

GUIDE BOOK

***FOR MANAGERS AND
COGNIZANT TECHNICAL OFFICERS
ON ACQUISITION AND ASSISTANCE***



***UNITED STATES
AGENCY FOR INTERNATIONAL DEVELOPMENT
OFFICE OF PROCUREMENT***

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INTRODUCTION

The purpose of this guidebook is to bring together in one volume information that will be helpful to technical officers in performing their duties in the formation and administration of program funded contracts, grants and cooperative agreements. While not providing all the needed information in detail, it does refer to the appropriate ADS chapters and regulations that set out the official policies and procedures. This guidebook does not establish any policies or essential procedures; anything that is not covered in an Automated Directives System (ADS) chapter as policy or essential procedures is only guidance. While such a volume cannot be "complete" it reflects the basic requirements as of Fall 1998.

This guidebook concerns contracts, grants and cooperative agreements with non-governmental organizations as instruments for implementing activities. It covers the following type of actions:

- ! **USAID Direct Grants and Cooperative Agreements:** The transfer by AID of resources to non-governmental entities to accomplish public purposes. USG policy on Grants and Cooperative Agreements is set forth in 22 CFR Part 226. USAID policy and procedures are set forth in ADS 303.*

- ! **Host Country Contracting:** Contracts undertaken by the Host Government which are financed by USAID. ADS 305 contains the policies and procedures applicable to Host Country Contracting. Requirements are discussed in Chapter XV of this Guidebook.*

- ! **Procurement Under USAID-Funded Prime Contracts and Assistance Agreements:** USAID's policy on eligibility of goods and services (i.e., source/origin and nationality, local procurement, restricted and ineligible goods) apply to procurements undertaken by prime and sub contractors and recipients.*

Documents referenced here can be found at the Office of Procurement, Policy Division Home Page on the Intranet (www.usaid.gov/m/op/p).

DEFINITIONS

ACQUISITION: *The purchase or lease of supplies or services through a contract. Synonymous with the term "procurement."*

ASSISTANCE: *The transfer of money, property, services or anything of value to an organization in order to support a public purpose authorized by Federal statute. The instruments that may be used to provide this support are grants or cooperative agreements. Cooperative Agreements include substantial involvement between USAID and the recipient. Grants do not include substantial involvement on the part of USAID.*

ASSISTANCE EXECUTIVE: *Director, Office of Procurement in USAID/W, or his/her designee, who acts as the Agency's coordinator for all matters which may require OMB approval; and makes final decisions for any appeals brought under 22 CFR 226.90 or the Standard Provision entitled "Disputes."*

COGNIZANT TECHNICAL OFFICER (CTO): *As used in this Guidebook, the individual in the office or on the Strategic Objective Team sponsoring the activity who is responsible for the technical oversight and administration of the activity, and it includes the role of Contracting Officer's Technical Representative (COTR). USAID has determined to use the term CTO rather than COTR.*

FEDERAL ACQUISITION REGULATION (FAR): *The primary document containing the uniform policies and procedures for acquisition for all executive agencies. It is issued as Chapter 1 of Title 48 of the Code of Federal Regulations.*

HEAD OF THE CONTRACTING ACTIVITY (HCA): *The official who has overall responsibility for managing the particular contracting activity. USAID contracting activities consist of the Office of Procurement (M/OP), the Office of Foreign Disaster Assistance (BHR/OFDA), the Center for Human Capacity Development in the Global Bureau (G/HCD), and each overseas post. (See AIDAR 702.170-3). Limits on the contracting authority for each HCA are listed in AIDAR 701.601.*

PROCUREMENT EXECUTIVE: *Director, Office of Procurement in USAID/W, or his/her designee, who is responsible to the Administrator, through the Assistant Administrator for Management, for direction of USAID's procurement system, including implementation of USAID's unique procurement policies, regulations, and standards.*

USAID ACQUISITION REGULATION (AIDAR): *USAID's supplement to the FAR, issued as Chapter 7 of Title 48 of the Code of Federal Regulations.*

CHAPTER I

CHOOSING THE APPROPRIATE INSTRUMENT TO IMPLEMENT PROGRAM-FUNDED ACTIVITIES - (USAID-DIRECT)

OBJECTIVE: To present those factors both formal and practical which should be considered in determining whether a Contract, Grant, or Cooperative Agreement is the proper instrument for financing services when USAID is the implementing party.

The formal guidance concerning the choice of instrument is in Automated Directives System (ADS) Chapter 304. While the language of the statutory provisions and Agency policy are clear in many respects, the practical application of these requirements are subject to some interpretation. A list of "practical implications of the choice of implementation instrument" follows. Consideration of these implications may help indicate the most appropriate instrument in a particular case.

PRACTICAL IMPLICATIONS OF CHOICE OF INSTRUMENT

1. ***USAID Administrative Support:*** To the extent possible, contractors and their employees are normally provided with support by USAID to register with the Host Government, get HHE and program goods into the country, obtain drivers' licenses, visas, etc. Recipients of grants and cooperative agreements are normally not provided such support. The capability of a recipient to function independently of USAID should be carefully examined prior to award of assistance instruments.
2. ***Termination:*** A contract may be terminated unilaterally by the Government for "cause," or for "the convenience of the government." Grants and cooperative agreements contain provision for unilateral termination for cause. Grants and cooperative agreements also contain provision for termination for convenience; However, BOTH PARTIES MUST AGREE before such termination is effective. Grants and CAs do provide for unilateral termination by the Government when the Administrator or Deputy Administrator determines that termination is necessary for political reasons such as termination of a country program.
3. ***Cost Items:*** The Government has a high degree of control over contract costs. Salaries above the ES-6 level require approval of the Procurement Executive, differentials and allowances must be within USG limitations. Such limits are not applicable to grants and cooperative agreements. Instead, prior to award of a grant/agreement USAID must determine that the personnel policies and benefits, travel policies and procurement policies of the organization are reasonable. US organizations may "self-certify" their systems with M/OP.

