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Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance Issued: September 12, 2014

AAPD 14-04

Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, as amended – Conscience Clause Implementation, Medically Accurate Condom Information and Opposition to Prostitution and Sex Trafficking

Subject Category: ASSISTANCE, ACQUISITION MANAGEMENT
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: 12-04

<p>Applicable to:</p> <p><input checked="" type="checkbox"/> Existing awards; <input checked="" type="checkbox"/> Modification required</p> <p><input type="checkbox"/> No later than</p> <p><input checked="" type="checkbox"/> As noted in guidance below</p> <p><input checked="" type="checkbox"/> RFPs/RFAs issued on or after the effective date of this AAPD; all other Pending Awards, i.e., 8(a), sole source, IQC</p> <p><input type="checkbox"/> Other or N/A</p>	<p>Precedes change to:</p> <p>AIDAR Part(s) Appendix</p> <p><input checked="" type="checkbox"/> USAID Automated Directives System (ADS) Chapters 302, 303, and 308</p> <p><input type="checkbox"/> Code of Federal Regulations</p> <p><input type="checkbox"/> Other</p> <p><input type="checkbox"/> No change to regulations</p>
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New Provision/Clause Provided Herein X

/s/

Aman S. Djahanbani

1. PURPOSE:

This Acquisition & Assistance Policy Directive (AAPD):

- A. Advises contracting officers (COs) and agreement officers (AOs) that ADS 302 – USAID Direct Contracting, ADS 303 – Grants and Cooperative Agreements to Non-Governmental Organizations, and ADS 308 – Awards to Public International Organizations and the relevant Mandatory Reference documents, have been updated to incorporate revised contract clauses and assistance provisions previously contained in Acquisition & Assistance Policy Directive (AAPD) 12-04 and ADS 303, including:
 - Conscience Clause Implementation (February 2012);
 - Condoms (September 2014) (revised from AAPD 12-04 and ADS 303); and
 - Prohibitions on Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (September 2014) (revised from AAPD 12-04 and ADS 303).
- B. Informs COs and AOs that while all contract clauses and assistance provisions have been incorporated into the relevant ADS chapters and Mandatory Reference documents, they are also provided in attachments A, B and C of this AAPD.
- C. Clarifies that:
 - (1) a U.S. non-governmental organization (NGO) that is a USAID recipient or contractor that receives funds for HIV/AIDS activities, whether a prime recipient or subrecipient, is exempt from the statutory requirement to have a policy opposing prostitution and sex trafficking;
 - (2) a non-U.S. NGO that is a USAID recipient or contractor that receives funds for HIV/AIDS activities, whether a prime recipient or subrecipient, is subject to the statutory requirement to have a policy opposing prostitution and sex trafficking unless exempted pursuant to Sections A.4(b), B. 2.(b) and C.4(b) in Attachments A, B and C; and
 - (3) a USAID recipient or contractor that receives funds for HIV/AIDS activities and is still subject to the statutory requirement to have a policy opposing prostitution and sex trafficking meets that requirement by signing a statement in its award that the recipient or contractor is opposed to the practices of prostitution and sex trafficking. The USAID recipient or contractor is not required to adopt a separate organizational policy opposing prostitution and sex trafficking.
- D. Replaces and supersedes AAPD 12-04, in its entirety.

The clauses and provisions in the relevant Mandatory Reference documents of ADS 302, ADS 303 and ADS 308 impose funding restrictions that enable USAID to exercise administrative remedies should the awardee violate the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, as amended, by not complying with the terms of the award.

Required Actions:

- (1) **Solicitations:** COs and AOs must include the solicitation provisions as prescribed in the applicability statement of the relevant Mandatory Reference documents in ADS 302, ADS 303 and ADS 308 in new acquisition or assistance solicitations that are issued on or after the effective date of this AAPD.
- (2) **New awards:** COs and AOs must include the contract clauses and assistance provisions as prescribed in the applicability statement of the relevant Mandatory Reference documents in ADS 302, ADS 303 and ADS 308 in new contracts, grants, and cooperative agreements that are executed on or after the effective date of this AAPD.
- (3) **Modifications/Amendments:** COs and AOs must replace all previous versions of the contract clauses and assistance provisions in existing instruments as prescribed in the applicability statement of the relevant Mandatory Reference documents in ADS 302, ADS 303 and ADS 308, when such instruments are bilaterally modified/amended for any reason on or after the effective date of this AAPD.

