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FROM THE AMERICAN PEOPLE

Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance Issued: April 13, 2010

AAPD 05-04 Amendment 3

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

Subject Category: ASSISTANCE, ACQUISITION MANAGEMENT
Type: POLICY [See Also AAPD 05-04, issued June 9, 2007](#)

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: 05-04 as amended

<p>Applicable to:</p> <p><input checked="" type="checkbox"/> Existing awards; <input 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 22 CFR 226</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

(signature on file)

Gary Juste
Acting Director

1. PURPOSE:

This Acquisition & Assistance Policy Directive (AAPD) amendment:

(A) replaces all previous versions of the provisions titled “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking” with the revised versions in Attachments A through C. Agreement Officers (AOs) and Contracting Officers (COs) must include the revised standard provisions for assistance agreements (Attachments A and B). They must also include the revised special provisions for contracts (Attachment C) in awards that include FY04-FY13 funds that are made available for HIV/AIDS activities, regardless of the program account;

(B) clarifies that a USAID recipient or contractor that receives funds for HIV/AIDS activities meets the statutory requirement to have a policy opposing prostitution and sex trafficking by signing a statement in its award that the recipient or contractor is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. The USAID recipient or contractor is not required to adopt a separate organizational policy opposing prostitution and sex trafficking;

(C) eliminates the requirement that a prime recipient must provide a separate document certifying compliance with applicable standard provisions for assistance agreements that include funds for HIV/AIDS activities. The certification requirement was established in Section 3.A.III of the original AAPD 05-04;

(D) modifies the criteria AOs and COs use for determining whether or not there is sufficient separation between a USAID recipient or contractor that receives funds for HIV/AIDS activities and an affiliate organization that engages in activities that are not consistent with a policy opposing prostitution and sex trafficking as set forth in Section 4 below; and

(E) clarifies that AAPD 05-04 as amended through this Amendment No. 3 applies, effective as of the date of the AO/CO signature, to awards that include FY04-FY13 funds that are made available for HIV/AIDS activities, regardless of the program account.¹

See the Actions Required in Section 2 below for specific steps for implementation.

¹ FY04-FY13 funds that are made available to the President in the Foreign Operations, Export Financing, and Related Programs Appropriations Act under the heading “Bilateral Economic Assistance” and that are allocated or used, in whole or in part, for the purposes of combating HIV/AIDS should be considered potentially affected by the restrictions in AAPD 05-04 and its amendments. Consult the Office of the General Counsel (GC) or your Regional Legal Advisor (RLA) to seek legal advice on whether the restrictions apply to the funds in question.

2. ACTIONS REQUIRED:

(A) Assistance to Non-Governmental Organizations (NGOs) and Non-Exempt Public International Organizations² (PIOs)

(1) Standard Provisions

AOs must include the provisions in Attachment A in each of the following when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds made available for HIV/AIDS activities, regardless of the program account:

- (a) any new Request for Applications (RFA) and Annual Program Statement (APS);
- (b) any new grant or cooperative agreement to a U.S. NGO, a non-U.S. NGO, or a non-exempt PIO that meets the conditions set forth in Section 4.A below; and
- (c) any modification to an existing grant or cooperative agreement to a U.S. NGO, a non-U.S. NGO, or a non-exempt PIO that meets the conditions set forth in Section 4.A below.

(2) Assistance Awards to Alliance for Open Society International (AOSI), Pathfinder or a member of Global Health Council (“GHC”) or InterAction³ (with the exception of DKT International, Inc.)

AOs must include the language in Footnote #9 in Attachment A in each of the following when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds made available for HIV/AIDS activities, regardless of the program account:

- (a) any new grant or cooperative agreement to AOSI, Pathfinder or a member of GHC or InterAction (with the exception of DKT International, Inc.) that meets the conditions set forth in Section 4.A below; and
- (b) any modification to an existing grant or cooperative agreement to AOSI, Pathfinder or a member of GHC or InterAction (with the exception of DKT International, Inc.) that meets the conditions set forth in Section 4.A below.