If an organization has certified to M/OP that its systems comply with defined standards set forth in OMB Circular A-110 (as codified in 22 CFR Part 226), no further review is required. Systems of local organizations must be examined and accepted prior to award.

4. *Control Over the Implementation of the Activity: Technical service contracts normally provide for "technical direction" whereby the Government may direct the manner in which the contractor accomplishes the scope of work within the existing terms and conditions of the contract. Under "performance based" contracts the Government should let the contractor implement the work unfettered by micromanagement by USAID, however, USAID does have the authority to direct the activities, if appropriate.*

Under a grant or cooperative agreement the Government does not have the same authority. Instead USAID generally monitors the activities of the recipient through periodic progress reports against stated benchmarks and through site visits to determine if the recipient is using its best efforts to achieve the purpose of the grant or agreement. Cooperative agreements provide for substantial USAID involvement in the implementation of the recipient's program. Appropriate types of substantial involvement are discussed in ADS 303.

5. *Cost sharing: USAID policy effective March 1997 requires that an appropriate level of financial participation be sought from Private and Voluntary Organizations (PVOS) which are recipients of grants and cooperative agreements. The suggested point of reference is a contribution of 25% of the total activity costs; however, application of the policy should be case-specific and flexible. Decisions on specific financial participation requirements shall be made by the Agency officer authorizing the assistance activity at the operational unit level. Normally, cost-sharing is not required under USAID contracts.*
6. *Subgrants: Subgrants can be made under contracts only if the Head of the Contracting Activity (Mission Director) approves an action memo authorizing such subgrants. The draft action memo must be forwarded to M/OP/P for comment and the memo must be cleared by the Regional Legal Officer. Approval should generally be limited to situations where it is not feasible to accomplish USAID's objectives through normal contract and grant instruments executed by USAID and where either (a) the grant program is incidental and relatively small in comparison to other technical assistance activities of the contractor or (b) the burden of executing a number of small grant activities is particularly difficult for the responsible USAID Mission or office. USAID shall have substantial involvement in the establishment of selection criteria and the actual selection of grant recipients. USAID must have the authority to terminate the subgrant activities unilaterally in extraordinary circumstances.*

Chapter II

COMPETITION

OBJECTIVE: *To summarize the requirements for competition for USAID contracts and assistance instruments.*

COMPETITION AND ACQUISITION

There are three levels of competition in contracting when the value exceeds the simplified acquisition threshold of \$100,000.

- ! Full and open competition*
- ! Full and open competition after exclusion of sources*
- ! Other than full and open competition*

Full and open competition is required unless there is a basis to follow another procedure, and it includes contracting through:

- ! Sealed bids*
- ! Competitive proposals*
- ! Other procedures*

Sealed bidding is used when requirements and solicitations are clear and unambiguous. Contractors can prepare and submit bids and the Government can make an award strictly on price and on factors related to price. After submission of bids no discussion between the Government and bidders is permitted. This procedure is not often used in USAID.

Competitive proposals are offers made in response to solicitations that have the possibility of being interpreted with varying degrees of difference by offerors. Often, some discussion is required between the Government and offerors, resulting in modifications to those offers or proposals.

Whether sealed bids or competitive proposals are selected, under full and open competition there is potentially a large universe of prospective bidders or offerors. The more bids or proposals, the better the chances for the Government to obtain a good "buy."

The next degree of competition is obtained when the Government provides for full and open competition after exclusion of sources. This procedure, somewhat less competitive than full and open competition, is used when the Government excludes certain potential bidders or offerors from consideration for a contract in order to establish or maintain alternative sources. This procedure is used to reduce the Government's dependency on one or a few sources or to increase the manufacturing or supply base for national defense reasons.

When used for one of these purposes in the Agency, approval by the Procurement Executive is required. Exclusion of sources is also used for set-aside of acquisitions for small businesses, small and disadvantaged businesses, and labor surplus concerns. No special approvals are required at USAID for participation in set-aside programs. The least competitive method of acquiring goods and services is known as other than full and open competition. Under the method, a bid or proposal is solicited from only one or a few sources. This kind of contracting can be done only in limited circumstances:

The following seven exceptions to full and open competition are listed in the FAR and are applicable government-wide:

- 1. Only one responsible source exists (a sole source acquisition).*
- 2. The agency's need is of such an unusual and compelling urgency that the U.S. Government would be seriously injured unless the agency is permitted to limit the number of sources solicited.*
- 3. It is necessary to award the contract to a particular source or sources to maintain a mobilization capacity in a national emergency; or to set up and maintain a source of essential engineering, developmental, or research work.*
- 4. An international agreement precludes full and open competition.*
- 5. A Federal statute authorizes or requires acquisition through certain sources (e.g., Federal Prison Industries, certain agencies for the blind, utility services, and Government printing and binding).*
- 6. Disclosure of the agency's needs would compromise the national security unless the number of solicited sources is limited.*
- 7. When the Administrator determines that it is in the public interest.*

In addition, USAID's legislation permits an additional exception: impairment of foreign aid programs (40 U.S.C. 474). This authority may be used in the following cases [see AIDAR 706.203-70(b)].

