

Subpart E—Additional Provisions For Awards to Commercial Organizations

§ 226.80 Scope of subpart.

This subpart contains additional provisions that apply to awards to commercial organizations. These provisions supplement and make exceptions for awards to commercial organizations from other provisions of this part.

§ 226.81 Prohibition against profit.

No funds shall be paid as profit to any recipient that is a commercial organization. Profit is any amount in excess of allowable direct and indirect costs.

§ 226.82 Program income.

The additional costs alternative described in § 226.24(b)(1) may not be applied to program income earned by a commercial organization.

Subpart F—Miscellaneous

§ 226.90 Disputes.

(a) Any dispute under or relating to a grant or agreement shall be decided by the USAID Agreement Officer. The Agreement Officer shall furnish the recipient a written copy of the decision.

(b) Decisions of the USAID Agreement Officer shall be final unless, within 30 days of receipt of the decision, the grantee appeals the decision to USAID's Deputy Assistant Administrator for Management, USAID, Washington, DC 20523. Appeals must be in writing with a copy concurrently furnished to the Agreement Officer.

(c) In order to facilitate review on the record by the Deputy Assistant Administrator for Management, the recipient shall be given an opportunity to submit written evidence in support of its appeal. No hearing will be provided.

(d) Decisions by the Deputy Assistant Administrator for Management shall be final.

§ 226.91 Marking.

(a) USAID policy is that all programs, projects, activities, public communications, and commodities, speci-

fied further at paragraph (b)–(e) of this section, partially or fully funded by a USAID grant or cooperative agreement or other assistance award or subaward must be marked appropriately overseas with the USAID Identity, of a size and prominence equivalent to or greater than the recipient's, other donor's or any other third party's identity or logo.

(1) USAID reserves the right to require the USAID Identity to be larger and more prominent if it is the majority donor, or to require that a cooperating country government's identity be larger and more prominent if circumstances warrant; any such requirement will be on a case-by-case basis depending on the audience, program goals and materials produced.

(2) USAID reserves the right to request pre-production review of USAID funded public communications and program materials for compliance with the approved Marking Plan.

(3) USAID reserves the right to require marking with the USAID Identity in the event the recipient does not choose to mark with its own identity or logo.

(4) To ensure that the marking requirements "flow down" to subrecipients of subawards, recipients of USAID funded grants and cooperative agreements or other assistance awards are required to include a USAID-approved marking provision in any USAID funded subaward, as follows:

As a condition of receipt of this subaward, marking with the USAID Identity of a size and prominence equivalent to or greater than the recipient's, subrecipient's, other donor's or third party's is required. In the event the recipient chooses not to require marking with its own identity or logo by the subrecipient, USAID may, at its discretion, require marking by the subrecipient with the USAID Identity.

(b) Subject to § 226.91 (a), (h), and (j), program, project, or activity sites funded by USAID, including visible infrastructure projects (for example, roads, bridges, buildings) or other programs, projects, or activities that are physical in nature (for example, agriculture, forestry, water management), must be marked with the USAID Identity. Temporary signs or plaques

§ 226.91

22 CFR Ch. II (4–1–10 Edition)

should be erected early in the construction or implementation phase. When construction or implementation is complete, a permanent, durable sign, plaque or other marking must be installed.

(c) Subject to § 226.91 (a), (h), and (j), technical assistance, studies, reports, papers, publications, audio-visual productions, public service announcements, Web sites/Internet activities and other promotional, informational, media, or communications products funded by USAID must be marked with the USAID Identity.

(1) Any “public communications” as defined in § 226.2, funded by USAID, in which the content has not been approved by USAID, must contain the following disclaimer:

This study/report/audio/visual/other information/media product (specify) is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of [insert recipient name] and do not necessarily reflect the views of USAID or the United States Government.

(2) The recipient shall provide the Cognizant Technical Officer (CTO) or other USAID personnel designated in the grant or cooperative agreement with at least two copies of all program and communications materials produced under the award. In addition, the recipient shall submit one electronic and/or one hard copy of all final documents to USAID’s Development Experience Clearinghouse.

