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AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 228

RIN 0412-AA70

Procurement of Commodities and Services Financed by USAID Federal
Program Funds.

AGENCY: Agency for International Development (USAID).

ACTION: Final rule.

SUMMARY: This Final Rule revises USAID regulations to simplify implementation of the statutory requirement that Federal assistance, or program, funds made available by the United States Congress (Congress) to USAID under the authority of the Foreign Assistance Act of 1961, as amended (FAA), be used for procurement in the United States (U.S.), the recipient country, or developing countries. It does so by revising USAID's current source, origin and nationality (S/O/N) regulation to track more closely the statutory procurement authority provided under the FAA and referenced above by establishing a new code for procurements from the U.S., recipient country and developing countries as well as reflecting existing, special procurement authorities established by Congress; deleting the concept of ``origin," and simplifying the concepts of ``source" and ``nationality" to reflect better Congress's directive to procure from the U.S., recipient or developing countries; and simplifying application of the statutory waiver authority in the FAA.

DATES: Effective: February 6th, 2012.

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On August 19, 2011, USAID published in the Federal Register (76 FR 51916) a Proposed Rule which substantially modified the current S/O/N regulation by establishing a single primary geographic (source) code, deleting the concept of "origin" from the rule, requiring recipients and contractors to document "availability for purchase" of commodities and services, and streamlining existing waiver procedures. The Agency provided a forty five day public comment period on the Proposed Rule, which ended Monday, October 3rd, 2011. The Agency also offered the public the opportunity to submit comments by surface mail, email or fax.

The publication of the Proposed Rule was the second step in a three step, public "notice and comment" rulemaking procedure. Previously on February 16, 2011, USAID published an "Advanced Notice of Proposed Rulemaking" (ANPRM) in the Federal Register (76 FR 8961), proposing changes to the current regulation, soliciting suggestions and comments for such changes, and providing a forty five day comment period, which ended April 4, 2011. Comments received in response to the ANPRM were discussed and reflected in the publication of the Proposed Rule. USAID's discussion of the comments received in response to the Proposed Rule, below at part III, and reflection of those comments in this "Final Rule," completes the public notice and comment rulemaking process. USAID also consulted with the relevant Congressional committees concerning revisions to the regulation.

USAID received sixteen public comments in response to the Proposed Rule, all strongly in favor of substantial simplification of the regulation to keep pace with the globalization of the economy. Comments also urged revision of the proposed requirement for documentation of

multiple, yearly sales as part of the definition of "available for purchase;" revisions to the "nationality" proposed requirements to allow eligibility of foreign-owned (non-governmental) development organizations employing a majority of U.S. or developing country staff ; and clarification of the waiver requirements. Comments received in response to the Proposed Rule are discussed and addressed in greater detail, below in part III, Responses to Comments Received on the Proposed Rule.

I. Background

Historically, the initial version of Section 604(a) provided that federal program funds made available under the FAA could be used for procurement outside the United States only if the President made a determination that such procurement would not have adverse effects upon the economy of the U.S., or that any such harm was outweighed by the benefits of "less costly government procurement outside the United States." USAID implemented this directive by adapting the concepts of "source, origin and nationality" developed under USAID's commodity import program (CIP),¹ to all program funded procurements under the FAA. USAID also adapted the "principal geographic codes"² developed under the CIP to apply to all USAID financed, Federal program funded procurements, in part in order to address Congress's

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concern that U.S. taxpayer funded foreign assistance not provide any direct benefits to the governments of communist countries during the Cold War. The practical result of these decisions was that all program funded procurement transactions financed by USAID were restricted to the source, origin and nationality geographic code specified for the implementing agreement.

¹ A CIP is a program in which USAID provides foreign exchange to a host country that, by the terms of the applicable agreement between USAID and the host country, is used to finance particular commodity import transactions of the host country.

² Geographic codes were established to note, for every implementing agreement, the source, origin and nationality authorized for every good and service procurement transaction under that implementing agreement.

In 1993, Congress amended the FAA procurement authorities in Section 604(a) to provide that federal program funds made available to

USAID may be used for procurement from the U.S., the recipient country,³ or developing countries (but not advanced developing countries).⁴ However, USAID did not change its procurement regulations to reflect the change in statutory procurement authorities, but instead self-imposed a policy to continue to follow the same limits on procurement in the recipient and developing countries as if the 1993 statutory amendments had not occurred. The concepts of source, origin and nationality were maintained in USAID's procurement regulations at 22 CFR part 228, as were the principal geographic codes, none of which captured in any single code Congress's clear 1993 directive to procure from the U.S., recipient country, or developing countries.

³ Recipient countries are also called "cooperating countries" to distinguish them from recipients of grants.

⁴ Prior to Public Law 102-391, FAA 604(a) stated, "Funds made available under this chapter may be used for procurement outside the United States only if the President determines that such procurement will not result in adverse effects upon the economy of the United States or the industrial mobilization base, with special reference to any areas of labor surplus or to the net position of the United States in its balance of payments with the rest of the world, which outweigh the economic or other advantages to the United States of less costly procurement outside the United States, and only if the price of any commodity procured in bulk is lower than the market price prevailing in the United States at the time of procurement, adjusted for differences in the cost of transportation to destination, quality, and terms of payment."

Because of the end of the Cold War and the subsequent globalization of the economy, this approach has become increasingly difficult to administer and, in some respects, obsolete. The costs of compliance with the complex regulation, and of the self-imposed and unnecessary restrictions on procurement in recipient and developing countries means that the foreign assistance dollar does not go as far as it would with a more straightforward regulation that reflects the statutory authority to procure in the recipient country and other developing countries, in addition to the U.S.

The overwhelming majority of comments received in response to the Proposed Rule (as well as suggestions in response to the ANPRM) endorse this revised approach of allowing procurements in the recipient and developing countries as well as the U.S., as a "very positive" and "very responsive" approach which is "long overdue" and will "eliminate many longstanding and problematic issues" with a current regulation that is "overly complex and difficult to implement." Most

commenters anticipated that the "streamlining of the procurement process" will allow resources to go further and achieve greater results "at a time when aid and development communities are challenged to do more with fewer resources." The overall tenor of all comments received was favorable, even highly so, to the proposed revisions. Some commenters commented that the revisions did not go as far as possible in terms of eliminating requirements and imposing internal deadlines on the time for processing waivers. All comments are discussed below at part III.