- 1. An award under Section 636(a)(3) of the Foreign Assistance Act of 1961, as amended, involving a personal services contractor serving abroad;*
- 2. An award of \$250,000 or less by an overseas contracting activity;*
- 3. (i) An award for which the Assistant Administrator responsible for the program makes a formal written determination, with supporting findings, that compliance with full and open competition procedures would impair foreign assistance objectives, and would be inconsistent with the fulfillment of the foreign assistance program; or*

(ii) Awards for countries, regions, activities, or programs for which the Administrator of USAID makes a formal written determination, with supporting findings, that compliance with full and open competition procedures would impair foreign assistance objectives, and would be inconsistent with the fulfillment of the foreign assistance program.

4. *Awards under AIDAR 715.613-70 (Title XII selection procedure-general) or 715.613-71 (Title XII selection procedure-collaborative assistance).*
5. *An award for the continued provision of highly specialized services when award to another resource would result in substantial additional costs to the government or would result in unacceptable delays.*

A sample justification for other than full and open competition appears as appendix 2 to this chapter.

The following discussion covers all of the various procurement methods available for use by USAID.

1. Full and Open Competition

- a. *General: Full and Open Competition requires the use of a formal Invitation for Bids (IFB) or Request for Proposals (RFP). Both procedures require advertising in the Commerce Business Daily, listing in USAID's internet location, forwarding of formal solicitation documents to all interested parties and receipt of bids/proposals at a designated place at a specified date and time. Following the receipt of bids/proposals the procedures differ for IFBs and RFPs as follows:*

IFB Procedure: Bids are publicly opened and award is made to the responsible bidder whose bid conforms to all of the Government's requirements and is lowest in price. The IFB procedure is used only when the Government's requirements can be precisely defined, and the only, or most important, award criterion is price.

RFP Procedure: Proposals are opened privately and evaluated against criteria contained in the RFP; a determination is made as to which proposals are competitive, both technical and cost/price negotiations may be conducted with the competitive offerors, best and final offers are requested and award is made to that offeror whose offer, as amended during negotiations, constitutes the best value to the Government based on technical and other defined factors. The RFP procedure is used to purchase services and commodities when the Government's requirements can not be precisely defined and/or there are a number of award criteria besides cost or price.

- b. *Role of Results Package Team: 1) For IFBs the team is responsible for developing a requirement which contains definitive specifications, including shipping, packing and inspection requirements. The team also determines if the bid meets all of the Government's stated requirements.*

2) For RFPs the results package team is responsible for developing a request, which includes a scope of work, evaluation criteria and the government cost estimate, and for appointing a panel to evaluate the technical proposals received in response to RFPs. Detailed guidance for the functioning of a technical evaluation panel is contained as an appendix to this Chapter.

- c. Advantages: Competition should ensure that the necessary commodities and services are obtained at the lowest possible price, or at the best value to the Government.*
- d. Disadvantages: 1) Under the IFB procedure award must be made to the lowest priced responsible bidder whose bid meets the stated minimum requirements. It is not possible to accept a higher priced bid which offers more favorable terms and conditions and/or specifications. 2) The formal RFP procedure is effort-intensive and time-consuming for both the technical office and the contracting office.*

2. Simplified Acquisition (Small Purchases):

- a. General: For all purchases of less than \$100,000 (excluding accessorial costs of freight and transportation) the procurement regulations permit the use of simplified purchasing procedures including procedures for requesting the purchase, competitive requirements, and contract format. The simplified competitive requirements are discussed here.*
- b. Limitations on Use: Small purchases must not exceed \$100,000. Although there is no requirement to group purchases together, a procurement may not be divided for the sole purpose of avoiding the \$100,000 limitation.*
- c. Requirements for Competition: The file must document that reasonable steps were taken to obtain the best deal for the Government. Normally, the requirement is met if a reasonable number of sources were considered. There are requirements for posting notice of procurements over \$10,000 but not over \$25,000, and for synopsis in the Commerce Business Daily of U.S. procurements over \$25,000.*
- d. Role of the Results Package Team: The team is responsible for writing specifications for goods and scopes of work for services. They are also responsible for identifying sources. The team may also solicit proposals from firms for simplified acquisitions. **IN NO CASE, HOWEVER, SHALL A TEAM DO SO WITHOUT FIRST CONSULTING WITH THE APPROPRIATE CONTRACTING OFFICER.** When applicable, the team will advise the contracting officer on the relative technical merits of all proposals received.*
- e. Advantages: Quick. Effort required is minimal.*
- f. Disadvantages: Simplified contract document might not be sufficient for all circumstances.*

3. *Indefinite Quantity Contract (IQC) Task Orders*

- a. *General: USAID/W has negotiated (normally through full and open competition) IQC contracts in most USAID technical subjects. There are normally a number of similar IQC contracts in each technical subject area. Procuring activities may issue orders against these contracts for specific tasks.*

USAID has traditionally used IQCs which can be accessed for services ancillary to activity implementation - design, evaluation, audit, etc. which were restricted in duration. In the last several years, numerous larger IQCs without limitations on task order durations have been awarded. These IQCs are normally for activity implementation. The Federal Acquisition Regulation (FAR) now contains coverage on IQC task order contracts for service which establishes a preference for multiple awards.

