



Acquisition & Assistance Policy Directive

(AAPD)

From the Director, Office of Acquisition and Assistance

Issued: July 16, 2004

AAPD 04-04 (Revision 2)

Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 – Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking

Subject Category: Assistance, Contracts
Type: Policy

AAPDs provide information of significance to all agency personnel and partners involved in the Acquisition and Assistance process. Information includes (but is not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, AAPDs may be used to implement new requirements on short-notice, pending formal amendment of acquisition or assistance regulations.

AAPDs are **EFFECTIVE AS OF THE ISSUED DATE** unless otherwise noted in the guidance below; the directives remain in effect until this office issues a notice of cancellation.

This AAPD: Is New Replaces/ Amends
CIB/AAPD No: 04-04

Precedes change to: AIDAR Part(s) 752 Appendix
 USAID Automated Directives System (ADS) Chapters 303
 Code of Federal Regulations _____
 Other _____
 No change to regulations

Applicable to: Existing awards; Modification required:
 Effective immediately
 No later than _____
 As noted in guidance below
 RFAs issued on or after the effective date of this AAPD; all other Pending Awards, i.e., 8(a), sole source...
 Other or N/A All new awards or modifications to existing awards obligating funds for HIV/AIDS activities

New Provision/Clause Provided Herein: Yes; Scheduled update to Prodoc: September 2004
 No

(signed version on file)
TIMOTHY T. BEANS

1. PURPOSE:

The purpose of the AAPD is to provide clauses to be included as new standard provisions for assistance agreements and contracts that include FY 2004 HIV/AIDS funds. These provisions: (i) permit recipients to not endorse or utilize a multisectoral approach to combatting HIV/AIDS, or to not endorse, utilize or participate in a prevention method or treatment program to which the organization has a religious or moral objection; (ii) prohibit the funds provided under the agreement to be used to promote the legalization or practice of prostitution or sex trafficking; and (iii) require certain recipients to agree that they oppose prostitution and sex trafficking.

2. BACKGROUND:

The United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, Pub.L. No. 108-25 (2003) (the "AIDS Authorization") authorizes funds to be appropriated for HIV/AIDS activities for the fiscal years 2004-2008. The AIDS Authorization includes, among other things, certain restrictions on the use of HIV/AIDS funds, and requires certain recipients of those funds to have certain policies in place. It also permits an organization to receive funds even if such organization cannot endorse, utilize or participate in a prevention method or treatment program to which the organization has a religious or moral objection.

Specifically, section 301, entitled "Assistance to Combat HIV/AIDS," includes the following provisions:

"(d) ELIGIBILITY FOR ASSISTANCE- An organization that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961 (as added by subsection (a)) or under any other provision of this Act (or any amendment made by this Act) to prevent, treat, or monitor HIV/AIDS shall not be required, as a condition of receiving the assistance, to endorse or utilize a multisectoral approach to combatting HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the organization has a religious or moral objection.

(e) LIMITATION. – No funds made available to carry out this Act, or any amendment made by this Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and when proven effective, microbicides.

(f) LIMITATION. – No funds made available to carry out this Act, or any amendment made by this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking."

In response to a question from Senator Leahy on the Senate floor regarding provision (f) above, Senator Frist stated that "a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed

to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women . . . would satisfy the intent of the provision.” 149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Frist)

The Consolidated Appropriations Act of 2004, Division D – Foreign Operations, Export Financing, and Related Programs Appropriations (“FY 04 Appropriations Act”), Title II – Bilateral Economic Assistance, United States Agency for International Development, Child Survival and Health Programs Fund includes the following provision, “That information provided about the use of condoms as part of projects or activities that are funded from amounts appropriated by this Act shall be medically accurate and shall include the public health benefits and failure rates of such use.”

In a colloquy on the Senate floor regarding the application of section 301(d) of the AIDS Authorization (see above), Senator Frist noted as follows: “I fully agree that it is essential that information about approaches to HIV/AIDS prevention be medically accurate, including both the public health benefits and failure rates of the approach involved. That is what is intended by this provision. In fact, the provision uses the words “an organization that is otherwise eligible to receive assistance”. I believe that “otherwise eligible” should be interpreted to require explicit assurances by such organizations that when it provides information about HIV/AIDS prevention approaches it will meet this standard of accuracy.”

In addition, the FY 04 Appropriations Act amends section 301(f) of the AIDS Authorization by exempting the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any “United Nations agency” from that section. The Statement of Managers states that the conferees “intend that for purposes of this provision, the World Health Organization includes its six regional offices: The Americas (PAHO); South-East Asia (SEARO); Africa (AFRO); Eastern Mediterranean (EMRO); Europe (EURO); and Western Pacific (WPRO).”

The US Government has determined that it is appropriate to apply the requirement set forth in section 301(f) only to foreign organizations, including non-exempted public international organizations (PIOs).

OMB has approved the Agency’s information collection request under the Paperwork Reduction Act, allowing USAID to require (i) non-U.S. nongovernmental organizations, certain public international organizations and contractors or subcontractors that are foreign organizations to have a policy explicitly opposing, in their activities outside of the United States, prostitution and sex trafficking and (ii) U.S. and non-U.S. nongovernmental organizations receiving FY04 HIV/AIDS funds under a grant or cooperative agreement to provide a certification that they are in compliance with the standard provisions “Condoms” and “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking” that appear below. (OMB No.: 0412-0568)

3. GUIDANCE:

A. For Assistance Awards (grants and cooperative agreements) to U.S. non-governmental, non-U.S. non-governmental, and Public International Organizations (PIOs):

I. Eligibility

The following provisions must be included in each new Request for Applications (RFA) and Annual Program Statement (APS) utilizing FY04 HIV/AIDS funding. When designing a program for HIV/AIDS the SO Team or requiring office must be mindful of the first clause below. The evaluation criteria should not give any special advantage to an organization that endorses or utilizes a multisectoral approach (multisectoral in the legislation refers to Abstinence, Be Faithful/Behavior Change, and Condoms).