II. The Final Rule

A. Purpose of Rule

The purpose of this rule is to bring USAID regulations into full alignment with Section 604(a) of the Foreign Assistance Act of 1961, as amended, which directs that federal program funds made available under the FAA may be used for procurement "in the United States, the recipient country, or developing countries." The Final Rule also includes principal geographic codes that reflect existing, special procurement authorities for the Development Fund for Africa, 22 U.S.C. 2293 et seq. (DFA) and New Independent States (NIS) 22 U.S.C. 2295b, established by Congress.

B. USAID Regulations Amended by This Rule

The Final Rule amends in its entirety 22 CFR part 228, Rules on Source, Origin and Nationality for Commodities and Services Financed by USAID. The Final Rule applies to all commodities and services procured under implementing instruments financed by USAID with program (sometimes called assistance) funds under the authority of the FAA.

C. Summary of Changes to the Existing Rule

The Final Rule revises the existing regulation to track more closely the statutory procurement authority provided under the FAA by establishing a new principal geographic code for procurements from the U.S., recipient country, and developing countries, as well as including in the Final Rule special principal geographic codes under the DFA and NIS authorities, above. The Final Rule also deletes the concept of "origin," which is increasingly obsolete and difficult to apply in today's globalized economy, and in place of the concept of "origin," simplifies and strengthens the concepts of "source" and "nationality" in order to reflect better Congress's directive to procure from the U.S., recipient countries, or developing countries. Based on comments received, the Final Rule additionally deletes from

the Proposed Rule a requirement for documentation of ``multiple sales" under the definition of the statutory term ``available for purchase," and substitutes a prohibition that recipients and contractors do not engage vendors to circumvent the ``source" provisions by ordering commodities otherwise ``not available" in countries in the designated principal geographic code at the time of sale. This change achieves the same objective as that notified in the Proposed Rule but will impose fewer burdens on implementers with requirements that would have no practical effect on compliance. The Final Rule clarifies that waivers to permit procurements beyond the U.S., the recipient country, or developing countries will be to Code 935-- any area or country but excluding ``prohibited sources" (formerly referred to as ``foreign policy restricted countries"), reflecting USAID's agreement with comments that explicit reference be made to Code 935 as the code to which waivers will authorize procurement. USAID will maintain a list of prohibited sources which will be available in USAID's Automated Directives System, ADS 310; as in the current rule, there is no waiver of the statutory prohibited sources prohibition. The Final Rule also raises the amount, from \$5 million to \$10 million, for which foreign-owned (non-governmental) local firms will be eligible for construction procurement because that amount has not been raised in over fifteen years, and confirms the current requirement that USAID determine that no capable U.S. construction company is operating in the cooperating/recipient country or, if there is such a company, that it is not interested in bidding for the proposed contract. Finally, the Final Rule also clarifies that case by case waivers can be approved by commodity or service type or category (for example, a category of medical equipment like diagnostic

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machinery, or of services like translation services), to obviate the need for repeat or serial waivers for the same type or category of commodity or service. This clarification more explicitly reflects past and current Agency practice.

III. Responses to Comments Received on the Proposed Rule

On August 19, 2011 USAID published in the Federal Register (76 FR 51916) a Proposed Rule for Procurement of Commodities and Services Financed by USAID. By October 3, 2011, the closing date for comments, USAID received sixteen (16) external comments, including comments from USAID partners that have received USAID funding, trade associations that represent them, and other interested parties. All of the comments were considered, and all relevant or substantial comments are discussed below. The following is a summary of comments by issue, and the

Agency's responses to those comments.

A. General Comments

All of the comments received were in favor of revision of USAID's procurement regulations; the variation of opinion among commenters concerning how to revise the regulations is discussed below. Specific areas identified as significant improvement are improved procurement authorities in cooperating and developing countries, removal of the increasingly troublesome concept of "origin," improved waiver procedures and overall clarification and simplification of the rule.

Comment: Comments from some for-profit and non-profit USAID program implementing grantees and contractors urged USAID to revise procurement practices even more broadly, by requesting Congress to amend the procurement authorities in the FAA to untie aid completely.

Response: While USAID consulted with the pertinent authorizing and appropriations Congressional committee staff concerning the revisions reflected in the Proposed Rule, amendments to the FAA are beyond the scope of this rulemaking process, and USAID has no plans to request statutory amendments to FAA procurement provisions at this time.

Comment: Several comments lauded USAID for engaging in a public rulemaking process but urged USAID to avoid reliance on internal agency policies and eliminate or limit references to such policies, including USAID's Automated Directive System (ADS). Those commenters indicated references should be to the USAID Web site so as to not give unwarranted regulatory credence to the ADS.

Response: USAID shares the concern that reliance on additional sources of guidance concerning application of the source and nationality requirements may result in inconsistent application of the Final Rule. USAID has limited ADS references in the Final Rule to the minimum necessary to ensure the rule is in compliance with sometimes changing Congressional mandates, including those concerning prohibited sources and restricted commodities. Because the list of prohibited sources and restricted commodities is, at least in part, determined by foreign policy and consultations with Congress on annual appropriations, including non-binding committee reports and statements of managers, a minimal amount of flexibility in defining prohibited sources and restricted commodities is necessary for effective and efficient implementation of the Final Rule.

Comment: While all comments supported the removal of the concept of "origin" from the rule, some comments expressed concern that the requirement that recipients and contractors document that commodities be "available for purchase" in a country reflected in the principal geographic code added back complication into USAID's clarification and simplification of the rule. Others opined that the concept of a single "principal geographic code" did not reflect other statutory

procurement authorities, such as those benefitting the Development Fund for Africa and New Independent States.

Response: These concerns are addressed below in the comments on Sec. 228.01, Definitions, and Sec. 228.03, Identification of the Principal Geographic Codes.