This modification/amendment must be bilateral (i.e., must be signed by the USAID CO/AO and the awardee). By signing the modification/amendment, the contractor or recipient agrees to be bound by the clause/provision requirements. Current contracts, grants, and cooperative agreements need not be modified/amended to include the new clauses or provision until they are bilaterally modified/amended for any purpose.

(4) COs and AOs must consider the guidance regarding “Conscience Clause Objections” in Section 2.D.

(5) COs and AOs must comply with the “Organizational Integrity Guidance” in Section 2.E.

2. GUIDANCE:

A. Conditions

COs and AOs must include the clauses/provisions as prescribed in the applicability statements of the relevant Mandatory Reference documents in ADS 302, ADS 303 and ADS 308 when obligating or intending to obligate (in the case of solicitations) FY04 or later funds made available for HIV/AIDS activities, regardless of the program account.

B. Personal Services Contracts (PSCs)

The special provisions in Attachment C do not apply to PSCs. During the period of their contracts, PSCs are considered federal employees for the purposes of [18 USC 202\(A\)](#), [5 CFR part 2635](#), and the [USAID General Notice entitled “Employee Review of the New Standards of Conduct.”](#)

C. Grants under Contracts

In accordance with ADS 302.3.5.16, when a contract provides for the contractor to execute grants to NGOs (not-for-profits or for-profits), the CO must provide in the solicitation that the contractor must comply with the requirement to use the assistance provisions of this AAPD. The contractor must do this when awarding grants under its contract (in compliance with ADS 302.3.5.6(b)).

D. Conscience Clause Objections

Operating units design solicitations following evidence-based and country-specific approaches to create the most effective program with the most efficient use of resources. Linkages and referrals – across HIV/AIDS services and between HIV/AIDS programs and other health or development programs – to create multisectoral or comprehensive programs are frequently programmatically appropriate in order to achieve desired health outcomes.

Under Sections A.1, A. 2, C.1 and C.2 in Attachments A and C, respectively, organizations shall not be required to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS or to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection. For example, for moral or religious reasons, some organizations choose not to provide condoms or other contraceptives. To accommodate an organization's moral or religious objection as described in these sections, solicitations for HIV/AIDS programs must specify that an organization is eligible to compete for any funding opportunity as a prime partner, or as a leader or member of a consortium that comes together to compete for an award, even where the organization has a religious or moral objection to a specific activity or activities contemplated under the award. In organizing a consortium, members have flexibility to determine how to combine forces to provide comprehensive or integrated services.

Ultimately, an organization with a religious or moral objection may choose to submit an offer that does not respond to all of the specified activities. If such organization has properly notified the cognizant CO or AO of a religious or moral objection pursuant to the procedures set forth under Sections A.1(b) or C.1(b) in Attachments A and C, respectively, the offeror's proposal will be evaluated based on the activities for which a proposal is submitted, and will not be evaluated favorably or unfavorably due to the absence of a proposal addressing the activity(ies) to which it objected and which it thus omitted. The cognizant CO or AO must consult GC/A&A immediately after receiving notification of a religious or moral objection to activities in a solicitation. Depending on the specific nature of the religious or moral objection, which activities the applicant has an objection to implementing, and the design of the particular solicitation, GC will work with the relevant CO/AO and technical staff to identify an appropriate approach.

E. Organization Issues

Sections A.4(b), B.2(b) and C.4(b) in Attachments A, B and C, respectively, require certain organizations to state in the award that they oppose the practices of prostitution and sex trafficking. COs/AOs must therefore consider the “Organizational Integrity Guidance” below when determining a prospective or existing organization’s eligibility or compliance with these sections. COs/AOs must also obtain clearance from the General Counsel’s office or their Regional Legal Advisor before issuing any written determination relating to organizational integrity pertaining to USAID awards.

Organizational Integrity Guidance

In accordance with Sections A.4(b), B.2(b) and C.4(b) in Attachments A, B and C, respectively, certain organizations must state in the award that they oppose the practices of prostitution and sex trafficking. Due to organizational affiliations, such statement may be adversely implicated by the statements or activities of an affiliate of the awardee. In such cases, COs and AOs must consider the below guidance to assess whether there is such a risk. The Federal Acquisition Regulation (FAR) subpart 2.101 defines “Affiliates” as follows:

“Affiliates” means associated business concerns or individuals if, directly or indirectly—

- (1) Either one controls or can control the other; or
- (2) A third party controls or can control both.