- b. *Limitations on Use: Differs with each contract.*
- c. *Requirement for Competition: For IQCs which were awarded prior to FAR coverage on task order contracts, no competition is required when placing orders. Under the new multiple award IQCs, each contractor must be given fair consideration for each order unless it meets one of the exceptions provided in the FAR. Such consideration may consist of a review of the contractor's performance under other delivery orders or a review of the relative price structures of various IQCs if cost is an important consideration. Because of the large size of possible orders (\$ millions) the Agency keeps very close track of the usage of the various contractors.*
- d. *Role of Results Package Team: For older IQCs that do not require consideration of all contractors - following the selection of a contractor, the team checks with the contracting officer to ensure that use of the contract is appropriate and submits a procurement request to the Contracting Office. For IQCs that require fair consideration of all contractors, the team follows the procedures specified in the contract, or justifies selection of a particular contractor based on one of the FAR exceptions.*
- e. *Advantages: Relatively quick since consideration between multiple holders of IQCs is substantially less onerous than full and open competition.*
- f. *Disadvantages: Restricted to firms already holding IQC contracts. Depending on the pricing mechanism (e.g., fixed daily rates, multiplier) it can be more expensive than other contracts.*

4. *Contracts Awarded to "8(a)" Firms*

- a. *General: Section 8(a) of the Small Business Act gives the Small Business Administration authority to contract on a noncompetitive basis with registered profit-making firms owned by disadvantaged persons. Combining that authority with authority to contract with other Government agencies without competition, USAID can obtain the services of firms registered with the SBA without following competitive*

procedures.

- b. Limitations on Use: At least 50 percent of the "cost of contract performance incurred for personnel" shall be expended for employees of the 8(a) firm. This limits the possibilities of the 8(a) firm subcontracting with a non-8(a) firm. Competitive procurements awarded through the 8(a) process (those over \$3 million for USAID's purposes) must be advertised in the Commerce Business Daily.*
- c. Requirement for Competition: No competition is required unless the anticipated value of the award exceeds \$3 million. For contracts of lesser value, limited technical competition between a number of registered firms may be conducted when permitted by the SBA pursuant to a specific written request. When technical competition is permitted, the SBA reserves for itself the final choice of contractor. Cost competition is not permitted in this case.*
- d. Role of Results Package Team: The team is responsible for locating a registered firm. Both technical colleagues and contracting officers usually have experience with a number of registered firms and are able to assist in contractor selection.*
- e. Advantages: It is possible to obtain the services of a very responsible contractor very quickly.*
- f. Disadvantages: Because many registered firms are new to overseas work and to USAID, they may require special support from USAID.*

5. Continuing Activity

- a. General: AIDAR 706.302-70(b)(5) permits noncompetitive award for the continued provision of highly specialized services when award to another resource would result in substantial additional costs to the government or would result in unacceptable delays.*
- b. Limitation on Use: A formal "Justification for Other than Full and Open Competition" must be approved by the Agency Competition Advocate if the period of the action is over one year or the value is over \$250,000. Other justifications may be approved by the Contracting Officer.*
- c. Requirement for Competition: Intention to award must be advertised in the Commerce Business Daily.*
- d. Role of Results Package Team: Must prepare justification for use of authority for incorporation into the formal memo.*
- e. Advantages: Time savings and performance continuity.*
- f. Disadvantages: Lack of competition could result in less than best offer from incumbent contractor and lack of discipline in the negotiation process.*

6. Mission Contracts under \$250,000 and personal services contracts of any value.

- a. General: AIDAR 706.302-70(b) permits other than full and open competition for these categories of contracts for which full and open competition is not appropriate.**
- b. Limitations on Use: The Federal Acquisition Regulation requires that a formal "Justification for other than Full and Open Competition" must be approved the contracting officer. The prescribed format for the approval document is illustrated in the appendices to this Chapter.**

The following class justifications have been executed. If they apply, only a memorandum justifying the source of contractor must be provided.

! Mission Contracts under \$100,000: Reasonable steps must be taken to obtain competition.

! Mission Contracts between \$100,000 and \$250,000: Must be publicized locally sufficiently to ensure that a reasonable number of contractors were notified.

! Local Hire USPSCs of any value: Must be publicized in the same way that the Mission announces direct-hire U. S. citizen positions. Renewals or extensions need not be publicized.

! Off-shore USPSCs, and USPSCs hired for work in USAID/W, of any value: Must be publicized in the USAID Internet Website for a minimum of ten days as described in Contract Information Bulletin 97-17.

! PSCs with CCNs or TCNs subject to the local compensation plan: must be publicized consistent with Mission/Embassy practice on announcement of direct-hire FSN positions. Renewals or extensions need not be publicized.