(d) Subject to § 226.91 (a), (h), and (j), events financed by USAID such as training courses, conferences, seminars, exhibitions, fairs, workshops, press conferences and other public activities, must be marked appropriately with the USAID Identity. Unless directly prohibited and as appropriate to the surroundings, recipients should display additional materials such as signs and banners with the USAID Identity. In circumstances in which the USAID Identity cannot be displayed visually, recipients are encouraged otherwise to acknowledge USAID and the American people’s support.

(e) Subject to § 226.91 (a), (h), and (j), all commodities financed by USAID, including commodities or equipment

provided under humanitarian assistance or disaster relief programs, and all other equipment, supplies and other materials funded by USAID, and their export packaging, must be marked with the USAID Identity.

(f) After technical evaluation of applications for USAID funding, USAID Agreement Officers will request Apparent Successful Applicants to submit a Branding Strategy, defined in § 226.2. The proposed Branding Strategy will not be evaluated competitively. The Agreement Officer shall review for adequacy the proposed Branding Strategy, and will negotiate, approve and include the Branding Strategy in the award. Failure to submit or negotiate a Branding Strategy within the time specified by the Agreement Officer will make the Apparent Successful Applicant ineligible for award.

(g) After technical evaluation of applications for USAID funding, USAID Agreement Officers will request Apparent Successful Applicants to submit a Marking Plan, defined in § 226.2. The Marking Plan may include requests for approval of Presumptive Exceptions, paragraph (h) of this section. All estimated costs associated with branding and marking USAID programs, such as plaques, labels, banners, press events, promotional materials, and the like, must be included in the total cost estimate of the grant or cooperative agreement or other assistance award, and are subject to revision and negotiation with the Agreement Officer upon submission of the Marking Plan. The Marking Plan will not be evaluated competitively. The Agreement Officer shall review for adequacy the proposed Marking Plan, and will negotiate, approve and include the Marking Plan in the award. Failure to submit or negotiate a Marking Plan within the time specified by the Agreement Officer will make the Apparent Successful Applicant ineligible for award. Agreement Officers have the discretion to suspend the implementation requirements of the Marking Plan if circumstances warrant. Recipients of USAID funded grant or cooperative agreement or other assistance award or subaward should retain copies of any specific marking instructions or waivers in their project, program or activity files.

Agency for International Development

§ 226.91

Cognizant Technical Officers will be assigned responsibility to monitor marking requirements on the basis of the approved Marking Plan.

(h) *Presumptive exceptions:* (1) The above marking requirements in §226.91 (a)–(e) may not apply if marking would:

(i) Compromise the intrinsic independence or neutrality of a program or materials where independence or neutrality is an inherent aspect of the program and materials, such as election monitoring or ballots, and voter information literature; political party support or public policy advocacy or reform; independent media, such as television and radio broadcasts, newspaper articles and editorials; public service announcements or public opinion polls and surveys.

(ii) Diminish the credibility of audits, reports, analyses, studies, or policy recommendations whose data or findings must be seen as independent.

(iii) Undercut host-country government “ownership” of constitutions, laws, regulations, policies, studies, assessments, reports, publications, surveys or audits, public service announcements, or other communications better positioned as “by” or “from” a cooperating country ministry or government official.

(iv) Impair the functionality of an item, such as sterilized equipment or spare parts.

(v) Incur substantial costs or be impractical, such as items too small or other otherwise unsuited for individual marking, such as food in bulk.

(vi) Offend local cultural or social norms, or be considered inappropriate on such items as condoms, toilets, bed pans, or similar commodities.

(vii) Conflict with international law.

(2) These exceptions are presumptive, not automatic and must be approved by the Agreement Officer. Apparent Successful Applicants may request approval of one or more of the presumptive exceptions, depending on the circumstances, in their Marking Plan. The Agreement Officer will review requests for presumptive exceptions for adequacy, along with the rest of the Marking Plan. When reviewing a request for approval of a presumptive exception, the Agreement Officer may review how program materials will be

marked (if at all) if the USAID identity is removed. Exceptions approved will apply to subrecipients unless otherwise provided by USAID.

(i) In cases where the Marking Plan has not been complied with, the Agreement Officer will initiate corrective action. Such action may involve informing the recipient of a USAID grant or cooperative agreement or other assistance award or subaward of instances of noncompliance and requesting that the recipient carry out its responsibilities as set forth in the Marking Plan and award. Major or repeated non-compliance with the Marking Plan will be governed by the uniform suspension and termination procedures set forth at 22 CFR 226.61 and 226.62.