Comment: Several commenters advised USAID to revise the procurement provisions ``reserved" at 22 CFR part 226, Administration of Assistance Awards to Non-governmental Organizations.

Response: USAID appreciates these comments, but they are outside the scope of this rule. Nonetheless, USAID recognizes the need to ensure consistency between this rule and related regulations and is in the process of reviewing and determining appropriate revisions to 22 CFR part 226; ADS chapters 303, 310, 311, 312, and 221; and 48 CFR chapter 7 (the USAID Acquisition Regulation). Such changes will be made to conform to the Final Rule and are, therefore, logical outgrowths of the Final Rule.

Comment: There is confusion as to what extent the prohibition on assistance to countries to which assistance is prohibited by law (simplified to ``prohibited sources" in the Final Rule) extends to citizens of those countries as consultants/independent contractors.

Response: The Final Rule clarifies in Sec. 228.15 that citizens or permanent residents of countries which are prohibited sources are not eligible to provide commodities or services as an employee, individual contractor, or consultant under this rule.

Comment: The term ``goods" should be used in place of the term ``commodities" in the Final Rule, because the term ``commodities" may create confusion due to its use in USAID's food programs.

Response: In order to align USAID's rules for procurement completely with the Congressional mandate for ``Procurement" at Section 604(a) of the FAA, the Final Rule contains the same terminology as Section 604(a), including the statutory terms ``recipient country" and ``commodities." The Final Rule includes alternative, more familiar terms such as ``cooperating country" along with recipient country, and ``goods" along with commodities where suggested and appropriate, in order to clarify any confusion about terminology and application.

B. Comments on Specific Provisions

1. Sec. 228.01 Definitions

Comment: One commenter suggested lettering the definitions for easy reference.

Response: USAID followed the alphabetical listing used in other parts of the Code of Federal Regulations, such as the Federal Acquisition Regulation at 48 CFR part 1, in formatting this Final Rule. Listing each definition in alphabetical order without lettering them will simplify any future additions or deletions to this section.

Comment: Regarding the definition in the Proposed Rule of ``available for purchase," many commenters expressed concern that the requirement for recipients and contractors to document multiple sales of a commodity or service by the supplier of the commodity or service in an authorized country during the past calendar year would create a compliance burden. In addition, commenters recommended increasing the de minimis exception to documentation requirements, in order to reduce the compliance burden.

Response: The definition was intended to prevent ``fly by night" vendors, either individual or

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enterprises, and especially those subsidized by foreign governments, from establishing themselves as sources in countries within the principal geographic code designated in the implementing instrument, to take advantage of procurements funded by USAID. The definition was also intended to discourage recipients and contractors from engaging local suppliers to import commodities on their behalf for purposes of circumventing the source rules.

USAID has responded to concerns about regulatory burden by removing the documentation of multiple sales requirement from the definition of ``available for purchase" in the Final Rule (consequently, the de minimis exception has not been amended, but deleted as well). Instead, USAID addresses the circumvention issue directly: Section 228.11, Source of commodities, now contains an express prohibition from engaging suppliers of commodities in an authorized country to import commodities from a country outside of the principal geographic codes for the purposes of circumventing the requirements of this rule, enforceable through disallowance by USAID of the cost of procurement of the subject commodity. USAID as a matter of course retains the usual right, at its discretion, to request additional information if it has questions about an allowable cost. USAID has also determined that the ``fly by night vendor" issue can also be addressed under the nationality requirements of Sec. 228.12 and restrictions on eligibility of foreign government- owned enterprises in Sec. 228.13, see discussion below.

In response to comments received, the definition of ``available for purchase" has also been amended to reflect the addition in the Final Rule of existing Code 935 (any area or country but excluding prohibited sources) in Sec. 228.03, ``Identification of the Principal Geographic Codes," by exempting Code 935 procurements from the definition of ``available for purchase." Code 935 is being retained to reflect the authorities for DFA and NIS, as well as to designate the source and nationality to which waivers under Subpart D will be made. Code 935 procurements are exempted from the definition of ``available for

purchase" because, as commenters noted, the source rules will not apply and no circumvention issues will arise when ``any country or region" is the authorized principle geographic code under Code 935.

Comment: One commenter pointed out that the Proposed Rule, Sec. 228.15, Miscellaneous Service Transactions, contained a definition of ``commission" more appropriately included in the definitions section, Sec. 228.01.

Response: The definition of ``commission" has been moved to Sec. 228.01, as have the definitions of ``long term lease" and ``motor vehicles" previously included in the requirements, rather than definitions, section of the current regulation and the Proposed Rule.

Comment: Commenters suggested non-substantive, slight clarifications/grammatical improvements to the definitions of ``developing countries," ``implementing document," and ``source" in the Proposed Rule.

Response: The suggestions have been accepted, and the changes made in the Final Rule. Please note the term ``implementing document" has been slightly changed to ``implementation instrument" in the Final Rule to correspond with Agency terminology in the ADS Glossary.

Comment: Regarding the definition of ``nationality" in the Proposed Rule, one commenter suggested that not all countries' immigration laws have the immigration status of ``lawful permanent resident" as included in the definition of ``nationality" in the Proposed Rule.

Response: The concept of lawful permanent residency as part of the ``nationality" requirement has been amended to add ``or equivalent immigration status to live and work on a continuing basis," to address immigration law/status variances from country to country, while at the same time confirming that some form of continuing or permanent residency is necessary to satisfy the nationality requirement.

Comment: Several commenters inquired whether sub recipients and subcontractors came within the scope of this regulation and the definition of ``recipients and contractors."

Response: The definition of ``recipients and contractors" has been amended to include sub recipients and subcontractors, which confirms that this rule applies to both. Please note that partner country governments are not subjects of this Final Rule, although USAID host country government contracting requirements do contain procurement provisions which are still applicable unless revised.

Comment: Several commenters requested additional definitions.

Response: USAID has added to Sec. 228.01 Definitions, a definition of ``Pharmaceuticals" and also of ``Free Port or Bonded Warehouse" in response to requests for the same.