There is no corresponding definition of “affiliates” in USAID assistance regulations.

The affected contractors and recipients of grants and cooperative agreements (hereafter collectively referred to as “Recipients”) must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the Recipient’s opposition to the practices of prostitution and sex trafficking (“restricted activities”). A Recipient will be found to have objective integrity and independence from such an organization if:

(1) The affiliated organization receives no transfer of Leadership Act funds, and Leadership Act funds do not subsidize restricted activities; and

(2) The Recipient is, to the extent practicable in the circumstances, separate from the affiliated organization. Mere bookkeeping separation of Leadership Act funds from other funds is not sufficient. USAID will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient separation exists. The presence or absence of any one or more factors relating to legal, physical, and financial separation will not be determinative. Factors relevant to this determination shall include, but are not limited to:

- (a) Whether the affiliated organization is a legally separate entity;
- (b) The existence of separate personnel or other allocation of personnel that maintains adequate separation of the activities of the affiliated organization from the recipient;
- (c) The existence of separate accounting and timekeeping records;
- (d) The degree of separation of the Recipient’s facilities from facilities in which restricted activities occur; and

(e) The extent to which signs and other forms of identification that distinguish the Recipient from the affiliated organization are present.

Sections A.4(b), B.2.(b) and C.4(b) in Attachments A, B and C, respectively, provide exemptions to certain categories of organizations from the requirement to state in their awards that they oppose the practices of prostitution and sex trafficking. As such, for awards to exempt organizations, COs and AOs will not need to consider the “Organizational Integrity Guidance” above.

3. BACKGROUND:

Attachment D includes the legislative and litigation background of this AAPD and its predecessor AAPDs, and a summary of the history of the Organizational Integrity Guidance and the limited contracting exception for providers of certain commercial items or services.

4. POINTS OF CONTACT:

USAID Contracting Officers and Agreement Officers may direct their questions about this AAPD to Lyudmila Bond, M/OAA/P, Phone: (202) 567-4753; email: lbond@usaid.gov.

Contractors, recipients, and prospective offerors for contracts or assistance awards must direct their questions to the cognizant Contracting Officer or Agreement Officer for the award.

All other inquiries about this AAPD may be addressed to Diana Weed, GC/GH, Phone: (202) 712-5245 e-mail: dweed@usaid.gov.

ATTACHMENT A – Assistance Provisions for Non-Governmental Organizations (NGOs)

The provisions in this attachment have been incorporated into the following mandatory references to ADS Chapter 303:

- **303maa, Standard Provisions for US Non-Governmental Organizations (NGOs),**
- **303mab, Standard Provisions for Non-U.S. NGOs,**
- **303mat, Standard Provisions for Fixed Obligation Grants to Nongovernmental Organizations,**
- **303may, Certifications, Assurances, Other Statements of the Recipient and Solicitation Standard Provisions.**

A.1 Conscience Clause Implementation (Assistance) - Solicitation Provision (February 2012)

APPLICABILITY: This provision must be included in any new Request for Applications (RFA) or Annual Program Statement (APS) that intends to obligate FY04 or later funds made available for HIV/AIDS activities, regardless of the program account. Further guidance is found in AAPD 14-04, Section 2.D.

“CONSCIENCE CLAUSE IMPLEMENTATION (ASSISTANCE) – SOLICITATION PROVISION (FEBRUARY 2012)

- (a) An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—
 - 1) Shall not be required, as a condition of receiving such assistance—
 - (i) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or
 - (ii) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and
 - 2) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a)(1) above.
- (b) An applicant who believes that this solicitation contains provisions or requirements that would require it to endorse or use an approach or participate in an activity to which it has a religious or moral objection must so notify the cognizant Agreement Officer in accordance with the Mandatory Standard Provision titled “Notices” as soon as possible, and in any event not later than 15 calendar days before the deadline for submission of applications under this solicitation. The applicant must advise which activity(ies) it could not implement and the nature of the religious or moral objection.