- c. Requirement for Competition: See b. above.**
- d. Role of Results Package Team: For PSCs, the team is primarily responsible for evaluating individuals as possible contractors. For institutions, the team is responsible for locating sources, but the contracting officer will request competitive informal proposals from those sources. Informal evaluation of the proposals received is conducted jointly by both offices.**
- e. Advantages: Informal competition allows for flexibility in evaluating possible contractors.**
- f. Disadvantages: Restricted competition may result in the selection of other than the most qualified contractor.**

7. Circumstances under which Full and Open Competition would be Inconsistent with the Fulfillment of the Foreign Assistance Act

- a. General:** For programs for which they are responsible, Assistant Administrators may authorize other than full and open competition when compliance with full and open competition would impair foreign assistance objectives and would be inconsistent with the fulfillment of the foreign assistance program. The Administrator has similar authority with respect to all contracts under specified countries, regions, activities or programs.
- b. Limitations on Use:** At times this authority has been interpreted to apply to a wide variety of political, social and program considerations. Any proposed use of this authority should be reviewed with appropriate legal counsel.
- c. Requirements for Competition:** Normally none.
- d. Role of Results Package Team:** Prepares a justification and request to USAID/W for consideration and presentation to the AA or A/AID.
- e. Advantages:** May be the only authority available in politically sensitive circumstances.
- f. Disadvantages:** Requires high level USAID/W involvement.

8. Federal Acquisition Regulation authorities for other than Full & Open Competition

- a. General:** The FAR contains seven authorities under which Other than Full and Open Competition may be authorized. These are as follows:

- ! only one responsible source,
- ! unusual and compelling urgency
- ! industrial mobilization or experimental, development or research work,
- ! international agreement
- ! authorized or required by statute
- ! national security
- ! public interest

Other than unusual and compelling urgency, these authorities are seldom applicable to USAID procurement. Results Package Teams should confer with their contracting officer prior to pursuing actions pursuant to this authority.

- b. Limitations on Use:** A formal "Justification for other than Full and Open Competition" must be approved by the Contracting Officer for procurements under \$500,000 and by the Mission Competition Advocate for other procurements not exceeding \$10,000,000. The prescribed format is illustrated in the appendices to this Chapter.

- c. *Requirement for Competition: Varies with each authority.*
- d. *Role of Results Package Team: In conjunction with the contracting officer, prepares justification for other than full and open competition for approval by the appropriate party.*
- e. *Advantages: Speed.*
- f. *Disadvantages: Restricted competition can lead to selection of other than the most qualified contractor.*

9. *Unsolicited Proposals*

- a. *General: The FAR provides a procedure for contracting on the basis of "Unsolicited Proposals". Unsolicited proposals for contracts are received by the Office of Procurement, Evaluation Division, USAID/Washington who refers them to the appropriate Bureau or Mission for review and evaluation.*
- b. *Limitations on Use: In order to be accepted, an "unsolicited proposal" must be determined to be:*
 - ! *innovative and unique*
 - ! *independently originated and developed by the offeror*
 - ! *prepared without Government supervision*
 - ! *of value to the Government*
 - ! *not an advance proposal for a known agency requirement that could be acquired by competitive means.*

In practice, very few proposals will meet all of these requirements.

- c. *Requirement for Competition: None*
- d. *Role of Results Package Team: If approached concerning a possible unsolicited proposal, the team should direct the offeror to the US USAID/W contact point: M/OP/E.*

10. *GSA Schedule Contracts*

- a. *General: As the central procuring agency for the Federal Government the General Services Administration enters into ordering contracts for everything from computers to paint brushes. These contracts are available to USAID Missions for both administrative and program procurement. The Executive Office procurement office has or can obtain lists of the contracts available.*

- b. *Limitations on Use: Some contracts have maximum ordering quantities. Others specifically are not applicable to overseas ordering activities. Each contract must be examined in detail for such limitations.*
- c. *Requirement for Competition: Under a Multiple Awards Schedule, orders valued over the micro-purchase threshold should be placed with the schedule contractor that provides the best value. Ordering offices should consider reasonably available information on at least three contractors in making a selection.*
- d. *Role of Results Package Team: Works with the procurement office to determine if the required commodities are covered by GSA Schedule contracts. The team then prepares a request.*
- e. *Advantages: Can save time.*
- f. *Disadvantages: Prices on GSA schedule contracts are often higher than prices obtainable through competition.*

11. Commercial Items

- a. *General: Recent procurement reform enables USG contracting officers to "throw away the book" and procure "commercial" and "modified commercial" items through procedures similar to those normally used by the private sector.*
- b. *Limitations on Use: The procedures can only be used for items within the definition of "commercial" and "modified commercial" and for purchases under \$5 million. Contraceptives such as condoms and IUDs have been purchased as commercial items.*
- c. *Requirement for Competition: Procurements must be advertised in the CBD with a commercial description of the item(s). The advertisement could:*
 - ! *announce a meeting in which written/oral bids/offers would be received;*
 - ! *convene a conference telephone call during which time bids/offers would be received;*
 - ! *define any reasonable procedure.*

A bulky IFB or RFP would not be required. A very simple contract format is authorized.

- d. *Role of Results Package Team: Prepare commercial description of item(s) to be procured.*
- e. *Advantages: Great potential savings in both time and effort.*
- f. *Disadvantages: As with any very new system the chance of protest is probably higher than with normal procurement procedures.*

Competition and Assistance

It is USAID policy to require all grants and cooperative agreements be awarded competitively unless an exception is authorized in accordance with the requirements of ADS Chapter 303.

1. Competition Requirements

Basic requirements for competition include publishing an announcement on the USAID Internet site and recommending awards after an impartial review and evaluation of all applications. Either of two different types of documents may be used to accomplish this:

- ! an Annual Program Statement that identifies program areas for which funding is available and invites interested parties to submit applications at any time. Applications may be submitted for a minimum of six months or up to one year during which time several rounds of evaluations and awards may take place;*
- ! a Request for Applications that identifies a specific program activity for which applications are requested and sets a short term deadline, generally from 30 to 45 days, for receipt of the applications.*

If the Results Package team leader authorizes, competition may be limited to local or regional (indigenous) organizations. In such cases advertising in an appropriate local publication will substitute for publishing on the Internet.