(3) Certification

AOs no longer need to obtain the certification set forth in Section 3.A.III of AAPD 05-04, dated June 9, 2005.

(4) Organizational Integrity Guidance

² The list of statutorily exempt PIOs is included in Section 2.B.

³ The lists of members of GHC and InterAction can be found at:

http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf

AOs must consider the “Organizational Integrity Guidance” in Section 4.B below when determining a prospective or existing assistance recipient’s eligibility or compliance with the provisions in Section 4.B below. AOs must also obtain clearance from Agency legal counsel before issuing any written determination relating to the organizational integrity pertaining to USAID awards.

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

(1) Standard Provisions

AOs must include the provisions in Attachment B in each of the following when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds made available for HIV/AIDS activities, regardless of the program account:

- (a) new Request for Applications (RFA) and Annual Program Statement (APS);
- (b) any new grant or cooperative agreement that meets the conditions set forth in Section 4.A below to:
 - the Global Fund to Fight AIDS, Tuberculosis and Malaria;
 - the World Health Organization;
 - the International AIDS Vaccine Initiative; or
 - any United Nations agency; and
- (c) any modification to an existing grant or cooperative agreement that meets the conditions set forth in Section 4.A below to:
 - the Global Fund to Fight AIDS, Tuberculosis and Malaria;
 - the World Health Organization;
 - the International AIDS Vaccine Initiative; or
 - any United Nations agency.

(2) Organizational Integrity Guidance

As these statutorily exempted PIOs are not required to state in their awards that they oppose the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children, AOs will not need to consider the “Organizational Integrity Guidance” in Section 4.B below.

(C) Contracts:

(1) Special Provisions

COs must include the special provisions in Attachment C in each of the following when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds made available for HIV/AIDS activities, regardless of the program account:

- (a) any new acquisition solicitation;
- (b) any new contract that meets the conditions set forth in Section 4.A below;
and
- (c) any amendment to an existing contract that meets the conditions set forth in Section 4.A below.

(2) Indefinite Quantity Contracts (IQC)

COs must include the special provisions in Attachment C in each of the following when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds made available for HIV/AIDS activities, regardless of the program account:

- (a) any new IQC solicitation;
- (b) any new IQC award that meets the conditions set forth in Section 4.A below⁴; and
- (c) any existing IQC when an order is placed that meets the conditions set forth in Section 4.A below⁵.

(3) Contracts to AOSI, Pathfinder or a member of Global Health Council (“GHC”) or InterAction⁶ (with the exception of DKT International, Inc.)

COs must include the bracketed footnote in Attachment C in each of the following when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds made available for HIV/AIDS activities, regardless of the program account:

- (a) any new contract or IQC award to AOSI, Pathfinder or a member of GHC or InterAction (with the exception of DKT International, Inc.) that meets the conditions set forth in Section 4.A below; and
- (b) any modification to an existing contract or IQC award to AOSI, Pathfinder or a member of GHC or InterAction (with the exception of DKT International, Inc.) that meets the conditions set forth in Section 4.A below.

(4) Personal Services Contracts (PSCs)

The special provisions in Attachment C do not apply to PSCs. During their tour of duty, PSC contractors 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.”](#),

(5) Grants under Contracts

⁴ The special provisions in Attachment C must be included in the IQC award. Such provisions will be deemed to apply to any order placed under the IQC for HIV/AIDS activities.

⁵ The IQC award need not be modified until a new order requiring additional funding for HIV/AIDS activities is placed. At that time, the IQC award should be modified. The modification will be deemed to apply to any order placed under the IQC for HIV/AIDS activities.

⁶ The lists of members of GHC and InterAction can be found at:

http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf

If a contract provides for the contractor to execute grants to NGOs (not-for-profits or for-profits) when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds that are made available for HIV/AIDS activities, regardless of the program account, then the contractor must comply with the requirement to use the assistance provisions in Section 2.A.I of this AAPD amendment. The contractor must do this when awarding grants or cooperative agreements under its contract (in compliance with ADS 302.3.5.6(b)).