Additional change: The Final Rule also simplifies the term in the Proposed Rule, ``countries to which assistance is prohibited by law" by replacing it with the concept of ``prohibited sources" adapted from

the Federal Acquisition Regulation, 48 CFR part 1, and providing a USAID-specific definition at Sec. 228.01. Please note the definition includes countries which are subject to applicable sanctions administered by the U.S. Treasury Department's Office of Foreign Assets Control, and other applicable executive branch restrictions. As in the Proposed Rule, USAID will provide a list of Prohibited Sources in ADS 310.

2. Sec. 228.02 Scope and Application

Comment: Several commenters suggested that this section confirm that procurements with program income and under Title II Food Aid programs are not required to comply with 22 CFR part 228 in its entirety.

Response: The Final Rule includes specific exceptions from coverage of this regulation for procurements with program income and procurements funded by Title II food aid funds, as well as an additional sentence reaffirming the non-applicability of this regulation to the six exempted categories of procurements at Sec. 228.02. The intent is to clarify that according to its terms, the statutory requirement of FAA 604(a) apply only to "[f]unds made available for assistance (emphasis added) under this Act" (the FAA).

The Final Rule also includes two slight, non-substantive grammatical refinements to Sec. 228.02.

3. Sec. 228.03 Identification of the Principal Geographic Codes

Comment: Several implementing grantee and contractor commenters suggested that the establishment of one geographic code was an oversimplification of USAID's procurement authorities.

Response: The Proposed Rule attempted to mirror the specific language of USAID's statutory procurement authority to procure in "the United States, the recipient country, or developing countries," FAA 604(a), by establishing one principal geographic code to replace the many others developed over the years. The "additional authorities and conditions" language in Sec. 228.02, above, was intended to preserve statutory procurement authority that augments FAA 604(a), such as Support for Economic and Democratic Development of the Independent States of the Former Soviet Union, 22 U.S.C. Section 2295b (reflected in the current regulation as Code 110), and Development Fund for Africa, 22 U.S.C. 2293 et seq. (reflected

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in the current regulation as Code 935) However, due to the possibility of confusion, the Final Rule adds back Principal Geographic Codes 110 and 935, as specified below in Sec. 228.03.

4. Sec. 228.11 Source of Commodities

Comments and response: as noted above in III.B., Sec. 228.11 now contains a restriction on recipients and contractors engaging vendors

to import commodities in circumvention of source and nationality requirements, in lieu of requirements in the Proposed Rule for documentation of multiple sales in past year, now deleted from the definition of "available for purchase" in Sec. 228.01 of the Final Rule.

5. Sec. 228.12 Nationality of Suppliers of Commodities and Services

Comments: One commenter expressed opinions that by requiring both principal place of business in a country in the primary geographic code and requiring majority direct or beneficial ownership of for profit organizations by individuals who are citizens or lawful permanent residents of a country in the designated code, the regulation would result in the non-eligibility and exclusion of "a whole class of foreign-owned development organizations even though such organizations have a substantial involvement in the United States, or developing country, economies."

Response: The nationality provision (along with the restrictions on eligibility of foreign government controlled enterprises, below) was intended to address the specter of "fly by night" vendors from otherwise ineligible (not recipient or developing) third countries descending on a recipient or developing country, taking advantage of less rigorous citizenship or business establishment requirements, and undercutting U.S. or local vendors. In order to address commenter concerns about exclusion of legitimate foreign (but not foreign government) owned or controlled international development organizations, the nationality requirements for organizations have been simplified to require, as uniformly recommended by commenters (1) organization under the laws of a country in the principal geographic code designated in a implementing instrument; (2) conducting business as a "going concern" (functioning business entity for the foreseeable future) in such country; and either (3) management by a governing body, the majority of whom are citizens or residents of such country or (4) employment of citizens or residents of such country in more than half of its permanent full time positions and half of its principal management positions. The criticized "majority direct ownership or beneficial ownership" requirement of the Proposed Rule has been deleted in its entirety; USAID anticipates that the majority management and employment requirements will discourage fly by night vendors while at the same time preserving the eligibility of foreign-owned but U.S. or recipient/developing country benefitting, foreign assistance organizations.

6. Sec. 228.13 Foreign Government-Owned Organizations

Comment: One commenter expressed concern that the Proposed Rule did not adequately distinguish between foreign-owned commercial enterprises, which are not eligible for financing, and foreign entities, such as government ministries, but also educational, health care, and other public sector actors, which are appropriate and

necessary partners for USAID.

Response: The exclusions at Sec. 228.13 have been broadened in the Final Rule to preserve the eligibility of government education institutions, health care providers, and technical entities not formed primarily for a business or commercial purpose from the restrictions of this provision (similar to recent Millennium Challenge Corporation provisions on foreign government-owned enterprises). In addition, a statement is added to the second sentence of Sec. 228.13 to emphasize that regional and local governments, along with national government ministries and agencies, are eligible partners for USAID financing.

7. Sec. 228.15 Nationality of Individuals Under Contracts or Subcontracts for Services

Comment: Several commenters praised the revisions but inquired whether or not individual contractors were covered by Sec. 228.15.

Response: The Final Rule has been amended to clarify that individual contractors as well as consultants of recipients and contractors are eligible, and not subject to the eligibility requirements. However, as above, citizens or permanent residents of countries which are prohibited sources are not eligible for USAID financing under the Final Rule.

8. Sec. 228.17 Special Procurement Rules for Construction and Engineering Services

Comment: Several commenters questioned how reasonable it is for recipients and contractors to determine which advanced developing countries have attained a competitive capacity in international markets for construction and engineering services.

Response: Sec. 228.17 has been amended to clarify in the Final Rule that USAID makes such determinations, and will make those determinations available through ADS 310.

9. Sec. 228.18 Long-Term Leases

Comment: One commenter inquired whether or not a lease of 18 vehicles for 10 days each at the same time would trigger the long term lease provisions.

Response: Sec. 228.18 has been amended in the Final Rule to move the definition of long term lease into the definitions section, Sec. 228.01, and also to clarify that the source and nationality requirements of Subpart B are only triggered for repeat leases of single vehicles totaling 180 days or more.