- (c) In responding to the solicitation, an applicant with a religious or moral objection may compete for any funding opportunity as a prime partner, or as a leader or member of a consortium that comes together to compete for an award. Alternatively, such applicant may limit its application to those activities it can undertake and must indicate in its submission the activity(ies) it has excluded based on religious or moral objection. The offeror's proposal will be evaluated based on the activities for which a proposal is submitted, and will not be evaluated favorably or unfavorably due to the absence of a proposal addressing the activity(ies) to which it objected and which it thus omitted. In addition to the notification in paragraph (b) above, the applicant must meet the submission date provided for in the solicitation.

(End of Provision)"

A.2 Conscience Clause Implementation (Assistance) (February 2012)

APPLICABILITY: This provision must be included in any new assistance award or amendment to an existing award (if not already incorporated into the agreement) obligating FY04 or later funds made available for HIV/AIDS activities, regardless of the program account. Further guidance is found in AAPD 14-04, Section 2.D.

"CONSCIENCE CLAUSE IMPLEMENTATION (ASSISTANCE) (FEBRUARY 2012)

An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

- (a) Shall not be required, as a condition of receiving such assistance—
- (1) To endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or
 - (2) To endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and
- (b) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a) above.

(End of Provision)"

A.3 Condoms (Assistance) (September 2014)

APPLICABILITY: This provision must be included in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award or amendment to an existing award obligating or intending to obligate (in the case of solicitations) FY04 or later funds made available for HIV/AIDS activities, regardless of the program account.

“CONDOMS (ASSISTANCE) (SEPTEMBER 2014)

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 and shall be consistent with USAID’s fact sheet entitled “USAID HIV/STI Prevention and Condoms”. This fact sheet may be accessed at:

<http://www.usaid.gov/sites/default/files/documents/1864/condomfactsheet.pdf>

The prime recipient must flow this provision down in all subawards, procurement contracts, or subcontracts for HIV/AIDS activities.

(End of Provision)”

A.4 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance) (September 2014)

APPLICABILITY: This provision must be included in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award or amendment to an existing award obligating or intending to obligate (in the case of solicitations) FY04 or later funds made available for HIV/AIDS activities, regardless of the program account. Further guidance is found in AAPD 14-04, Section 2.E.

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (SEPTEMBER 2014)

(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)(1) Except as provided in (b)(2), by accepting this award or any subaward, a non-governmental organization or public international organization

awardee/subawardee agrees that it is opposed to the practices of prostitution and sex trafficking.

- (b)(2) The following organizations are exempt from (b)(1):
- (i) the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.
 - (ii) U.S. non-governmental organization recipients/subrecipients and contractors/subcontractors.
 - (iii) Non-U.S. contractors and subcontractors if the contract or subcontract is for commercial items and services as defined in FAR 2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.

(b)(3) Notwithstanding section (b)(2)(iii), not exempt from (b)(1) are non-U.S. recipients, subrecipients, contractors, and subcontractors that implement HIV/AIDS programs under this assistance award, any subaward, or procurement contract or subcontract by:

- (i) Providing supplies or services directly to the final populations receiving such supplies or services in host countries;
- (ii) Providing technical assistance and training directly to host country individuals or entities on the provision of supplies or services to the final populations receiving such supplies and services; or
- (iii) Providing the types of services listed in FAR 37.203(b)(1)-(6) that involve giving advice about substantive policies of a recipient, giving advice regarding the activities referenced in (i) and (ii), or making decisions or functioning in a recipient's chain of command (e.g., providing managerial or supervisory services approving financial transactions, personnel actions).

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

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Prostitution” means procuring or providing any commercial sex act and the “practice of prostitution” has the same meaning.

“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 must insert this provision, which is a standard provision, in all subawards, procurement contracts or subcontracts for HIV/AIDS activities.

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

(End of Provision)”

ATTACHMENT B – Assistance Provisions incorporated into mandatory reference to ADS 308 entitled “Standard Provisions for Cost-Type Awards¹ to Public International Organizations (PIOs)

B.1 Condoms (Assistance) (September 2014)

***APPLICABILITY:** This provision must be included in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award or amendment to an existing award obligating or intending to obligate (in the case of solicitations) FY04 or later funds made available for HIV/AIDS activities, regardless of the program account. If a PIO objects to the reference to the USAID fact sheet in the provision below, please consult with GC/GH.*

“CONDOMS (ASSISTANCE) (SEPTEMBER 2014)

Information provided about the use of condoms as part of projects or activities that are funded under this award shall be medically accurate and shall include the public health benefits and failure rates of such use and shall be consistent with USAID’s fact sheet entitled “USAID HIV/STI Prevention and Condoms”. This fact sheet may be accessed at:

<http://www.usaid.gov/sites/default/files/documents/1864/condomfactsheet.pdf>

The prime recipient must flow this provision down in all subawards, procurement contracts, or subcontracts for HIV/AIDS activities.