(j) USAID Principal Officers, defined for purposes of this provision at §226.2, may at any time after award waive in whole or in part the USAID approved Marking Plan, including USAID marking requirements for each USAID funded program, project, activity, public communication or commodity, or in exceptional circumstances may make a waiver by region or country, if the Principal Officer determines that otherwise USAID required marking would pose compelling political, safety, or security concerns, or marking would have an adverse impact in the cooperating country. USAID recipients may request waivers of the Marking Plan in whole or in part, through the Cognizant Technical Officer. No marking is required while a waiver determination is pending. The waiver determination on safety or security grounds must be made in consultation with U.S. Government security personnel if available, and must consider the same information that applies to determinations of the safety and security of U.S. Government employees in the cooperating country, as well as any information supplied by the Cognizant Technical Officer or the recipient for whom the waiver is sought. When reviewing a request for approval of a waiver, the Principal Officer may review how program materials will be marked (if at all) if the USAID Identity is removed. Approved waivers are not limited in duration but are subject to Principal Officer review at any time due to changed circumstances. Approved

§ 226.1001

waivers “flow down” to recipients of subawards unless specified otherwise. Principal Officers may also authorize the removal of USAID markings already affixed if circumstances warrant. Principal Officers’ determinations regarding waiver requests are subject to appeal to the Principal Officer’s cognizant Assistant Administrator. Recipients may appeal by submitting a written request to reconsider the Principal Officer’s waiver determination to the cognizant Assistant Administrator.

(k) *Non-retroactivity.* Marking requirements apply to any obligation of USAID funds for new awards as of January 2, 2006. Marking requirements also will apply to new obligations under existing awards, such as incremental funding actions, as of January 2, 2006, when the total estimated cost of the existing award has been increased by USAID or the scope of work is changed to accommodate any costs associated with marking. In the event a waiver is rescinded, the marking requirements shall apply from the date forward that the waiver is rescinded. In the event of the rescinding of a waiver after the date of completion as defined in 22 CFR 226.2 but before closeout as defined in 22 CFR 226.2., the USAID mission or operating unit with initial responsibility to administer the marking requirements shall make a cost benefit analysis as to requiring USAID marking requirements after the date of completion of the affected programs, projects, activities, public communications or commodities.

(l) The USAID Identity, USAID Partner Co-Branding Guide, and other guidance will be provided at no cost or fee to recipients of USAID grants, cooperative agreements or other assistance awards or subawards. Additional costs associated with marking requirements will be met by USAID if reasonable, allowable, and allocable under the cost principles of OMB Cost Circular A-122. The standard cost reimbursement provisions of the grant, cooperative agreement, other assistance award or subaward should be followed when applying for reimbursement of additional marking costs.

(m) This section shall become effective on January 2, 2006.

[70 FR 50190, Aug. 26, 2005]

22 CFR Ch. II (4-1-10 Edition)

Subpart G—USAID-Specific Requirements

§ 226.1001 Eligibility rules for goods and services. [Reserved]

§ 226.1002 Local cost financing. [Reserved]

§ 226.1003 Air transportation. [Reserved]

§ 226.1004 Ocean shipment of goods. [Reserved]

APPENDIX A TO PART 226—CONTRACT PROVISIONS

All contracts, awarded by a recipient including small purchases, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*— All contracts to be performed in the United States, or to be performed with employees who were recruited in the United States, shall contain a provision requiring compliance with E.O. 11246, “Equal Employment Opportunity,” as amended by E.O. 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and as supplemented by regulations at 41 CFR Chapter 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor,” to the extent required by the foregoing.

2. *Copeland “Anti-Kickback” Act (18 U.S.C. 874 and 40 U.S.C. 276c)*— All contracts and subawards in excess of \$2,000 for construction or repair to be performed in the United States awarded by recipients and subrecipients shall include a provision for compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the Federal awarding agency.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7)*— When required by Federal program legislation, all construction, alteration, and/or repair contracts to be performed in the United States awarded by the recipients and subrecipients of more than \$2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) and as supplemented by Department of Labor regulations (29 CFR part 5,