10. Sec. 228.19 Special Rules Requiring United States Manufacture or Procurement

Comment: Several commenters suggested grammatical edits to clarify the title of this section, advocated for revisions of USAID's ADS 312 on Eligibility of Commodities and Commodity Eligibility Listing, and also requested inclusion of a definition of "pharmaceuticals" in the Final Rule.

Response: Recommendations for grammatical edits were accepted and

made, and definitions of ``commodities" and ``pharmaceuticals" have been added to Sec. 228.01, Definitions, in the Final Rule. Sec. 228.19(a), regarding Agriculture Commodities, has been revised to state that USAID provides a list of restricted agricultural commodities in ADS 312. Section 228.19(b) clarifies that financing transportation or driver services from an individual or commercial entity and not directly financing the purchase or lease of a vehicle, is subject to the nationality of suppliers requirements of Sec. 228.12, not the restrictions on motor vehicle procurements. The provision on pharmaceuticals in Sec. 228.19(c) has been revised to comply with ``plain language" guidance for federal regulations.

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

Comment: Four commenters suggested revision or elimination of provisions related to the Cargo Preference Act, 46 U.S.C. 55305 (Sec. 228.21) and eight commenters suggested revision or elimination of provisions related to the Fly America Act, 49 U.S.C. App. 1517 (Sec. 228.22) in the Final Rule.

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Response: USAID is participating in a separate interagency working group considering updates to Cargo Preference Act implementing guidance and regulations. Further action to update these implementing regulations, if any, will be subject to notice and comment, and will be published in the Federal Register by the Department of Transportation's Maritime Administration.

Currently, USAID does not plan to engage Congress concerning amendments to the Fly America Act, although the provisions of Sec. 228.22 have been slightly revised to reflect that it applies only to transport of commodities under the Final Rule.

12. Subpart D--Waivers

Comments: The waiver provision of the proposed rule received a substantial number of comments from implementing grantee and contractor commenters as well as their advocacy groups. USAID received the following relevant and significant suggestions: (1) Deletion of the term ``produced in" as part of the larger phrase, ``not produced in and available for purchase in" as grounds for a waiver under Sec. 228.30(a)(1), due to concern the words ``produced in" were reintroducing the concept of ``origin" otherwise deleted from the Proposed Rule; (2) clarification whether or not cost savings for procurement of a commodity could be grounds for a waiver to ``promote efficiency in the use of United States foreign assistance resources"; (3) assigning authority to approve waivers to USAID senior field staff, as is done with waivers for USAID branding and marking requirements, 22 CFR 226.91, and (4) imposing an internal time limit for USAID's

processing waivers, perhaps as short as 15 days.

Responses: (1) While the term "produced in and available for purchase in" is retained in the Final Rule because it tracks the statutory language at Section 604(a) of the FAA, a clarification has been added that the term as used in Sec. 228.30(a)(1) will have the same meaning as the definition of "available for purchase" in Sec. 228.1, and thus not reintroduce inquiries into where a commodity has been "produced" or the concept of "origin" through the backdoor of the waiver provision; (2) While a favorable price differential of 50% or greater may be grounds for approval of a waiver in order to promote efficiency in the use of foreign assistance resources, it would be subject to the discretion of the approving authority for the waiver; (3) Similarly to waiver approval authority for USAID branding and marking requirements, under USAID's internal delegations of authority, waiver authority for source, nationality requirements currently is assigned to USAID's most senior officials in field missions, as suggested; and (4) While USAID declines to impose time limitations on internal processing of waivers, USAID will be providing training on the Final Rule to USAID staff, and anticipates that the additional guidance on waivers provided in the Final Rule will result in expedited processing of waivers. USAID also expects that revisions to source and nationality requirements reflected in the Final Rule will obviate the need for many previously needed waivers.

USAID has declined a suggestion to incorporate approved waivers into the Final Rule in order to preserve the distinction between the requirements of the rule and the special circumstances reflected in an approved waiver determination.

C. Subpart E, Effective Date

Comment: USAID received suggestions advocating for a delayed effective date due to the necessity to absorb changes made by the Final Rule, and one suggestion for a retroactive effective date due to the importance and benefit of changes made by the rule.

Response: USAID has established an effective date of February 6th, 2012 in order to allow for training of USAID staff on the Final Rule, and also to prepare implementation guidance and ensure related agency policy which reflects the revisions to USAID procurement requirements established in the Final Rule. USAID has no plan to make the implementation date retroactive, a step that requires meeting stringent legal tests to overcome a presumption that new laws be applied prospectively.

Because the effective date is specified in the section following the preamble Summary in publication of the Final Rule, Subpart E has been removed. If need be, USAID awards in effect at the time the Final Rule becomes effective that contain any non-Code 935 geographic codes

shall be modified to reflect the principal geographic codes established at Sec. 228.03. All new awards after February 6, 2012 are subject to the Final Rule.

IV. Regulatory Planning and Review: Findings and Certifications of Impact Assessment

A. Executive Orders 12866 and 13563

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action" although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

B. Congressional Review Act

This rule is not a major rule under 5 U.S.C. 804. However, in order to ensure compliance with Executive Branch rulemaking policy and priorities, this rule has been reviewed by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

C. Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), USAID has considered the economic impact of the Final Rule and has certified that its provisions would not have a significant economic impact on a substantial number of small entities.

D. Paperwork Reduction Act

There is no reporting or documentation or other information collection requirements under the Final Rule that require analysis under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

List of Subjects in 22 CFR Part 228

Foreign aid, Procurement, USAID contractors, Grantees, and Non-governmental recipients.

For the reasons set forth above and based on the comments received in response to the ANPRM and Proposed Rule, USAID revises 22 CFR part 228 to read as follows:

PART 228--RULES FOR PROCUREMENT OF COMMODITIES AND SERVICES FINANCED BY USAID

Sec.

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Subpart D--Waivers

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228.31 Authority to approve waivers.

