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On behalf of my Client, Chemonics International Inc., we respectfully offer the following comments on the proposed AIDAR Rule change. As announced, the change would amend AIDAR clause 752.7028, "Differential and Allowances," by including language limiting the payment of post differential and danger pay allowances to a maximum of 40 hours per week, unless an exception is granted for payment of these allowances on an extended workweek by the Mission Director or Assistant Administrator having program responsibility for the program.

You asked for comments concerning the text of the proposed change, as well as the impact the change would have on contractors' standard policies regarding benefits. As explained below, should USAID proceed with the change, Chemonics suggests some technical changes to clarify the effective date of the rule and to emphasize the need for contractual implementation of exemptions to the limitations on the allowances. Perhaps more importantly, however, Chemonics urges USAID to limit application of the policy to situations where Contractors are authorized overtime pay for work in excess of 40 hours. While the intent of the policy is to foster parity between the compensation of USAID direct-hire and contractor personnel, the proposed rule leads to incongruent results in cases where contractors are not eligible for overtime premiums.

As an initial matter, Chemonics applauds your addressing this issue through formal rulemaking, as such action is very necessary. While recent questions directed to your office may have focused on extended work weeks in Iraq and Afghanistan, where both long and short-term expatriated Contractor employees are required to work longer hours, extended work weeks have often been authorized routinely for short term expatriates in other countries under circumstances where such employees may qualify for both allowances.

A complicating issue arises in cases where the added hours are required without recognizing any entitlement for premium pay. In essence, for affected personnel, the "extended" work week becomes the *base* period of employment. For example, Chemonics is performing USAID-funded work in Iraq where the base work week is defined as "not . . . less than 40 hours and shall be scheduled to coincide with the work week for those employees of the USAID Mission." Because USAID has ordered six-day work weeks under the prime contract, Chemonics personnel work a minimum of 48 hours per week. When faced with such situations, institutional contractors had routinely paid allowances for these extended work hours, in accordance with their standard personnel and financial policies and practices. It is Chemonics understanding that, in late 2004, DCAA began challenging this practice in connection with audits of Iraq contracts. As a consequence, the USAID Procurement Executive issued *Procurement Executive Bulletin ("PEB") 05-001*, on February 3, 2005. This PEB addressed Iraq procurements and specified that payment of allowances would be limited to a 40 hour work week, regardless of the number of hours actually worked. On February 19, 2005, USAID issued USAID/Iraq A&A Notice 05-003, which implemented the directive and applied it uniformly to "all contracting activities awarding and administering cost reimbursement contracts being performed in Iraq." The Notice provided that this rule would become "*effective February 3, 2005* and shall remain in effect until cancelled by the Procurement Executive."

On March 30, 2005, a similar PEB was issued concerning Afghanistan. A subsequent A&A Notice implemented the directive with an effective date of March 30th -- the date of the Afghanistan-related PEB. Chemonics, as a prudent USAID contractor, ceased making payments of such allowances on extended work weeks in Iraq and Afghanistan as of these respective dates.

The referenced PEBs and related Mission A&A Notices have been the *only* USAID public directives concerning this issue. These announcements were specific to Iraq and Afghanistan and did not address other countries in which USAID operates. Thus, the Proposed AIDAR change is the first official USAID directive with worldwide application. To avoid confusion, the proposed AIDAR change should make clear that, with the exception of contracts in Iraq and Afghanistan covered by PEBs 05-002 and 003, the rule will become effective on the date of publication. .

Accordingly, Chemonics respectively requests that the following effective date language be added to the Final Rule change:

"Paragraph E. Effective Dates

These AIDAR changes shall be effective as of the following dates

- (1) For Iraq: February 3, 2005.
- (2) For Afghanistan: March 30, 2005
- (3) For other countries where USAID operates: as of the effective date of this Final Rule."

Chemonics notes that, under the amended rule, USAID Mission Directors, or cognizant Assistant Administrators, may authorize exceptions to the restrictions on payment of the allowances. However, because the Contracting Officer is generally the only official with authority to implement contractual actions, Chemonics recommends that language be added to the text of the AIDAR clause indicating that exceptions will be implemented through contractual documents or by modifications signed by the Contracting Officer.

More importantly, however, Chemonics urges that the application of this rule be limited to cases where contractor employees are eligible for overtime premiums for hours worked in excess of 40 per week (or, in the alternative, the rule should provide that exceptions should be routinely granted where overtime compensation has not been granted). The basic rationale for the proposed rule is grounded on the principle of parity and the desire to ensure that contractor pay for allowances is "in line with that applied to direct-hire employees." 71 F.R. No. 205 at 62229. While direct-hire personnel are not paid these allowances for work in excess of 40 hours per week, the reason for this is because such personnel are paid *overtime* premiums for such hours.

As recognized in the notice of proposed rulemaking, the Department of State has established that the base work week for its employees is 40 hours. See Department of State Foreign Affairs Manual ("*FAM*"), 3 *FAM*-2331.1-1. By statute, virtually all direct-hire employees are entitled to premium pay for hours worked in excess of their base work week. Thus, direct-hires receive danger pay and post-differential pay only for their base work week, but earn premium pay for hours worked in excess of 40 hours. The overtime premium effectively offsets the loss of danger pay and post-differential allowances and, typically, results in direct-

hire personnel receiving their highest per-hour compensation for those hours worked in excess of 40 hours per week.

As long as premium pay for overtime is authorized for contractor employees, limiting payment of the above allowances to a 40 hour week would result in the equal treatment USAID seeks. The problem, however, is that, under many contracts, USAID requires extended work weeks, but *does not* authorize overtime pay. Effectively, in these circumstances, the *base work week* for contractor employees becomes *more than 40 hours* per week. Contractor employees working overseas are not protected by the *FAM* or statutes guaranteeing overtime premiums. Effectively, their *base work week* is whatever USAID mandates. Where USAID requires contractor employees to work more than 40 hours per week, but does not authorize overtime, the proposed rule limiting payment of allowances does not foster parity, it makes disparate treatment worse.

True parity would exist if both direct-hires and contractor employees were eligible for overtime pay for hours worked in excess of a base 40 hour work week. If, however, work in excess of 40 hours by contractors is not considered overtime, then it must be considered part of the employees base work week. Parity is already lost. Even if contractor employees are paid danger pay and post-differential allowances for hours in excess of 40 per week, such pay will not equate to the amount they would receive if they were paid premium pay like their direct-hire counterparts. The disparity becomes worse if allowances are eliminated for hours in excess of 40 per week. USAID pays its direct-hires danger and post allowance differentials for *all* of the hours included in their base work week. However, under the proposed rule, USAID effectively is proposing to pay contractor employees allowances for only *part* of their base work week. The ironic result is that contractor employees are compensated the *least* for hours worked in excess of 40 hours per week, while direct-hire employees get compensated the *most* for such time. This is neither equitable nor comparable to payment practices in the commercial marketplace. It is a commonly accepted convention -- embodied in numerous U.S. labor laws -- that 40 hours represents a reasonable standard for full-time employment and that employees working in excess of this standard deserve additional compensation in return for the extra effort.

By refusing to pay overtime *and* taking away allowances paid for base work hours, the proposed policy directly contradicts this convention. Overtime, this practice would threaten to make it more difficult to hire quality personnel, cause pressure to increase base compensation/benefits to account for the possibility that extended work weeks *might* be ordered, and require other efforts to attract and retain qualified personnel. The cost of such measures, which ultimately would be passed to USAID, could easily exceed the cost of directly paying for the additional hours with the appropriate allowances.