(6) Organizational Integrity Guidance

COs must consider the “Organizational Integrity Guidance” in Section 4.B below when determining a prospective or existing organization’s eligibility or compliance with the provisions in Section 4.B below. COs must also obtain clearance from Agency legal counsel before issuing any written determination relating to organizational integrity pertaining to USAID awards.

3. BACKGROUND:

Attachment D includes the legislative and litigation background of this AAPD 05-04 Amendment No. 3 and a brief summary of the history of the Organizational Integrity Guidance and the limited contracting exception for providers of certain commercial items or services contained in AAPD 05-04 Amendment No. 1 and AAPD 05-04 Amendment No. 2, respectively. AAPD 05-04 Amendment No. 1, AAPD 05-04 Amendment No. 2, PEB No. 2005-08, and PEB 2008-04 have been superseded in their entirety by this AAPD 05-04 Amendment No.3.

4. GUIDANCE:

The provisions in this AAPD are 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.

A. AOs and COs must use the provisions as prescribed in Attachments A, B, or C.

All new contracts, grants, and cooperative agreements that are (1) funded with FY04-13 funds made available for HIV/AIDS activities, regardless of the program account and (2) executed on or after April 13, 2010, the effective date of AAPD 05-04 Amendment No. 3, AOs and COs must include the provisions as prescribed in Attachments A, B, or C.

Under certain conditions AOs and COs must replace all previous versions of the provisions titled “Prohibition on the Promotion or Advocacy of the Legalization or

Practice of Prostitution or Sex Trafficking” with the revised versions in Attachments A, B, or C.

These conditions are when contracts, grants, and cooperative agreements are (1) funded with FY04-13 funds that are made available for HIV/AIDS activities, regardless of the program account; (2) modified on or after April 13, 2010, the effective date of AAPD 05-04 Amendment No. 3; and (3) when the modification requires additional funding.

This modification must be bilateral (i.e., must be signed by the USAID AO or CO and by the contractor, grantee, or recipient). By signing the modification, the contractor, grantee, or recipient agrees to be bound by the clause requirements.

Current contracts, grants, and cooperative agreements need not be modified to include the new clauses if they are not modified to add funds.

B. The restriction set forth in Sections A.3(b) and C.3(b) in Attachments A and C, respectively, no longer requires organizations to adopt a separate organizational policy opposing prostitution and sex trafficking. Instead, the restriction requires organizations to state in the award that they oppose the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. AOs and COs must consider the below guidance when evaluating whether a recipient’s agreement that it opposes prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children may be adversely implicated by the statements or activities of an affiliate of the recipient.⁷

Organizational Integrity of Recipient.

Contractors, grantees, and recipients of cooperative agreements (“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 because of the psychological and physical risks they pose for women, men, and children (“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

⁷ 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 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.

5. POINTS OF CONTACT:

USAID Contracting Officers and Agreement Officers may direct their questions about this AAPD to Jacqueline L. Taylor, M/OAA/P, Phone: (202) 712-0492 email: jltaylor@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 Diane Bui, GC/GH & EGAT, Phone: (202) 712-0529 e-mail: dbui@usaid.gov or to Diana Weed, GC/GH & EGAT, Phone: (202) 712-5245 e-mail: dweed@usaid.gov.

ATTACHMENT A – Assistance Provisions – Non-Governmental Organizations (NGOs) and Non-Exempt Public International Organizations (PIOs)⁸

A.1 Organizations Eligible for Assistance (Assistance) (June 2005)

Prescription. This AAPD amendment does not amend the provision titled “Organizations Eligible for Assistance (Assistance) (June 2005)” set forth in Section 3.A.I of the original AAPD 05-04, dated June 9, 2005. Agreement Officers (AOs) must include that Standard Provision, found at: http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf, in any new assistance award, or amendment to an existing award (if not already incorporated into the agreement), to U.S. NGOs, non-U.S. NGOs, or non-exempt PIOs. The prime recipient must flow this provision down in all subawards, procurement contracts or subcontracts.