(End of Provision)”

B.2 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Standard) (September 2014)

***APPLICABILITY:** This provision is applicable to awards with public international organizations other than the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, and any United Nations agency. This provision must be included in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award, or amendment to an existing award obligating or intending to obligate (in the case of solicitations) FY04 or later funds made available for HIV/AIDS activities, regardless of the program account with the exception of the International Disaster Assistance (IDA) account. Further guidance is found in AAPD 14-04, Section 2.E.*

¹ As under AAPDs 05-04 and AAPD 12-04, this AAPD 14-04 does not apply to USAID contributions to capital of multidonor trust funds, such as to the Trust Fund for the Global Fund to Fight AIDS, Tuberculosis and Malaria.

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (STANDARD) (SEPTEMBER 2014)

- (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 award 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)(1) Except as provided in (b)(2), by accepting this award or any subaward, a non-governmental organization or public international organization awardee/subawardee agrees that it is opposed to the practices of prostitution and sex trafficking.

- (b)(2) The following organizations are exempt from (b)(1):
 - (i) the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.

 - (ii) U.S. non-governmental organization recipients/subrecipients and contractors/subcontractors.

 - (iii) Non-U.S. contractors and subcontractors if the contract or subcontract is for commercial items and services as defined in FAR 2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.

- (b)(3) Notwithstanding section (b)(2)(iii), not exempt from (b)(1) are non-U.S. recipients, subrecipients, contractors, and subcontractors that implement HIV/AIDS programs under this assistance award, any subaward, or procurement contract or subcontract by:
 - (i) Providing supplies or services directly to the final populations receiving such supplies or services in host countries;

 - (ii) Providing technical assistance and training directly to host country individuals or entities on the provision of supplies or services to the final populations receiving such supplies and services; or

 - (iii) Providing the types of services listed in FAR 37.203(b)(1)-(6) that involve giving advice about substantive policies of a recipient, giving advice regarding the activities referenced in (i) and (ii), or making decisions or

functioning in a recipient's chain of command (e.g., providing managerial or supervisory services approving financial transactions, personnel actions).

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

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Prostitution” means procuring or providing any commercial sex act and the “practice of prostitution” has the same meaning.

“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 must insert this provision, which is a standard provision, in all subawards, procurement contracts or subcontracts for HIV/AIDS activities.

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

(End of Provision)”

B.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance) (Alt I – the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, and any United Nations agency) (September 2014)

APPLICABILITY: This provision is applicable to awards to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, and any United Nations agency. This provision must be included in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award, or amendment to an existing award obligating or intending to obligate (in the case of solicitations) FY04 or later funds made available for HIV/AIDS activities, regardless of the program account with the exception of the International Disaster Assistance (IDA) account.

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (Alt I– THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, THE WORLD HEALTH ORGANIZATION, AND ANY UNITED NATIONS AGENCY) (SEPTEMBER 2014)

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

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Prostitution” means procuring or providing any commercial sex act and the “practice of prostitution” has the same meaning.

“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)).

(c) The recipient must insert this provision, which is a standard provision, in all subawards for HIV/AIDS activities.

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

(End of Provision)”

ATTACHMENT C – Acquisition Provisions and Clauses

The clauses in this attachment have been incorporated into the Mandatory Reference to ADS 302 entitled “Special Provisions for Acquisitions”.

C.1 Conscience Clause Implementation (Acquisition) - SOLICITATION PROVISION (February 2012)

For use in any new acquisition solicitation intending to obligate FY04 or later funds available for HIV/AIDS activities, regardless of the program account. Please refer to ADS 302.3.5.16.a and AAPD 14-04, Section 2.D for additional guidance.

