



U.S. AGENCY FOR
INTERNATIONAL
DEVELOPMENT

February 1, 2005

ACTION MEMORANDUM

TO: The Acting Administrator

FROM: AA/ANE, James Kunder /s/
A/AA/DCHA, William Garvelink /s/
GC, John S. Gardner /s/

SUBJECT: Expedited Acquisition and Assistance Procedures for Activities
and Programs Related to Tsunami Relief and Reconstruction

ISSUE FOR DECISION

Whether to approve the use of other than full and open competition in soliciting and awarding contracts and grants, as well as other waivers, to facilitate and expedite the procurement process for conduct of the USAID relief and reconstruction efforts related to the recent tsunami in South Asia.

ESSENTIAL FACTORS

In the aftermath of the tragic tsunami of December 26, 2004, USAID is acting quickly to establish the Tsunami Relief and Reconstruction Task Force (TRRTF) to lead the Agency's response to the fast-changing crisis.

In order to conduct relief and reconstruction activities in the most expeditious manner possible, to save lives and to assist affected countries to respond to the public health crisis and to rebuild their economies, an essential aspect of the U.S. Government's response to the tsunami will be the need to quickly initiate a multitude of activities, in both relief and

reconstruction, that respond to the humanitarian and economic crises occasioned by the tsunami. Accordingly, the Administrator has determined that USAID should develop a multi-faceted program to assist those affected by the tsunami, to be carried out through the TRRTF and also implemented in part by Missions in affected USAID presence countries. While the general nature of the goods and services needed for this effort is known, details of the exact requirements for assistance will be refined over time, based in large part on the work of the TRRTF.

The quick delivery of humanitarian relief and quick commencement of reconstruction projects will help enhance the capacity for the people of the affected countries to rebuild and recover as expeditiously as possible. The United States must achieve positive, immediate impact in getting the process of relief and reconstruction underway. Any delay in making assistance available will seriously affect the ability of the United States to achieve its foreign policy goals, including the goal of maximizing immediate humanitarian relief. In short, achievement of U.S. foreign policy and development policy objectives related to the tsunami crisis requires constructive, demonstrable results within a short timeframe.

ANE and DCHA, among others in USAID, will take the lead for the Agency in planning and implementing the proposed program of assistance. USAID will need to use every resource at its disposal to be able to respond quickly and appropriately to the crisis and meet the objectives of the foreign assistance program. Accordingly, consistent with, and drawing upon recent experience with the emergency programs in Afghanistan and Iraq, we have identified the areas of normal USAID implementation procedures, which, with specific regard to the urgent needs of those affected by the tsunami, may lead to unacceptable delay in program implementation. In particular, one "lesson learned" from our efforts in Afghanistan and Iraq is that relief and reconstruction must begin hand-in-hand; we cannot simply wait for the "relief" period to end before beginning planning for and implementation of reconstruction activities. To this end, we recommend that you approve the following blanket waivers that are needed to enable us to expedite and implement activities undertaken in response to the crisis.

The waivers would be effective immediately, would be applicable to all acquisition and assistance to be carried out by USAID for the tsunami response program discussed herein, and would remain in force throughout the life of any activity carried out or initiated under these waiver authorities.

As a matter of law and policy, USAID's normal preference is to follow standard procedures, including full and open competitive procedures, for routine procurements. This enables USAID to obtain the benefits that flow from the standard terms and procedures that have been developed over the years on a Government-wide basis. While we recognize that, in emergency circumstances, these interests must give way to the overriding objective of providing humanitarian assistance on a timely basis, the rationale for streamlining procurement and other project implementation requirements may be less compelling during the longer-term reconstruction phase of our tsunami-related efforts. The benefits that flow from competitive procedures could well outweigh the advantages of expedited or modified procedures. Accordingly, the use of the authorities approved in this memorandum will be reviewed annually and, should conditions warrant, we would make a recommendation as to whether the waiver authorities should be extended or modified (e.g., by limiting subsequent uses of the authorities to particular countries or activities). If approved, the waivers would cover tsunami-related activities in non-presence countries as well as presence countries. The waivers would also cover activities funded from all sources of Agency funding – including U.S. owned/controlled local currency or jointly programmed host-country owned local currency accounts. Finally, the waivers would apply to prior year funding as well as current and future fiscal year appropriations (unless special rules for these appropriations are enacted by the Congress).

Guidance as to the specific use of the waiver authorities (criteria for use, documentation, and reporting) will be developed by M/OAA and GC no later than six months from the date of your approval.