Comment: Just FY04, or FY 04-FY 08?

Answer: Per Susan, it's very likely that the 05 appropriation will make some changes anyway, so we won't gain anything by adding the additional year. She said we'll have to review the changes in future year appropriations anyway, so we agreed that it made sense to just use 04.

These provisions also must be included in the Standard Provisions of any new grant or cooperative agreement to a public international organization or a U.S. or non-U.S. non-governmental organization financed with FY04 HIV/AIDS funds or modification to an existing grant or cooperative agreement that adds FY04 HIV/AIDS.

“ORGANIZATIONS ELIGIBLE FOR ASSISTANCE (ASSISTANCE) (JULY 2004)

An organization that is otherwise eligible to receive funds under this agreement to prevent, treat, or monitor HIV/AIDS shall not be required to endorse or utilize a multisectoral approach to combatting HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the organization has a religious or moral objection.

CONDOMS (ASSISTANCE) (JULY 2004)

Information provided about the use of condoms as part of projects or activities that are funded under this agreement shall be medically accurate and shall include the public health benefits and failure rates of such use.”

Comment: Is this “Condoms” provision limited to only those awards involving condoms, or all HIV/AIDS, regardless of whether the specifically involve condoms?

Answer—The latter--all awards for HIV/AIDS, whether condoms are mentioned or not.

II. Limitation on the Use of Funds

The following must be included in the Standard Provisions of any grant or cooperative agreement or subagreement funded with FY04 HIV/AIDS funds with a U.S. nongovernmental organization, non-U.S., non-governmental organization or public international organizations.

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (JULY 2004)

(a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b) Except as noted in the second sentence of this paragraph, if the recipient or a subrecipient at any tier is a foreign non-governmental organization or a public international organization, as a condition of entering into this agreement or any subagreement, such foreign non-governmental organization or public international organization recipient/subrecipient must have a policy explicitly opposing, in its activities outside of the United States, prostitution and sex trafficking. The following organizations are exempt from this paragraph: the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any United Nations agency. These exempt organizations must include this paragraph in any subawards they make to non-exempt foreign non-governmental organizations or PIOs.

(c) The following definitions apply for purposes of this provision:

Foreign non-governmental organization means an entity that is not organized under the laws of any State of the United States, the District of Columbia or the Commonwealth of Puerto Rico.

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

(d) The recipient shall insert this provision, which is a standard provision, in all subagreements.

(e) This provision includes express terms and conditions of the agreement and any violation of it shall be grounds for unilateral termination of the agreement by USAID prior to the end of its term.

(End of Provision)”

III. Certification

This certification requirement only applies to the prime recipient. Before a U.S. or non-U.S. non-governmental organization receives FY04 HIV/AIDS funds under a grant or

cooperative agreement, such recipient must provide to the Agreement Officer a certification substantially as follows:

“[Recipient's name] certifies compliance as applicable with the standard provisions entitled “Condoms” and “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking” included in the referenced agreement.”

B. For Contracts:

I. Eligibility

The following provisions must be included in each new solicitation and contract utilizing FY04 HIV/AIDS funding. When designing a program for HIV/AIDS the SO Team or requiring office must be mindful of the first clause below. The evaluation criteria should not give any special advantage to an organization that endorses or utilizes a multisectoral approach (multisectoral in the legislation refers to Abstinence, Be Faithful/Behavior Change, and Condoms).

In addition, these provisions are to be included when any existing contract is amended to add FY04 HIV/AIDS funding.

ORGANIZATIONS ELIGIBLE FOR ASSISTANCE (ACQUISITION) (JULY 2004)

An organization that is otherwise eligible to receive funds under this contract to prevent, treat, or monitor HIV/AIDS shall not be required to endorse or utilize a multisectoral approach to combatting HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the organization has a religious or moral objection.

CONDOMS (ACQUISITION) (JULY 2004)

Information provided about the use of condoms as part of projects or activities that are funded under this contract shall be medically accurate and shall include the public health benefits and failure rates of such use.

II. Limitation on the Use of Funds

The following must be included in the Schedule of any contract that includes FY04 HIV/AIDS funds.

**PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE
LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING
(ACQUISITION) (JULY 2004)**

(a) This contract is authorized under the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 (P.L. 108-25). This Act enunciates that the U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. The contractor shall not use any of the funds made available under this contract to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b) Except as provided in the second sentence of this paragraph, if the contractor or a subcontractor at any tier is a foreign non-governmental organization or a public international organization, as a condition of entering into this contract or subcontract, the foreign non-governmental organization or public international organization contractor/subcontractor must have a policy explicitly opposing, in its activities outside of the United States, prostitution and sex trafficking. The following organizations are exempt from this paragraph: the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any United Nations agency. These exempt organizations must include this paragraph in any subawards they make to non-exempt foreign non-governmental organizations or PIOs.

(c) The following definitions apply for purposes of this provision:

Foreign non-governmental organization means an entity that is not organized under the laws of any State of the United States, the District of Columbia or the Commonwealth of Puerto Rico.

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

(d) The contractor shall insert this clause in all subcontracts.

(e) Any violation of this clause will result in the immediate termination of this contract by USAID.”

If the contract provides for the contractor to execute grants to non-Governmental organizations (not-for-profits or for-profits), per ADS 302.5.6 Grants under Contracts, then the contractor must comply with the assistance provisions in Section 3.A of this AAPD when awarding grants or cooperative agreements under its contract (in compliance with ADS 302.5.6(c) and (d)).

4. POINT OF CONTACT:

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