apply to all employees, including those in Administratively-Determined (AD) positions, with one exception: employees of certain agencies and certain categories of employees are subject to more restrictive rules. Within USAID, this applies only to career members of the Senior Executive Service (SES).

The following general guidelines are broken down based on employment status, first all employees other than career SES

members; and second, career SES members.

1. PERMITTED AND PROHIBITED ACTIVITIES FOR ALL EMPLOYEES OTHER THAN CAREER SES MEMBERS, INCLUDING ADMINISTRATIVELY DETERMINED POSITIONS.

Employees may:

- register and vote as they choose;
- assist in voter registration drives;
- express opinions about candidates and issues;
- contribute money to political organizations;
- attend political fundraising functions;
- attend and be active at political rallies and meetings;
- join and be an active member of a political party or club;
- sign nominating petitions;
- campaign for or against referendum questions, constitutional amendments, and municipal ordinances;
- be candidates for public office in nonpartisan elections;
- campaign for or against candidates in partisan elections;
- make campaign speeches for candidates in partisan elections;
- distribute campaign literature in partisan elections;
- hold office in political clubs or parties.

Employees may not:

- use their official authority or influence to interfere with an election;
- solicit or discourage political activity of anyone with business before the agency;
- solicit or receive political contributions (though this may be done in certain limited situations in connection with a Federal labor union or other employee organization);
- be candidates for public office in partisan elections;
- wear political buttons on duty;
- engage in political activity while either on duty, in a government office, wearing an official uniform, or using a government vehicle.

suspension without pay for 30 days. In addition, a violation could result in embarrassment for USAID, the candidate, and the party.

Please be aware there is no "de minimis" exception to the Hatch Act restrictions, including restrictions on use of employee computers or other government property for prohibited purposes.

You should consult with Jim Peters in the Office of the General Counsel, Ethics and Administration (GC/EA), at 2-4785, if you have any questions concerning a particular activity or the interpretation of the rules.

You may also review information concerning political activities on the GC/EA "Ethics Homepage," found at:

<http://inside.usaid.gov/A/GC/EA/>

The Office of Special Counsel is the agency that is responsible for investigating and enforcing the Hatch Act rules. You will find additional information on the Hatch Act on the OSC's website at:

<http://www.osc.gov/hatchact.htm>

Point of Contact: Any questions concerning this Notice may be directed to: Jim Peters, GC/EA, (202) 712-4785.

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