In the context of these proposed waivers, it is important to recall that international disaster and famine assistance (IDFA) funds, Transition Initiative (TI) funds, and certain other types of funding appropriated to USAID have been made available to the Agency “notwithstanding any other provision of law.” This means that these types of funds may be used to provide assistance, notwithstanding prohibitions against assistance to particular countries, activity level restrictions, and/or notwithstanding restrictions relating to competitive procedures or source/origin requirements. Disaster assistance requires special and expedited procedures; notwithstanding authority permits USAID to respond to the needs of disaster victims in a timely fashion, notwithstanding statutory requirements that otherwise might restrict our ability to respond in a timely fashion.

Notwithstanding authority is an extraordinary authority granted to USAID by Congress to use in special circumstances. As a matter of Agency policy to avoid any perception by Congress that USAID is abusing its notwithstanding authority, the clear preference is for USAID to use more conventional waiver authorities when practicable. Therefore, notwithstanding authority should be invoked only if other expedited acquisition and assistance procedures proposed in the memorandum are either unavailable or inappropriate for purposes for which notwithstanding authority is available. It is anticipated that, once USAID begins to transition away from tsunami-related emergency relief activities and into rehabilitation and reconstruction efforts, streamlining procurement and other project implementation requirements by invoking notwithstanding authority will be less appropriate. Because notwithstanding authority flows with the funds that carry notwithstanding authority, rather than being vested in any particular office, it is the Bureau, Office or Mission that will obligate the funds that will have the authority to determine whether to exercise notwithstanding authority. Bureaus, Offices and Missions should consult with the Office of General Counsel or their Regional Legal Advisor if they have any specific questions about using notwithstanding authority or more conventional waiver authorities.

In general, notwithstanding authority never should be used to eliminate from USAID agreements financial accountability provisions, such as those relating to vouchering, audits, reports, and similar matters. Notwithstanding authority should not be used to circumvent USAID policies with regard to responsibility determinations. Regulations on government ethics or employee conduct likewise cannot be disregarded through use of this authority.

Funds appropriated under notwithstanding authority must still be used for the purposes of the particular account or appropriation, i.e., the authority does not change the nature of the funds appropriated. Thus, notwithstanding authority cannot be used to charge an OE cost to a program account nor can this authority be used to provide economic assistance to the military or to fund abortions, among other prohibitions. All decisions to exercise notwithstanding authority should be documented and should be cleared by either GC or the appropriate Regional Legal Advisor.

In addition to possible use of the notwithstanding authorities, we recommend approval of the following waivers for the reasons discussed elsewhere in this memorandum.

RECOMMENDATIONS

A. Approval of Obligations Not Covered by Existing Strategic Objectives (SOs). USAID, working through the TRRTF, will respond to the urgent and unpredictable needs arising from the tsunami and its aftermath. In the current situation, there is no way that USAID is able to prepare a strategic plan for tsunami-related assistance to the affected region in advance of the obligations. In this regard, ADS 201.3.4.5 provides that “[c]ertain programs are exempted from the mandatory procedure described in [ADS 201] including (1) emergency disaster assistance” ADS 201.3.4.5 also provides that in special foreign policy situations where it is necessary to initiate activities prior to completion and approval of a strategic plan, a temporary one-year exemption may be issued. Taken together, the provisions of ADS 201.3.4.5 provide an exception for the emergency relief activities contemplated within the scope of this memo, and if approved, a one-year exemption for the reconstruction activities. As required by ADS 201.3.4.5, PPC and GC clear on the proposed one-year exemption. During this initial period, the Task Force, in particular its ANE and DCHA members, will take the steps to initiate development or modifications of strategic plans, where necessary, for Agency approval.

Approve: *Fredrick W. Scheich*

Disapprove: _____

Date: *February 4, 2005*

B. Authorization for Other Than Fully Competitive Procedures for both Grants and Cooperative Agreements. For grants and cooperative agreements to non-governmental organizations (NGOs) or other eligible organizations, the competition requirements are considered to be met when an announcement is published and recommendation for award is made after an impartial review and evaluation of all applications. In accordance with USAID’s need to expedite programs in the affected region, it is imperative that USAID select its grant-financed partners and get them in operation in the shortest time possible. It will not always be possible to compete grant

applications in the manner required under ADS 303. To facilitate quick implementation of programs to be delivered by grants, we recommend the following:

- (1) Authorizing non-competitive amendments to existing grants and cooperative agreements for additional work similar to that performed under the initial agreement. These extensions would be limited to a two-year period in order to provide the time to obtain subsequent support on a more competitive basis and would count against the ten-year overall limit for noncompetitive extensions (ADS 303.5.5d); and
- (2) Authorizing awards of new grants and cooperative agreements using less than fully competitive procedures. While formal advertising would not be required, applications would be solicited from as many sources as practicable under the circumstances. While our preference will be to solicit from a number of sources, there may be circumstances in which sole source awards are necessary.