2. Exceptions to competition

Competition shall not be required for the following categories of assistance awards when appropriately justified:

- a. Amendments and follow-ons: Amendments to existing awards or follow-on awards for the same activity, or to further develop an existing assistance relationship. This authority shall not be used to extend an award beyond ten years of its original award date unless an exception is approved by the Assistance Executive for U.S. organizations or the Mission Director for non-U.S. organizations.*

The SO/RP Team Leader or Cognizant Technical Officer shall justify in writing why it would be more advantageous for USAID to amend an award or create a new "follow-on" award without the benefit of competition rather than open the process to competition. A justification is not required if the amendment is for strictly administrative purposes (such as incremental funding or changes which do not require budgetary revisions). Amendments which would require justifications are those which, for example, extend the life of the award and simultaneously either add additional funds or change the program description.

- b. *Unsolicited applications: An unsolicited application shall be reviewed and evaluated under the Annual Program Statement it comes closest to fitting. However, awards may be made based on an unsolicited application without the benefit of competition where the application clearly demonstrates a unique, innovative, or proprietary capability, represents appropriate use of USAID funds to support or stimulate a public purpose, and fits within an existing strategic objective. To qualify as an unsolicited application, it must be submitted to USAID solely on the applicant's initiative without prior formal or informal solicitation from USAID.*

The SO Team Leader or the Head of the Operating Unit shall certify that the application was not solicited by USAID; that, based on a review by an appropriate technical specialist and an Agreement Officer, the application is considered unique, innovative, or proprietary; that funding the application would represent appropriate use of USAID funds to support or stimulate a public purpose, and that it fits within a strategic objective.

- c. *Exclusive or Predominant Capability: Assistance awards for which one recipient is considered to have exclusive or predominant capability based on proprietary capability, specialized facilities or technical expertise, or based on an existing unique relationship with the cooperating country or beneficiaries.*

The justification shall describe in sufficient detail the uniqueness of the supported activity and proposed recipient. The SO/RP shall also describe how other options were explored. This exception shall not be used to continue a relationship with a recipient which received a non-competitive award based on the Small Award exception.

- d. *Small Awards: Awards with an estimated total amount of \$50,000 or less and with a term of no more than one year. These awards may not be amended either to add funds beyond \$50,000 nor extend the date beyond one year from the original date of the award. The justification shall explain how the proposed award fits the exception.*

- e. *Critical objectives of the Foreign Assistance Program: Such other circumstances as are determined to be critical to the objectives of the foreign assistance program by the cognizant AA or Office Director who reports directly to the Administrator. The justification shall explain the circumstances which require the exception and shall be approved by the responsible AA or Office Director who reports directly to the Administrator.*

All justifications shall be submitted to the Agreement Officer for review and approval, except that the Foreign Assistance Policy exception is considered final and not subject to the review and approval of the Agreement Officer. All other exceptions may, however, be returned by the Agreement Officer if that Officer is not satisfied with the justification. In such instances the Agreement Officer shall notify the SO/RP Team Leader or Cognizant Technical Officer in writing, explaining the

reasons for rejection. The SO/RP Team Leader or Cognizant Technical Officer may appeal to the Assistance Executive, who shall make a final determination.

Ch. II, App. 1

ORAL PRESENTATIONS

One of the most successful procurement reforms of the last few year is the use of ORAL PRESENTATIONS to receive much of the information traditionally contained in written proposals. Initial USG experience with oral presentations has shown that they can

- ! lower the workload for both offerors and the Government - reduce the chance that superior proposal writing skills will result in an inferior proposal receiving inflated scores*
- ! give the evaluation panel the chance to meet the persons who will actually be implementing the scope of work.*

Most of the information which is evaluated by the technical evaluation panel may be received through the interview process. The actual offer - i.e. the commitment to perform the scope of work during a stated time period for a stated price or estimated total cost plus fee - must be in writing.

Among the areas which can be fully covered during an interview are:

- ! the capabilities and experience of the offeror*
- ! the capabilities and experience of the proposed personnel - the particular technical and managerial approaches of the offeror*

As a new procedure with little history and no "best practices" the interview process must be very carefully planned and executed.

Among the "rules" which pioneering agencies have found to be vital are:

- ! the oral presentation should not be a rehash of a written proposal but in lieu of parts of traditional written proposals*
- ! the interview must be fully recorded (preferably both audio and video) and safeguarded - a time limit must be set and enforced for each offeror - offerors' presenters should be the key persons who will implement the activity.*

Oral presentations offer great benefit but must be undertaken with great care lest they result in time consuming protests.

JUSTIFICATION FOR OTHER THAN FULL & OPEN COMPETITION

ACTION MEMORANDUM FOR THE AGENCY COMPETITION ADVOCATE (See Note 1)

DATE:

FROM: (Requesting Cognizant Technical Officer)

THROUGH: (Contracting Officer)

SUBJECT: *Justification for Other Than Full and Open Competition*

I. PROBLEM

Your approval of a nine month (dates of extension), estimated (dollar value), extension of the technical assistance contract with XYZ Company under Democracy and Governance program through "Other than Full and Open Competition" is requested. Your approval, as the Agency Competition Advocate is required pursuant to the authority provided in AIDAR 706.302.70(b)(5) and (c)(4).