A.2 Condoms (Assistance) (June 2005)

Prescription. This AAPD amendment does not amend the provision titled “Condoms (Assistance) (June 2005)” set forth in Section 3.A.I of the original AAPD 05-04, dated June 9, 2005. AOs must include that Standard Provision, found at: http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf, in any new assistance award, or amendment to an existing award (if not already incorporated into the agreement), to U.S. NGOs, non-U.S. NGOs, or non-exempt PIOs. The prime recipient must flow this provision down in all subawards, procurement contracts or subcontracts.

A.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance) (April 2010)

Prescription. This AAPD amendment replaces the provision titled “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance) (June 2005)” set forth in Section 3.A.II of the original AAPD 05-04, dated June 9, 2005. AOs must include the following revised Standard Provision A.3 in any new assistance award or amendment to an existing award to U.S. NGOs, non-U.S. NGOs, or non-exempt PIOs. The prime recipient must flow this provision down in all subawards, procurement contracts or subcontracts.

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (APRIL 2010)

(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.

⁸ The list of statutorily exempt PIOs is included in Attachment B.

(b)(1) Except as provided in (b)(2) and (b)(3), 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 because of the psychological and physical risks they pose for women, men, and children.⁹

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

(b)(3) 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)(4) Notwithstanding section (b)(3), not exempt from (b)(1) are 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 shall insert this provision, which is a standard provision, in all subawards, procurement contracts or subcontracts.

(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)"

⁹ The following footnote should only be included in awards to Alliance for Open Society International (AOSI), Pathfinder, or a member of the Global Health Council (GHC) or InterAction (with the exception of DKT International, Inc.):

"Any enforcement of this clause is subject to Alliance for Open Society International v. USAID, 05 Civ. 8209 (S.D.N.Y., orders filed on June 29, 2006 and August 8, 2008) (orders granting preliminary injunction) for the term of the Orders."

The lists of members of GHC and InterAction can be found at:

http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf

ATTACHMENT B – Assistance Provisions – The Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency

B.1 Organizations Eligible for Assistance (Assistance) (June 2005)

Prescription. This AAPD amendment does not amend the provision titled “Organizations Eligible for Assistance (Assistance) (June 2005)” set forth in Section 3.A.I of the original AAPD 05-04, dated June 9, 2005.

Agreement Officers (AOs) must include that Standard Provision, found at: http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf, in any new assistance award, or amendment to an existing award (if not already incorporated into the agreement), to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency. The prime recipient must flow this provision down in all subawards.

B.2 Condoms (Assistance) (June 2005)

Prescription. This AAPD amendment does not amend the provision titled “Condoms (Assistance) (June 2005)” set forth in Section 3.A.I of the original AAPD 05-04, dated June 9, 2005. AOs must include that Standard Provision, found at http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf, in any new assistance award, or amendment to any existing award (if not already incorporated into the agreement), to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency. The prime recipient must flow this provision down in all subawards.

B.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance – the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any United Nations agency) (April 2010)

Prescription. This AAPD amendment replaces the provision titled “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance) (June 2005)” set forth in Section 3.A.II of the original AAPD 05-04, dated June 9, 2005. AOs must include the following revised Standard Provision B.3 in any new assistance award, or amendment to an existing award, to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency. The prime recipient must flow this provision down in all subawards.

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE – THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, THE WORLD HEALTH ORGANIZATION, THE INTERNATIONAL AIDS VACCINE INITIATIVE, AND ANY UNITED NATIONS AGENCY) (APRIL 2010)

(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) 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 shall insert this provision, which is a standard provision, in all subawards.

(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

C.1 Organizations Eligible for Assistance (Acquisition) (June 2005)

Prescription. This AAPD amendment does not amend the provision titled “Organizations Eligible for Assistance (Acquisition) (June 2005)” set forth in Section 3.B.I of the original AAPD 05-04, dated June 9, 2005.

Contracting Officers (COs) must include that Special Provision, found at http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf, in any new acquisition award, or amendment to an existing award (if not already included in the agreement), to contractors. The prime contractor must flow this provision down in all subcontracts.