Pursuant to ADS 303.5.5(d)(1)(e), competition is not required for assistance awards when justified by circumstances which are determined to be critical to the objectives of the foreign assistance program. The crisis caused by the tsunami calls for immediate action, and USAID's programs in support of relief and reconstruction in the region, which are critical to U.S. foreign policy objectives, must be expedited if it is to be successful. If slowed by the standard competitive process, an opportunity to move quickly on vital relief and reconstruction efforts would be squandered. We recommend that, by approving below, you make the "critical objectives" finding described above and authorize the use of other than fully competitive procedures in making awards under assistance agreements.

Approve: _____

Frederick W. Schick

Disapprove: _____

Date: February 4, 2005

C. Authorization for Other Than Full and Open Competition for Contracts. We recommend that flexible and expedited procurements procedures be approved for USAID direct contracting for the delivery of goods and services for tsunami-related activities in the affected region. Specifically, we recommend that such procurement be undertaken through limited competitive procedures that are quicker as well as less labor intensive than the FAR full and open competitive procedures. As in (B) above, this would apply to all follow-on extensions of existing contractual efforts (again, with the two-year limit as described above), as well as to new procurements.

Under the USAID Acquisition Regulation (AIDAR), you may determine in writing, with supporting findings, that compliance with full and open competitive procedures would impair foreign assistance objectives and be inconsistent with the fulfillment of the foreign assistance program. AIDAR 706.302-70(b)(3)(ii). You have the authority to make such a determination with respect to the entire program, such as the programs and activities which will be developed, coordinated, or implemented by the ANE and DCHA Bureaus and other Agency elements through the TRRTF, as further defined by the formal written determination attached at TAB A. In essence, the programs and activities would be those undertaken in direct response to the tsunami relief and reconstruction effort. The expedited procedures would be utilized for quick reaction activities where the impact of U.S. assistance will be needed quickly. Your approval below would also serve as approval of the formal written determination with supporting findings at TAB A. The Agency Competition Advocate has reviewed the determination. While formal advertising would not be necessary, solicitation would be made from as many sources as practicable under the circumstances. While our preference would be to solicit from a number of sources, there may be circumstances in which sole source awards are necessary. In those circumstances, your approval of less than full and open competition would constitute a sole source justification as required by FAR 603.2-1 and ADS 302.5.8.

Approve: *Andrew W. Schweik*

Disapprove: _____

Date: *February 4, 2005*

D. Source, Origin, and Nationality Waiver. USAID source, origin, and nationality regulations generally require that goods and services acquired under direct USAID contracts be procured from Geographic Code 000 (United States) or Geographic Code 941 (U.S. and developing countries). See ADS 260.3.3. We recommend that Geographic Code 935 (which includes all countries except foreign policy restricted countries) be established as the applicable authorized source/origin/nationality code for any goods and services procured in direct support of the USAID relief and reconstruction program with respect to the tsunami, with a preference for the procurement of U.S. source, origin, and nationality to the extent practicable. The preference for U.S. procurement would be subject to the terms of any promulgated, published policy of USAID effective at the time of the procurement.

Services of local and regional contractors can be used in obtaining access to readily available equipment and materials in nearby countries, enabling implementation to get underway quickly. In addition, the ability to procure from Geographic Code 935 sources can enable USAID to “domesticate” certain aspects of the relief and reconstruction effort, by using all local supplies and subcontractors, ensuring that the maximum benefits of our efforts will go to people of the affected countries. Absent a blanket waiver, USAID would experience significant barriers in providing services in a timely manner and would have to expend significant time and resources to address source, origin, and nationality issues. While USAID is normally precluded from procurement of construction and engineering services from “advanced developing countries by Section 604(g) of the FAA (which, in this context, could arguably include Thailand, one of the most affected countries), this waiver would override that provision, according to the standards of 22 CFR 228, Subpart F.

Motor vehicles are included in the waiver, and your approval below constitutes the “special circumstances” finding required by Section 636(i) of the Foreign Assistance Act of 1961, as amended (FAA), for vehicles procured in direct support of the USAID relief and reconstruction program with respect to the tsunami crisis. However, the preference for U.S. source and origin vehicles is explicitly noted here in this finding, and procurement of motor vehicles from non-U.S. sources will be held to a minimum and carried out only when necessitated by required specifications, spare parts, and maintenance capabilities.

Pharmaceuticals are not included in the waiver; however, if necessary for program purposes, USAID will initiate a review of the technical feasibility of, and prepare a separate waiver for, some procurement of pharmaceuticals from non-U.S. sources, as may be required for timely program implementation, so long as the pharmaceuticals themselves are subject to regulation by a stringent regulatory authority.

22 CFR 228.51(a)(3) and 22 CFR 228.53(c) provide that a source, origin, and nationality waiver for goods or services may be authorized when it is found necessary to promote efficiency in the use of foreign assistance resources, including to avoid impairment of foreign assistance objectives. The regulation, as well as the underlying statute, FAA Section 604(a), provides that such waivers must be made on a case-by-case basis, and GC confirms that this proposed waiver meets this standard.