“302.3.5.16(a)(1) CONSCIENCE CLAUSE IMPLEMENTATION (ACQUISITION) – SOLICITATION PROVISION (FEBRUARY 2012)

- (a) An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—
 - (1) Shall not be required, as a condition of receiving such assistance—
 - (i) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or
 - (ii) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and
 - (2) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a)(1) above.
- (b) An offeror who believes that this solicitation contains provisions or requirements that would require it to endorse or use an approach or participate in an activity to which it has a religious or moral objection must so notify the cognizant Contracting Officer in accordance with AIDAR 752.7006 (Notices) as soon as possible, and in any event not later than 15 calendar days before the deadline for submission of applications under this solicitation. The offeror must advise which activity(ies) it could not implement and the nature of the religious or moral objection.
- (c) In responding to the solicitation, an offeror with a religious or moral objection may compete for any funding opportunity as a prime partner, or as a leader or member of a consortium that comes together to compete for an award. Alternatively, such offeror may limit its proposal to those activities it can undertake and should indicate in its submission the activity(ies) it has excluded based on religious or moral objection. The offeror’s proposal will be evaluated based on the activities for which a proposal is submitted, and will not be evaluated favorably or unfavorably due to the absence of

a proposal addressing the activity(ies) to which it objected and which it thus omitted. In addition to the notification in paragraph (b) above, the offeror must meet the submission date provided for in the solicitation

(End of Provision)”

C.2 Conscience Clause Implementation (ACQUISITION) (February 2012)

(For use in any new acquisition award or modification of an existing acquisition award (if not already incorporated into the award) obligating FY04 or later funds available for HIV/AIDS activities, regardless of the program account. In case of an Indefinite Delivery-Indefinite Quantity Contract (IDIQ), the CO must insert the clause in the basic IDIQ contract at the time of executing the IDIQ, or by a bilateral modification, if not already incorporated into the contract. Such provision shall be deemed to apply to any order placed under the IDIQ for HIV/AIDS activities. Please refer to ADS 302.3.5.16.a and AAPD 14-04, Section 2.D for additional guidance.)

“302.3.5.16(a)(2) CONSCIENCE CLAUSE IMPLEMENTATION (ACQUISITION) (FEBRUARY 2012)

An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

- (a) Shall not be required, as a condition of receiving such assistance—
 - (1) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or
 - (2) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and
- (b) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a) above.

(End of Provision)”

C.3 Condoms (Acquisition) (September 2014)

(For use in any new acquisition solicitation, and any new acquisition award or modification to an existing award obligating or intending to obligate FY04 or later funds available for HIV/AIDS activities, regardless of the program account. In case of an Indefinite Delivery-Indefinite Quantity Contract (IDIQ), the CO must insert the clause in the basic IDIQ contract at the time of

executing the IDIQ or by a bilateral modification. Such provision shall be deemed to apply to any order placed under the IDIQ for HIV/AIDS activities. Please refer to ADS 302.3.5.16 for additional guidance.

“302.3.5.16(a)(3) CONDOMS (ACQUISITION) (SEPTEMBER 2014)

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 and shall be consistent with USAID’s fact sheet entitled “USAID HIV/STI Prevention and Condoms”. This fact sheet may be accessed at:

<http://www.usaid.gov/sites/default/files/documents/1864/condomfactsheet.pdf>

The contractor agrees to incorporate the substance of this clause in all subcontracts under this contract for HIV/AIDS activities.

(End of Provision)”

C.4 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (September 2014)

(For use in any new acquisition solicitation, and any new acquisition award or modification to an existing award obligating or intending to obligate FY04 or later funds available for HIV/AIDS activities, regardless of the program account. In case of an Indefinite Delivery-Indefinite Quantity Contract (IDIQ), the CO must insert the clause in the basic IDIQ contract at the time of executing the IDIQ or by a bilateral modification. Such provision shall be deemed to apply to any order placed under the IDIQ for HIV/AIDS activities. Please refer to ADS 302.3.5.16 and AAPD 14-04, Section 2.E for additional guidance.

“302.3.5.16(a)(4) PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (SEPTEMBER 2014)

- (a) This contract is authorized under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Pub.L. No. 108-25), as amended. 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)(1) Except as provided in (b)(2), by its signature of this contract or subcontract for HIV/AIDS activities, a non-governmental organization or public international organization awardee/subawardee agrees that it is opposed to the practices of prostitution and sex trafficking.

