



May 1, 2015

HHS/ASFR/OGAPA/Division of Acquisition
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Submitted electronically at www.regulations.gov

Re: Health and Human Services Acquisition Regulation, parts 301 through 370

Dear Ms. Griffin:

The American Civil Liberties Union (ACLU) submits the following comments to the Department of Health and Human Services (HHS) in response to the Health and Human Services Acquisition Regulation (HHSAR), parts 301 through 370, published on March 2, 2015 at 80 Fed. Reg. 11265. The scope of our comments is limited to the sections on Non-Discrimination in Service Delivery (352.237-74), Non-Discrimination for Conscience (352.270-9), and Continued Ban on Funding Abortion and Continued Ban on Funding of Human Embryo Research (352.270-13).

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally. Because of the ACLU's profound respect for and demonstrated commitment to religious liberty and reproductive freedom, and LGBT equality, the ACLU is particularly well positioned to comment on these portions of the rule.

I. Non-Discrimination in Service Delivery (352.237-74)

We support the inclusion of the non-discrimination clause in HHS contracts in order to ensure that individuals, including members of the LGBT community, accessing services through HHS-supported programs are protected from discriminatory treatment. We endorse the principle that government dollars should never be used to fund discrimination, and endorse the Department's efforts to eliminate discrimination in government-funded programs and activities, including those run by contractors and sub-contractors.

We recommend that the Department make additions to the proposed language to ensure that all those who need services can access them. Specifically, in addition to the current language proposing that no one be denied the benefits of, excluded from participation in, or otherwise discriminated against in the administration of HHS programs and services on the basis of race, color, national origin, sex, gender identity, sexual orientation, or disability (physical or mental), the clause should also prohibit discrimination based on age, marital status, parental status, genetic information, political affiliation, and veteran status. Because some programs have limited who they serve on the basis of these characteristics, these additions would help to expand access to much-needed services on the ground. Additionally, HHS should clarify that nothing in this clause limits the ability of a recipient to target assistance to certain populations as defined in the award.

Any organization receiving government funds to carry out its program responsibilities must make its services available to all eligible beneficiaries, and a non-discrimination requirement helps to ensure this. Such a requirement does not burden organizations that voluntarily enter into contracts with the government.¹ To require anything less would encourage government-funded discrimination.

II. Non-Discrimination for Conscience (352.270-9)

The statute governing the President's Emergency Plan for AIDS Relief (PEPFAR) currently contains a broad and harmful refusal provision that puts beneficiaries at risk and undermines the entire program by allowing PEPFAR-participating organizations with religious or moral objections to certain services to refuse to provide any service to which they object. It even permits them to refuse to coordinate their activities or have any other relationship with programs that provide the services or information to which they object, regardless of how integral that service is to the objectives of the program. For example, this statutory restriction allows an organization to refuse to provide condoms and information about condoms (including referrals), despite the fact that the purpose of the program is to stem the impact of HIV/AIDS. This creates serious obstacles to ensuring that particular communities – including those at greatest risk of contracting HIV – or clients have access to the full range of HIV prevention, care, and treatment activities.

HHS must implement the “Non-discrimination for Conscience” clause, however, in line with the existing PEPFAR statute. The agency has done so in a manner that protects the interests of people impacted by HIV/AIDS, to the extent possible. We endorse the transparency requirement under which an organization with a religious or moral objection must disclose which work requirements it objects to and are therefore excluded from its proposal. This requirement provides HHS with more complete and accurate information about the scope of services an organization would provide, and allows HHS to make better funding determinations and ensure programmatic objectives are met.

We also support HHS' intent to ensure that contracts are awarded to entities that can and will

¹ See Ira C. Lupu & Robert W. Tuttle, Roundtable on Religion & Social Welfare Policy, *The State of the Law* – 2008 33-37 (2008), available at http://www.rockinst.org/pdf/faith-based_social_services/2008-12-state_of_the_law.pdf.

fulfill the salient work requirements of a project or program. Although HHS may not discriminate against an organization because of its religious or moral objection,² the agency has an obligation to make funding decisions that comply with the solicitation, ensure that the goals of a grant program are met, and provide individuals' access to health information and services. This is particularly crucial in developing countries where health care personnel and supplies are scarce.

This provision does not violate religious liberty protections or eligibility conditions. HHS must have a full understanding of the particular services a contractor, which voluntarily enters into an agreement to deliver services with taxpayer funds, will and will not provide in order to meaningfully evaluate funding proposals. HHS must also meet its own statutory obligations to address the needs of those living with HIV/AIDS and educate communities about HIV/AIDS prevention and treatment. Subsection (b) simply establishes a de minimus procedure for objecting organizations to exclude certain work requirements that may be called for in solicitations, while subsection (c) ensures that HHS can enter into contracts with entities that can further its statutory obligations.

III. Continued Ban on Funding Abortion and Continued Ban on Funding of Human Embryo Research (352.270-13)

We urge HHS to clarify its proposed “Continued Ban on Funding Abortion and Continued Ban on Funding of Human Embryo Research” clause in HHS contracts regarding research involving human subjects. While the scope of the abortion provision in Clause 352.270–13(a) is unclear, the proposed language incorrectly indicates a total ban on HHS funds for abortion as it relates to its contracts even though, pursuant to prevailing law, HHS funds may be used to provide abortions in the circumstances of rape, incest, and life endangerment.

In proposing to modify the HHSAR to require contract language that bars the use of HHS funds for abortion via Clause 352.270–13(a), HHS likely intends its contracts to reflect existing federal law – including the Hyde Amendment – that imposes arbitrary, harmful restrictions on the use of federal funds to provide abortions. We oppose such restrictions because they penalize and disproportionately harm the health of low-income women who rely on federal programs to meet their health care needs. Every woman should have access to comprehensive, quality health care including abortion services, regardless of her income or type of health care coverage. The Hyde Amendment and other similar policies restricting abortion coverage unacceptably interfere with women's personal medical decisions and continue to have the greatest negative impact on women of color, immigrant women, and young women – groups that already experience unintended pregnancy at higher rates due to a lack of resources and services.

However, the proposed language of Clause 352.270–13(a) does not even conform to the highly restrictive Hyde Amendment, which allows funding for abortions where “the pregnancy is the result of an act of rape or incest” or “in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in

² 22 U.S.C. § 7631(d)(2).

danger of death unless an abortion is performed.”³ Rather, the clause imposes an absolute prohibition on the use of HHS funds to provide abortions without exception. HHS should reconcile Clause 352.270–13(a) with the existing restrictions on abortion coverage, allowing funds to be used to provide abortions at least in the limited circumstances of rape, incest, and when a pregnancy endangers a woman’s life.⁴

We appreciate this opportunity to comment, and look forward to working with HHS to ensure access to critical services for all those who rely on HHS-supported programs.

Sincerely,



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Acting Director



Georgeanne M. Usova
Legislative Counsel

³ Pub. L. 113-235, Div. G, Title V § 506-507(c).

⁴ HHS should update Clause 352.270–13(a) in the event there are changes to the underlying law that would permit broader use of federal funds for abortion.