We recommend that you make the above finding and authorize the waiver of source, origin, and nationality requirements for goods and services purchased in direct support of the USAID relief and reconstruction program with respect to the tsunami, to permit procurement from Geographic Code 935 as the applicable source/origin/nationality code, with a preference for the procurement of U.S. source, origin, and nationality to the extent practicable as described above.

Approve: *Fredrick W. Schweik*

Disapprove: _____

Date: *February 4, 2005*

In addition to the above, the TRRTF will consider other actions, in conjunction with M/OAA, to facilitate the speedy implementation of tsunami-related relief and reconstruction activities. These actions include:

- (1) Ensuring maximum use of existing instruments designed to enable fast track assistance and acquisition processing, e.g., IQCs, grants under contract mechanisms, Leader/Associate assistance instruments if appropriate;

- (2) Encouraging the use of Public International Organizations (PIOs) to the extent their programs and goals are similar to USAID's; and
- (3) Encouraging Minority Serving Institutions and small and disadvantaged business utilization to the degree it can expedite the A&A process.

Attachment:

Tab A – Determination and Finding

DETERMINATION AND FINDING

The U.S. Agency for International Development (USAID) Administrator's Determination Regarding Expedited Procurement Procedures for Programs and Activities Related to Tsunami Relief and Reconstruction

Pursuant to the authority set forth in the USAID Acquisition Regulation, Section 706.302-70(b)(3)(ii), I have determined that it is necessary to use other than full and open competition for programs and activities related to relief and reconstruction following the tsunami of December 26, 2004 in order to avoid impairment of foreign assistance and U.S. foreign policy objectives. This determination is made in consideration of the supporting findings set forth below and will be effective from the date of this signature, subject to annual review, and will remain in force for the period of the programs and activities carried out by USAID with respect to tsunami-related relief and reconstruction.

Supporting Findings

It is imperative that USAID rapidly mobilize contractors and grantees for relief and reconstruction related to the tsunami of December 26, 2004. In particular, quick action is necessary to put into place programs and activities designed to save lives, deliver humanitarian relief, begin work on reconstruction projects, and begin strategic planning for USAID's work in the affected region. Maintenance of civil order, gaining public confidence in central governing authorities, and the promotion of U.S. foreign policy interests require that the flow of assistance take place immediately, without resort to the standard competitive procedures of USAID. The time frame required by fully competitive contracting procedures, if followed, will not enable USAID to act in a manner consonant with U.S. foreign policy in the affected region. The magnitude of the humanitarian crisis and the urgency of the need for immediate assistance call for expedited procurement procedures.

USAID, by seeking offers from as many sources as is practicable under the circumstances, should be able to achieve beneficial, healthy competition while ensuring that assistance is delivered as rapidly as possible.

Prior to using informal or expedited procedures for a particular procurement, as authorized by this determination, implementing offices will consider the feasibility of using full and open competitive procedures as described in the Federal Acquisition Regulation, as well as small business Section 8(a) procurement authorities and minority serving institutions.

All uses of this authority will be documented by the pertinent contracting activity and the pertinent contracting officer. The use of this waiver replaces the need for the justification for other than full and open competition otherwise required by FAR 6.303 when specific contracts are competed under it. USAID will review this waiver on an annual basis to determine the adequacy of the authorities; their continued necessity, if any; or any need for modification.

CLEARANCE PAGE FOR ACTION MEMORANDUM entitled "Expedited Acquisition and Assistance Procedures for Activities and Programs Related to Tsunami Relief and Reconstruction."

Clearances:

ES, Douglas J. Aller
ANE/AA, James Kunder
DCHA/A/AA, William Garvelink
GC, John S. Gardner
DAA/PPC, Barbara N. Turner
M/OAA/OD, Michael Walsh
GC/OAA, John Niemeyer
LPA/AA, J. Edward Fox

OR 2/3
EW for JK
EW for WG
WR for BT
EW for MW
EW for JN
EW for JEF

GC:JGardner:20900:1/16/05:GCPUB/gcpub/docs/Tsunamiprocwaiv.doc

USAID
ACQUISITIVE SECRETARIAT
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LPA/AA, J. Edward Fox

John S. Gardner 1/3/05

GC/ANE: V. Reddy: 12/30/04

GC: J. Gardner 1/6/04

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All uses of this authority will be documented by the pertinent contracting activity and the pertinent contracting officer. The use of this waiver replaces the need for the justification for other than full and open competition otherwise required by FAR 6.303 when specific contracts are competed under it. USAID will review this waiver on an annual basis to determine the adequacy of the authorities; their continued necessity, if any; or any need for modification.