C.2 Condoms (Acquisition) (June 2005)

Prescription. This AAPD amendment does not amend the provision titled “Condoms (Acquisition) (June 2005)” set forth in Section 3.B.I of the original AAPD 05-04, dated June 9, 2005. COs must include that Special Provision C.2, found at http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf, in any new acquisition award, or amendment to an existing award (if not already included in the agreement), to contractors. The prime contractor must flow this provision down in all subcontracts.

C.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Acquisition) (April 2010)

Prescription. This AAPD amendment replaces all previous versions of the provision titled “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Acquisition)”.

These previous versions include the June 2005 version in Section 3.B.II of the original AAPD 05-04, dated June 9, 2005, and the October 2007 version in Section 3 of AAPD 05-04 Amendment No.2, dated October 16, 2007. COs must include the following Special Provision C.3 in any new acquisition award, or amendment to an existing award, to contractors. The prime contractor must flow this provision down in all subcontracts.

“PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ACQUISITION) (APRIL 2010)

(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) and (b)(3), 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 because of the psychological and physical risks they pose for women, men, and children.^[10]

¹⁰ The following footnote should only be included in awards to Alliance for Open Society International (AOSI), Pathfinder, or a member of GHC or InterAction (with the exception of DKT International, Inc.):

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

(b)(3) 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)(4) Notwithstanding section (b)(3), not exempt from (b)(1) are 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 shall insert this provision in all subcontracts.

(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)”

“Any enforcement of this clause is subject to Alliance for Open Society International v. USAID, 05 Civ. 8209 (S.D.N.Y., orders filed on June 29, 2006 and August 8, 2008) (orders granting preliminary injunction) for the term of the Orders.”

The lists of members of GHC and InterAction can be found at:

http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf

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, as amended, includes, among other things, certain restrictions on the 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:

“(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 public international organizations are exempt from section 301(f) of the Leadership Act, they are subject to the AAPD 05-04 provision that implements section 301(e) of the Leadership Act, as amended.

B. Leadership Act Litigation

Alliance for Open Society International (“AOSI”)/Pathfinder International (“Pathfinder”) – U.S. District Court for the Southern District of New York:

On June 29, 2006, the District Court for the Southern District of New York issued a preliminary injunction order, pending a final judgment on the merits, prohibiting Defendants USAID and HHS from enforcing the statutory requirement to have a policy opposing prostitution and sex trafficking against AOSI or Pathfinder.

Defendants also were prohibited from investigating or auditing AOSI or Pathfinder regarding compliance with this statutory requirement.

On August 7, 2008, the Court granted the request of two associations, Global Health Council (“GHC”) and InterAction, to be added as plaintiffs in the AOSI suit and extended the reach of the preliminary injunction to cover the members of those associations as well.

Therefore, in addition to being prohibited from enforcing the statutory requirement to have a policy opposing prostitution and sex trafficking against AOSI or Pathfinder, USAID and HHS are now prohibited from enforcing this statutory requirement against any member of GHC or InterAction. They are likewise forbidden from investigating or auditing members of GHC or InterAction regarding compliance with this statutory requirement.

GHC and InterAction have provided USAID with lists of member organizations, and these lists can be found at: http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf

DKT International, Inc. (“DKT”) – D.C. Circuit Court of Appeals:

Although DKT is a member of GHC, the D.C. Circuit Court of Appeals previously held in a separate lawsuit that USAID may enforce the statutory requirement to have a policy opposing prostitution and sex trafficking against DKT. In its order, the District Court for the Southern District of New York specifically barred DKT from benefiting from the preliminary injunction. Therefore, USAID continues to enforce the statutory requirement against DKT.

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' Technical Representatives (COTRs) and Agreement Officers' Technical Representatives (AOTRs), 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 this Amendment No. 3 to AAPD 05-04 modifies that Organizational Integrity Guidance.

This guidance clarifies that the Government's organizational partners that have agreed that they oppose prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children, 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 as outlined in this guidance 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 in this guidance 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.

This guidance clarifies that 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 because of the psychological and

physical risks they pose for women, men, and children 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.

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.

The Leadership Act policy requirement remains applicable to all 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.