This waiver is requested to permit negotiation of a contract modification with XYZ Company for technical assistance activities under Contract No. _____. This will allow XYZ Company to continue assisting the Ministry of Finance in developing and monitoring implementation of the legislation and regulations decentralizing public finance to local governments.

II. DISCUSSION

XYZ Company has assisted the Ministry of Finance (MOF) in conducting analyses and developing new municipal finance legislation since 1996. Under the previous Government, the MOF and local government experts, assisted by XYZ Company advisors, developed draft policy guidelines for local government finance reform.

The proposal gained wide support within the Government and from the Parliamentary commission on local government which was consulted, but the recent Parliamentary election did not permit moving towards implementation. The current Government confirmed their desire to implement the public administration reform and decentralize the public finance system to local government. In line with USAID/XYZ Company advice, the GOP announced its willingness to extend the system of "own" revenues through local taxes to cover all three levels of local governments once they are established. The Government requested USAID assistance in this respect, including not only drafting legislation but also assistance in developing the regulatory framework, monitoring

implementation, and suggesting revisions following the six month pilot implementation period in 1999.

USAID, understanding the political importance of the reform, responded positively to the request. In terms of the contractual arrangements the only technically appropriate solution is to use the existing XYZ Company contract. This would require extending the scope of the activities to cover issues of financing of all three levels of local government, and extending the PACD by nine months to September 30, 1999.

The MOF is highly satisfied with the XYZ Company advisors' performance, trusts their knowledge, and expects their continuous support throughout the reform effort. Competing the institutional contract at this stage of the reform development, for the proposed nine month extension would cause tremendous disruption to ongoing activities. The political credibility of the Government depends to a large extent on the timing and quality of the decentralization legislation. Any delay in providing assistance from the USG side may affect the timely pace of reform preparation and implementation. Establishing close working relationships with the MOF took the XYZ Company team almost half a year in 1996. Since that time, the XYZ Company advisors have taken an active part in the reform debate, providing on a number of issues true intellectual leadership. At this time, their input to the national debate is widely appreciated and accepted by the MOF and municipal associations. Following is the specific technical justification:

Disrupting the momentum, at the critical stage of policy development: The XYZ Company team has been working on the reform proposal with the Department of Local Government Finance of the MOF since 1996. In 1998, they became advisors to the Deputy Minister of Finance responsible for drafting and implementing the decentralization reform. Changing the team of advisors at this stage would result in unavoidable delays in providing effective technical assistance, caused by installation of new advisors and inevitable need for familiarization with the specificity of the Government's decentralization legislation to be able to again resume intellectual leadership in the debate. It would also result in delay in strengthening the capacity of the Department of Local Government Finance of MOF to administer the new system, at the time of commencing implementation of reform in January 1999.

Specialized personnel: XYZ Company employs under this activity three extremely specialized advisors. All three have experience in fiscal decentralization in this region, and a working knowledge of local and national level issues related to financing local government in the host country. The unique mix of capabilities and experience from makes the team hardly replicable in a short period of time.

Incurring additional costs: Changing contractors for the proposed nine month extension of the existing 3.5 year activity would require USAID to bear the costs of the close-out of the current contract and start-up costs of the new contract. We estimate the costs of this additional demobilization and mobilization to be at a minimum \$90,000 - \$100,000. Given the nine month time frame, this is an excessive cost to the USG.

Non-competitive procurement of services under the existing contract requires the following changes under the SOW:

(1) The Activity Result no 2. will be modified to require from the contractor assisting

development and implementation of the decentralization legislation covering all three levels of local government, and

(2) the contract completion date be extended to (date).

III. JUSTIFICATION UNDER FAR 6.303.2:

The following is the information provided in accordance to the requirement of FAR 6.303.2(a) to justify the use of the specific authority:

- 1. Agency: (Specify USAID Mission or Regional Bureau)*
- 2. Description of the Action Being Approved: Pursuant to the authority provided in AIDAR 706.302-70(b)(5), your approval of this "Justification for a Contract modification through other than full and open competition" is required to permit XYZ Company, to continue providing assistance to the Ministry of Finance for an additional nine months.*
- 3. Description of Services: As part of the nine month extension, XYZ Company will continue to provide technical assistance to the development and implementation of the local government finance reform as a major part of the decentralization of the public finance effort. Technical assistance would also continue to be provided to strengthen the capacity of the Department of the Local Government Finance in the Ministry of Finance, which will administer the new system.*
- 4. Statutory Authority: 40 U.S.C. 474; Full and Open Competition need not be obtained when it would impair or otherwise have an adverse effect on programs conducted for the purpose of foreign aid, relief, and rehabilitation. And, AIDAR 706.302-70(b)(5).*
- 5. Unique Qualification of Contractor: For the last three years, XYZ Company has been the primary implementor of USAID assistance to the Ministry of Finance supporting policy analysis and development of the local government finance reform. The XYZ Company team of advisors has continued to build on a thorough knowledge of field conditions and of activity support requirements, which cannot be gained by another contractor in the final nine month stage of the implementation of this activity. XYZ Company staff have been able to establish excellent rapport within the Ministry of Finance and other concerned institutions, and they are well known and appreciated by counterparts, having proved to be able to provide intellectual leadership in the critical stages of the reform debate at various levels. For these reasons, USAID/_____ believes that it could not reasonably expect to maintain effective continuity of the technical assistance to the development and implementation of the local government finance reform without the assistance on the part of the XYZ Company team currently in place, throughout the proposed nine month extension.*

6. ***Efforts Made to Ensure that Potential Offers and Publication of CBD***

Notice: A CBD notice of the proposed non-competitive contract was published in accordance with FAR 5.2 on (Date) announcing that USAID/ _____ planned to enter into a sole source contract with XYZ Company. The intent of the notice was to identify other potential sources. No expressions of interest were received by expiration the 45 days notice. For the above reasons, USAID/ _____ has determined that, there are no responsible sources available to require that USAID/ _____ do a competitive procurement for the activity extension.