(b)(2) The following organizations are exempt from (b)(1):

(i) the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.

(ii) U.S. non-governmental organization recipients/subrecipients and contractors/subcontractors

(iii) Non-U.S. contractors and subcontractors are exempt from (b)(1) if the contract or subcontract is for commercial items and services as defined in FAR 2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.

(b)(3) Notwithstanding section (b)(2)(iii), not exempt from (b)(1) are non-U.S. contractors and subcontractors that implement HIV/AIDS programs under this contract or subcontract by:

(i) Providing supplies or services directly to the final populations receiving such supplies or services in host countries;

(ii) Providing technical assistance and training directly to host country individuals or entities on the provision of supplies or services to the final populations receiving such supplies and services; or

(iii) Providing the types of services listed in FAR 37.203(b)(1)-(6) that involve giving advice about substantive policies of a recipient, giving advice regarding the activities referenced in (i) and (ii), or making decisions or functioning in a recipient's chain of command (e.g., providing managerial or supervisory services approving financial transactions, personnel actions).

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

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Prostitution” means procuring or providing any commercial sex act and the “practice of prostitution” has the same meaning.

“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 must insert this provision in all subcontracts for HIV/AIDS activities.

(e) Any violation of this provision will result in the immediate termination of this award by USAID.

(f) This provision does not affect the applicability of FAR 52.222-50 to this contract.

(End of Provision)”

ATTACHMENT D – Background

A. Leadership Act Statutory Provisions:

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub.L. No. 108-25 (2003) (the “Leadership Act”) authorized funds to be appropriated for HIV/AIDS activities for the fiscal years 2004-2008. The Leadership Act was reauthorized by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub.L. No. 110-293 (2008) (the “Reauthorization Act”), which authorized funds to be appropriated for HIV/AIDS activities for the fiscal years 2009-2013. The Leadership Act was further amended by the PEPFAR Stewardship and Oversight Act of 2013, Pub.L. No. 113-56 (2013). The Leadership Act, as amended, includes, among other things, certain restrictions on the award and use of funds for HIV/AIDS activities, and requires recipients of those funds to have certain policies in place.

The Leadership Act was amended by 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 to exempt the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency from certain requirements.

Section 301 of the Leadership Act, as amended, entitled “Assistance to Combat HIV/AIDS,” includes the following provisions:

“(d) ELIGIBILITY FOR ASSISTANCE. – An organization, including a faith-based organization, that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961, under this Act, or under any amendment made by this Act or by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, for HIV/AIDS prevention, treatment, or care—

- (1) shall not be required, as a condition of receiving such assistance—
 - (A) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or
 - (B) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and
- (2) shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements under such provisions of law for refusing to meet any requirement described in paragraph (1).

(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, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.”

During legislative debate on the Leadership Act, 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 Statement of Managers of the FY 04 Appropriations Act 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).”

Although the above-named organizations are exempt from section 301(f) of the Leadership Act, they are subject to the AAPD 14-04 provisions that implement section 301 (e) of the Leadership Act, as amended. However, as under AAPD 05-04 and AAPD 12-04, this AAPD 14-04 does not apply to USAID contributions to capital of multidonor trust funds, such as to the Trust Fund for the Global Fund to Fight AIDS, Tuberculosis and Malaria.

B. Leadership Act Litigation

In 2005, section 301(f) of the Leadership Act was challenged as unconstitutional, and in 2013, the Supreme Court affirmed a Second Circuit decision that upheld a lower court’s preliminary injunction prohibiting the application of the policy requirement to U.S. organizations, finding that such a condition of federal funding violates the First Amendment. Consistent with the Supreme Court’s decision, the requirement to have a specific policy as stated in section 301(f) no longer applies to U.S. organizations.

In coordination with The Office of the Global Coordinator at the State Department and The Department of Health and Human Services, USAID has ceased applying the section 301(f) requirement to U.S. NGOs, whether they are prime recipients or subrecipients, of Leadership Act HIV/AIDS funds. However, the requirement remains applicable to non-U.S. NGOs and PIOs that receive funds for HIV/AIDS activities, whether a prime recipient or subrecipient, unless exempted pursuant to Sections A.4(b), B.2(b) and C.4(b) in Attachments A, B and C.

C. Organizational Integrity Guidance

In July 2007, USAID issued guidance designed to provide additional clarity for COs and AOs regarding the application of Section 301(f) of the Leadership Act.