Authority: Sec. 621, Pub. L. 87-195, 75 Stat. 445 (22 U.S.C. 2381), as amended, E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

Subpart A--Definitions and Scope of This Part

Sec. 228.01 Definitions.

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

Advanced developing countries mean those countries that are categorized by the World Bank as upper middle income countries according to their gross national income per capita, except for those countries in which USAID provides assistance. USAID will maintain a list of advanced developing countries primarily based on the most recent World Bank determinations, and will make the list available in USAID's Automated Directives System, ADS 310. This list will include determinations made under Sec. 228.17 of this part.

Available for purchase means for commodities, that the commodity is offered for sale in a country in the authorized principal geographic code at the time of purchase from the supplier, irrespective of the place of manufacture or production, unless it is a prohibited source country. If applicable, the commodity must also be able to be serviced, and, if warrantied, have a valid warranty. For services, available for purchase means the service is offered from a vendor which has complied with nationality and foreign government-owned organization requirements of this regulation, and is otherwise organized in a country in the authorized principal geographic code designated in an implementing instrument. This definition does not apply to procurements under the geographic Code 935, see Sec. 228.03 of this part, because that geographic code is for any country or area except for prohibited source countries.

Commission means any payment or allowance by a supplier to any person for the contribution which that person has made to secure 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.

Commodities or goods means any material, article, supply, good, or equipment.

Commodity-related services means delivery services and/or incidental services.

Cooperating country or recipient country means the country receiving the USAID assistance subject to this part 228, and includes all the countries receiving assistance under a regional program or project.

Delivery means the transfer to, or for the account of, an importer of the right to possession of a commodity, or, with respect to a commodity-related service, the rendering to, or for the account of, an

importer of any such service.

Delivery service means any service customarily performed in a commercial export or import transaction which is necessary to affect a physical transfer of commodities to the cooperating/recipient country. Examples of such services are the following: export packing, local drayage in the source country (including waiting time at the dock), ocean and other freight, loading, heavy lift, wharfage, tollage, switching, dumping and trimming, lighterage, insurance, commodity inspection services, and services of a freight forwarder. ``Delivery service" may also include work and materials necessary to meet USAID marking requirements.

Developing countries means those countries that are categorized by the World Bank as low or lower middle income economies according to their gross national income per capita, and also includes all countries to which USAID provides assistance. USAID will maintain a list of developing countries primarily based on the most recent World Bank determinations, and will make the list available in USAID's Automated Directives System, ADS 310.

Free Port or Bonded Warehouse is a special customs area with favorable customs regulations (or no customs duties and controls for transshipment).

Implementing instrument means a binding relationship established between USAID and an outside party or parties to carry out USAID programs, by authorizing the use of USAID funds and/or nonfinancial resources for the procurement of services or commodities and/or commodity related services. Implementing instruments include specific conditions that apply to each such procurement. Examples of such instruments include contracts, grants, cooperating agreements, and interagency agreements.

Incidental services means services such as installation, erection, maintenance, or upgrading of USAID-financed equipment, or the training of personnel in the maintenance, operation and use of such equipment, or similar services provided for the authorized disposition of such commodities.

Long term lease means, for purposes of subpart B, a single lease of more than 180 calendar days; or repetitive or intermittent leases under a single award within a one-year period, which cumulatively total more than 180 calendar days. A single lease may consist of lease of one or more of the same type of commodity within the same lease term.

Motor vehicles means self-propelled vehicles with passenger carriage capacity, such as highway trucks, passenger cars and buses, motorcycles, scooters, motorized bicycles, ATVs, and utility vehicles. Excluded from this definition are ambulances, snowmobiles, industrial vehicles for materials handling and earthmoving, such as lift trucks, tractors, graders, scrapers, off-the-highway trucks (such as off-road dump trucks), boats, and other vehicles that are not designed for

travel at normal road speeds (40 kilometers per hour and above).

Mission means the USAID Mission, office or representative in a cooperating/recipient country.

Nationality refers to the place of legal organization, ownership, citizenship, or lawful permanent residence (or equivalent immigration status to live and work on a continuing basis) of suppliers of commodities and services.

Pharmaceutical means any substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of diseases in humans or animals; any substances (other than food) intended to affect the structure or any function of the body of humans or animals; and, any substance intended for use as a component in the above. The term

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includes drugs, vitamins, oral rehydration salts, biologicals, and some in-vitro diagnostic reagents/test kits; but does not include devices or their components, parts, or accessories. Contraceptives, including condoms, are not included in this definition.

Prohibited sources means countries to which assistance is prohibited by the annual appropriations acts of Congress or other statutes, or those subject to other executive branch restrictions, such as applicable sanctions administered by the U.S. Treasury Department's Office of Foreign Assets Control. USAID maintains a list of prohibited sources, available in USAID's Automated Directives System, ADS 310.

Recipients and contractors. Recipient has the same meaning as defined in 22 CFR 226.02, except that it shall include non-U.S. individuals, entities and organizations, as well as subrecipients. Contractors mean those entities which enter into a contract, as the term is defined in 48 CFR part 2, with the U.S. Government, and includes subcontractors.

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

Source means the country from which a commodity is shipped to the cooperating/recipient country or the cooperating/recipient country itself if the commodity is located therein at the time of the purchase, irrespective of the place of manufacture or production, unless it is a prohibited source country. Where, however, a commodity is shipped from a free port or bonded warehouse in the form in which received therein, ``source" means the country from which the commodity was shipped to the free port or bonded warehouse.

Supplier means any person or organization, governmental or otherwise, who furnishes services, commodities, and/or commodity related services, including delivery or incidental services, financed by USAID.

United States means the United States of America, any State(s) of

the United States, the District of Columbia, and areas of U.S. associated sovereignty, including commonwealths, territories and possessions.

USAID means the United States Agency for International Development or any successor agency, including when applicable, each USAID Mission or office abroad.

USAID Principal Geographic Code means a USAID code which designates a country, a group of countries, or an otherwise defined area. The USAID principal geographic codes for purposes of procurement are described in Sec. 228.03 of this part.

Sec. 228.02 Scope and application.

