

Department of State

§ 228.40

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

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

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

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

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

§ 228.38 Miscellaneous service transactions.

This section sets forth rules governing certain miscellaneous services.

(a) *Commissions.* The nationality rules in subparts C and D of this part, with the exception of § 228.36, do not apply to the payment of commissions by suppliers. A commission is defined as any payment or allowance by a supplier to any person for the contribution which that person has made to securing the sale or contract for the supplier or which that person makes to securing on a continuing basis similar sales or contracts for the supplier.

(b) *Bonds and guarantees.* The nationality rules in subparts C and D of this part, with the exception of § 228.36, do not apply to sureties, insurance companies or banks who issue bonds or guarantees under USAID-financed contracts.

(c) *Liability insurance under construction contracts.* The nationality rules in subparts C and D of this part, with the exception of § 228.36, do not apply to

firms providing liability insurance under construction contracts.

§ 228.39 Special source rules for construction and engineering services.

Advanced developing countries, eligible under Geographic Code 941, which have attained a competitive capability in international markets for construction services or engineering services are not eligible to furnish USAID-financed construction and engineering services. There is no waiver of this provision. (22 U.S.C. 2354)

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

§ 228.40 Local procurement.

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

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

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

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

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

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

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

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

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

(3) Rental costs for housing and office space;

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

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

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

Subpart F—Waivers

§ 228.50 General.

USAID may expand the authorized source in order to accomplish project or program objectives by processing a waiver. When a waiver is processed to include a new country, area, or geographic code, procurement is not limited to the added source(s), but may be from any country included in the authorized geographic code. All waivers must be in writing.

§ 228.51 Commodities.

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

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

(2) It is necessary to permit procurement in a country not otherwise eligible in order to meet unforeseen cir-

cumstances, such as emergency situations.

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

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

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

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

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

(iv) Persuasive political considerations.

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

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

(b) *Additional requirements.* A waiver to authorize procurement from outside the United States of agricultural commodities, motor vehicles, or pharmaceuticals (see § 228.13, “Special source rules requiring procurement from the United States,”) must also meet requirements established in USAID directives on commodity eligibility. (USAID’s Automated Directives System Chapter 312.)

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

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