This clarifying guidance was also issued to Contracting Specialists, Contracting Officers' Representatives (CORs) and Agreement Officers' Representatives (AORs), Health Officers, and USAID's implementing partners (e.g., grantees, recipients and contractors).

The guidance noted that in enacting the Leadership Act, Congress developed a framework to combat the global spread of HIV/AIDS, tuberculosis, and malaria. The Leadership Act provides that all HIV/AIDS funding recipients, subject to limited exceptions, must have a policy explicitly opposing prostitution and sex trafficking. The guidance noted it is critical to the effectiveness of Congress's plan and to the U.S. Government's foreign policy underlying this effort, that the integrity of Leadership Act HIV/AIDS programs and activities implemented by organizations receiving Leadership Act HIV/AIDS funds is maintained, and that the U.S. Government's message opposing prostitution and sex trafficking is not confused by conflicting positions of implementing organizations.

Accordingly, USAID provided Organizational Integrity Guidance in AAPD 05-04 Amendment No. 1, and Amendment No. 3 to AAPD 05-04 modified that Organizational Integrity Guidance.

The guidance clarified that the Government's organizational partners that have agreed that they oppose prostitution and sex trafficking, may, consistent with the policy requirement, maintain an affiliation with separate organizations that do not satisfy the policy requirement, provided that such affiliations do not threaten the integrity of the Government's programs and its message opposing prostitution and sex trafficking, as specified in this guidance. To maintain program integrity, adequate separation is required between any federally funded partner organization and an affiliate that engages in activities inconsistent with a policy against prostitution and sex trafficking.

The criteria for affiliate independence are modeled on criteria upheld as constitutional by the U.S. Court of Appeals for the Second Circuit in Velazquez v. Legal Services Corporation, 164 F.3d 757, 767 (2d Cir. 1999), and Brooklyn Legal Services Corp. v. Legal Services Corp., 462 F.3d 219, 229-33 (2d Cir. 2006), cases involving similar organization-wide limitations applied to recipients of federal funding.

A recipient of Leadership Act HIV/AIDS funds may maintain an affiliation with an independent organization that engages in activities inconsistent with an opposition to prostitution and sex trafficking while remaining in compliance with the policy requirement.

The independent affiliate's position on these issues will have no effect on the recipient organization's eligibility for Leadership Act HIV/AIDS funds, so long as the affiliate satisfies the criteria for objective integrity and independence, as detailed in the guidance. By ensuring adequate separation between the recipient and affiliate organizations, these criteria guard against a public perception that the affiliate's views on prostitution and sex trafficking may be attributed to the recipient organization and thus to the Government, thereby avoiding the risk of confusing the Government's message opposing prostitution and sex trafficking.

Although the U.S. Government no longer applies Section 301(f) to U.S. organizations after the decision of the Supreme Court, the Organizational Integrity Guidance still remains valid guidance with respect to non-U.S. organizations.

D. Limited Contracting Exception for Providers of Certain Commercial Items or Services:

In October 2007, the contract provision implementing Sections 301(e) and 301(f) of the Leadership Act was amended in AAPD 05-04 Amendment No. 2 to provide a limited exemption from the policy requirement contained in Section 301 (f) (the “policy requirement”) for certain contracts and subcontracts for specific types of items and services. The provision exempts from the policy requirement contractors and subcontractors who are providing commercial items or services and where such activities do not involve any HIV/AIDS programmatic activities per se. As the U.S. Government no longer applies Section 301(f) to U.S. organizations after the decision of the Supreme Court, the practical relevance of this limited exemption for contractors and subcontractors is for non-U.S. contractors and subcontractors.

Notwithstanding the preceding paragraph, the Leadership Act policy requirement remains applicable to all non-U.S. contractors and subcontractors who directly implement HIV/AIDS programs by providing:

(1) Supplies or services directly to the final populations receiving such supplies or services in host countries:

(2) Technical assistance and training directly to host country individuals or organizations on how supplies or services are provided to the final populations receiving such supplies and services; or

(3) The types of services listed in FAR 37.203(b)(1)-(6) that involve:

- giving advice about substantive policies of a recipient,
- giving advice regarding the activities referenced in (1) and (2), or
- making decisions or functioning in a recipient’s chain of command.