This part is applicable to commodities and services procured under implementing instruments using Federal program funds made available for assistance under the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151 et seq. (FAA). The authorities and conditions applicable to the procurement of commodities or services shall be those in effect on the effective date of an implementing instrument for procurement of commodities or services. They include any directives, prohibitions, restrictions or other statutory and related requirements by the United States Congress that govern the Federal program funds appropriated to fund the specific procurement, including those on types of assistance and recipients of assistance. If additional authorities and conditions are otherwise provided by statute, regulation, or related administrative authorities, those authorities and conditions shall be incorporated in the implementing instrument and shall prevail in the event of any conflict with this part 228. This part is not applicable to

(a) Procurements of commodities and services under General Services Administration (GSA) supply schedules;

(b) Procurements with donated funds received under USAID's gift authority, FAA section 635(d);

(c) Procurements funded by cost share or program income as defined in 22 CFR 226.24;

(d) USAID Title II food programs, including monetization proceeds thereunder.

(e) Procurements funded from any congressional appropriation authorized by any statute other than the FAA;

(f) Procurements with non-program funds (such as operational expense account funds) made available under the FAA for any purpose other than assistance.

Sec. 228.03 Identification of the authorized principal geographic

procurement codes.

(a) USAID has established principal geographic codes which are used by USAID in implementing instruments. This regulation establishes a presumptive authorized principal geographic code, Code 937, for procurement of commodities and services unless otherwise specified in the implementing instrument. Code 937 is defined as the United States, the cooperating/recipient country, and developing countries other than advanced developing countries, and excluding prohibited sources. USAID maintains a list of developing countries, advanced developing countries, and prohibited sources, which will be available in USAID's Automated Directives System, ADS 310.

(b) For purposes of procurements under the authority of the Development Fund for Africa, 22 U.S.C. 2293 et seq.; for any waivers authorized under Subpart D of this regulation; and if otherwise designated in an implementing instrument, the authorized principal geographic code shall be Code 935, any area or country but excluding prohibited sources.

(c) For purposes of procurements under the Support for Economic and Democratic Development of the Independent States of the Former Soviet Union, 22 U.S.C. 2295b, the authorized principal geographic codes are Code 937 and Code 110 (New Independent States).

(d) Additional principal geographic codes may be added to this section if authorized by Congress.

Subpart B--Conditions Governing Source and Nationality of Commodity and Service Procurement Transactions for USAID Financing

Sec. 228.10 Purpose.

Sections 228.11 through 228.19 set forth the rules governing the eligible source of commodities and nationality of commodity and service suppliers for USAID Federal share financing under prime and subawards. These rules may be waived in accordance with the provisions in subpart D of this part.

Sec. 228.11 Source of commodities.

The source of all commodities financed with Federal program funds appropriated under the Foreign Assistance Act of 1961, as amended, shall be Code 937 (unless Code 935 or 110 are designated in the implementing instrument). Procurements of agricultural commodities, motor vehicles and pharmaceuticals must also comply with the special procurement rules in Sec. 228.19 of this part. Recipients and

contractors are prohibited from engaging suppliers of commodities in an authorized country to import commodities from a country outside of the authorized principal geographic codes for the purposes of circumventing the requirements of this rule. Any violation of this prohibition will result in the disallowance by USAID of the cost of the procurement of the subject commodity.

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Sec. 228.12 Nationality of suppliers of commodities and services.

The suppliers of all commodities and services financed with federal program funds appropriated under the Foreign Assistance Act of 1961, as amended, shall:

(a) If an individual, except as provided in Sec. 228.15, be a citizen or lawful permanent resident (or equivalent immigration status to live and work on a continuing basis) of a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument),

(b) If an organization,

(1) Be incorporated or legally organized under the laws of a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument);

(2) Must be operating as a going concern in a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument), and either

(3) Be managed by a governing body, the majority of whom are citizens or lawful permanent residents (or equivalent immigration status to live and work on a continuing basis) of countries in Code 937 (or other principal geographic procurement code designated in an implementing instrument), or

(4) Employ citizens or lawful permanent residents (or equivalent immigration status to live and work on a continuing basis) of a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument), in more than half its permanent full-time positions and more than half of its principal management positions.

Sec. 228.13 Foreign government-controlled organizations.

Firms operated as commercial companies or other organizations or enterprises (including nonprofit organizations) in which foreign governments or their agents or agencies have a controlling interest are not eligible as suppliers of commodities and services, except if their eligibility has been established by a waiver approved by USAID in

accordance with the provisions set forth in subpart D of this part. Government ministries or agencies of the cooperating/recipient country, including those at the regional and local levels, and government educational institutions, health care providers, and other technical entities of the cooperating/recipient country not formed primarily for commercial or business purposes, are eligible as suppliers of commodities and services.

Sec. 228.14 Construction procurement with foreign-owned local firms.

(a) When the estimated cost of a contract for construction is \$10 million or less and only local firms will be solicited, a local corporation or partnership which is a foreign-owned (owned or controlling interest by individuals not citizens or permanent residents, or equivalent immigration status, of the United States or the cooperating/recipient country) local firm will be eligible if it is determined by USAID to be an integral part of the local economy, see paragraph (b) of this section. However, such a determination is contingent on first ascertaining that no United States construction company with the required capability is currently operating in the cooperating/recipient country or, if there is such a company, that it is not interested in bidding for the proposed contract.

(b) A foreign-owned local firm is an integral part of the local economy provided:

(1) It has done business in the cooperating/recipient country on a continuing basis for at least three years prior to the issuance date of invitations for bids or requests for proposals to be financed by USAID;

(2) It has a demonstrated capability to undertake the proposed activity;

(3) All, or substantially all, of its directors of local operations, senior staff and operating personnel are lawfully resident (or equivalent immigration status to live and work on a continuing basis) in the cooperating/recipient country; and

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

Sec. 228.15 Nationality of employees and individuals under contracts or subcontracts for services.

The rules set forth in Sec. Sec. 228.10 through 228.13 of this part do not apply to the employees of contractors, or individuals providing technical or professional services to recipients or contractors. However, such individuals must not be citizens or lawful permanent residents (or equivalent immigration status) of countries

which are prohibited sources.

Sec. 228.16 Miscellaneous service transactions.

This section governs certain miscellaneous services.

(a) Commissions. The nationality rules of this part do not apply to the payment of commissions by suppliers.

(b) Bonds and guarantees. The nationality rules of this part 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 of this part do not apply to firms providing liability insurance under construction contracts.

Sec. 228.17 Special procurement rules for construction and engineering services.

Advanced developing countries, as defined in Sec. 228.01, which USAID has determined to 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 unless approved to do so under a waiver to Code 935 under subpart D of this part.

Sec. 228.18 Long-term leases.

Any commodity obtained under a long-term lease agreement as defined in Sec. 228.01, including motor vehicles, is subject to the source and nationality requirements of this subpart B of this part, including the special procurement rules as set forth in Sec. 228.19.

Sec. 228.19 Special rules requiring United States manufacture or procurement.

(a) Certain agricultural commodities and products thereof must be procured in the United States if the domestic price is less than parity, unless the commodity cannot reasonably be procured in the United States in fulfillment of the objectives of a particular assistance program under which such commodity procurement is to be financed. (22 U.S.C. 2354). USAID maintains a list of restricted agricultural commodities and related policies, which is available in USAID's Automated Directives System, ADS 312.

(b) Motor vehicles must be manufactured in the United States to be eligible for USAID financing (22 U.S.C. 2396). Any vehicle to be financed by USAID under a long-term lease or where the sale is to be guaranteed by USAID must be manufactured in the United States. However, financing of transportation or driver services from an individual or commercial entity and not directly financing the purchase or lease of a vehicle, is subject to the requirements at Sec. 228.12. Financing transportation or driver services means:

(1) The vehicle is independently owned or leased by the hired driver or company;

(2) The vehicle will be maintained by the individual or commercial entity and driven only by the hired driver(s); and

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(3) The vehicle is not directly leased, either as a separate line item in the contract separate from the cost of the driver's services, or under a separate contract.

(c) Under section 606(c) of the FAA, USAID cannot finance any pharmaceutical product that is manufactured outside of the United States if the pharmaceutical is covered by a valid U.S. patent, unless the U.S. patent holder expressly authorizes the manufacture of the pharmaceutical. Without such express authorization, the pharmaceutical must be purchased from the U.S. patent holder. In addition, USAID shall not finance non-contraceptive pharmaceuticals without prior written approval as provided in USAID's Automated Directives System Chapter 312. Contraceptives may be financed in accordance with the procedures in ADS 312.

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

Sec. 228.20 Purpose.

Sections 228.21 through 228.24 of this part set forth the rules governing the eligibility of commodity-related services, both delivery services and incidental services, for USAID financing. These rules, except for Sec. Sec. 228.21 and 228.22, may be waived in accordance with the provisions in subpart D of this part. The rules on delivery services apply whether or not USAID is also financing the commodities being transported. In order to be identified and eligible as incidental services, such services must be connected with a USAID-financed commodity procurement.

Sec. 228.21 Ocean transportation.

When transporting commodities subject to the provisions of the Cargo Preference Act, 46 U.S.C. 55305, USAID will administer its programs in accordance with that act and its implementing regulations in 46 CFR part 381 (and any waivers applicable thereto). Subpart D of 22 CFR part 228 does not apply to this provision.

Sec. 228.22 Air transportation.

The Fly America Act, Title 49 of the United States Code, Subtitle VII, part A, subpart I, Chapter 401, 40118--Government-Financed Air Transportation, is applicable to all transportation of commodities subject to this part. Subpart D of 22 CFR part 228 does not apply to this provision.

Sec. 228.23 Other delivery services.

No source or nationality rules apply to other delivery services, such as export packing, loading, commodity inspection services, and services of a freight forwarder. Such services are eligible when provided as part of a commodity procurement financed by USAID.

Sec. 228.24 Incidental services.

Source and nationality rules do not apply to suppliers of incidental services specified in a purchase contract relating to equipment.

Subpart D--Waivers

Sec. 228.30 General.

USAID may waive the rules contained in subparts A, B and C of this part (except for prohibited sources as defined in Sec. 228.01, and Sec. Sec. 228.21 and 228.22), in order to accomplish project or program objectives. For any waivers authorized, the principal geographic code shall be Code 935, any area or country but excluding prohibited sources. All waivers must be in writing, and where applicable, are limited to the term established by the waiver. All waiver decisions will be made solely on the basis of the following criteria:

(a) Waivers to permit procurement outside of Code 937 or 110 must be based on a case by case determination that

(1) The provision of assistance requires commodities or services of the type that are not produced in and available for purchase in Code 937 or 110, or;

(2) It is important to permit procurement from a country not specified in Code 937 or 110 to meet unforeseen circumstances, or;

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

(b) Case by case waivers under paragraph (a) of this section may be made on the basis of a commodity or service type or category, rather than processing repeat, individual waivers for an identical or substantially similar commodity or service. Such waivers may be approved on a regional, country or program basis. For purposes of paragraph (a)(1) of this section, ``produced in and available for purchase in" shall have the same meaning as the definition of ``available for purchase" in Sec. 228.01. A waiver under paragraph (a)(1) may also be based on the fact that a commodity is not available for purchase in Code 937 or 110 in sufficient, reasonable and available quantities or sufficient and reasonable quality that is fit for the intended purpose.

(c) A waiver to authorize procurement from outside the United States of agricultural commodities, motor vehicles, and pharmaceuticals must meet the requirements of Sec. 228.19.

(d) Any individual transaction not exceeding \$25,000 (excluding those covered by special procurement rules in Sec. 228.19 and excluding procurements from prohibited sources) does not require a waiver and is hereby authorized.

Sec. 228.31 Authority to approve waivers.

The authority to approve waivers of established policies under this regulation is delegated within USAID. Recipients or contractors shall request any necessary waivers through the USAID agreement or contracting officer.

Raj Shah,
USAID Administrator.
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