7. ***Determination by the Contracting officer that the Anticipated Cost Will Be Fair and Reasonable:*** See Certification of the RCO below.
8. ***Statement of Reasons for Not Conducting a Market Survey:*** Since this is a continuation of an existing technical assistance contract, we have not done a market survey. Rather, reliance was made on the CBD notice as a means to arouse interest from other competitive sources in the market.
9. ***Other Facts Supporting the Use of Other Than Full and Open Competition:*** As noted above, selection of a new contractor would lead to substantial additional costs to the U.S. Government that could not be recovered through competition (one additional close-down and start-up). Furthermore, competitive procurement of the required services would lead to disruption in the delivery of services, unacceptable delays and increased costs to the implementation and would risk compromising the expected accomplishments.
10. ***Expression of Interests in the Acquisition:*** No sources expressed interest in the acquisition in response to the CBD notice.
11. ***Efforts to Remove or Overcome barriers to Competition in Subsequent Acquisition:*** To enable full and open competition in subsequent acquisition (which there are currently no plans for), the contracting office will generalize the scope of work and advertise in the CBD.
12. ***Contracting Officer's Certification that the Justification is Accurate and Complete:*** See certification of the CO below.

IV. **CERTIFICATION AND DETERMINATIONS:**

- 1) ***As Activity Officer pursuant to FAR 6.303-1(b), I hereby certify that the above information is accurate and complete.***

(Name)

Date: _____

- 2) *Pursuant to FAR 6.303-2(a)(7), I certify that the anticipated cost to the Government will be fair and reasonable.*

(Name)
Contracting Officer

Date: _____

V. RECOMMENDATION:

That you determine that there is only one responsible source and no other services will satisfy agency requirements and that you, therefore, approve the procurement without full and open competition pursuant to the authority vested in you under AIDAR 706.302-70.

APPROVED: _____
James D. Murphy
Agency Competition Advocate

DISAPPROVED: _____
James D. Murphy
Agency Competition Advocate

Date: _____

Date: _____

Clearances:

NOTE 1: *A Justification for Other than Full and Open Competition using USAID's authority for follow-on services in excess of one year or over \$250,000 must be approved by the Agency Competition Advocate. See FAR 6.304 for other approval authorities.*

NOTE 2: *Copies of all approvals exceeding \$100,000 must be forwarded to the Agency Procurement Executive in Washington.*

GUIDANCE FOR TECHNICAL EVALUATION COMMITTEE

MEMORANDUM

TO: (Cognizant Technical Officer)

FROM: _____, Regional Contracting Officer

SUBJECT: Request for Proposal (RFP) NO:

The technical proposals submitted in response to the referenced RFP will be provided to your office as soon as possible after the closing date for receipt of proposals. The procedures to be followed leading up to award of a contract are set forth below. Each member of the USAID Technical Evaluation Committee ("The Committee") should be thoroughly familiar with these procedures.

ALL MEMBERS OF THE COMMITTEE MUST BE AWARE OF THE REQUIREMENTS OF THE PROCUREMENT INTEGRITY LEGISLATION THAT:

DURING THE CONDUCT OF ANY FEDERAL AGENCY PROCUREMENT OF PROPERTY OR SERVICES, NO PERSON WHO IS GIVEN AUTHORIZED OR UNAUTHORIZED ACCESS TO PROPRIETARY OR SOURCE SELECTION INFORMATION REGARDING SUCH PROCUREMENT, SHALL KNOWINGLY DISCLOSE SUCH INFORMATION, DIRECTLY OR INDIRECTLY, TO ANY PERSON OTHER THAN A PERSON AUTHORIZED BY THE HEAD OF SUCH AGENCY OR THE CONTRACTING OFFICER TO RECEIVE SUCH INFORMATION.

PROPRIETARY INFORMATION includes information in a bid or proposal, cost or pricing data, or any other information submitted to the Government by a competing offeror/bidder and designated as proprietary by the offeror/bidder, the head of the agency or the contracting officer. It does not include material otherwise available without restrictions to the Government, a competing contractor, or the public, or material which the contracting officer determines to release.

SOURCE SELECTION INFORMATION includes any information the disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement. All documents produced by the evaluation committee are source selection information and must be marked with the legend: **SOURCE SELECTION INFORMATION - SEE FAR 3.104.**

A. TECHNICAL EVALUATION

- 1. *In accordance with FAR 15.395, you should establish a committee, composed of yourself and, as appropriate, representatives of the host government and other concerned offices, to evaluate the technical proposals based on evaluation criteria set forth in the RFP. Please give the Contracting officer the names and organizational units of the committee chairperson and other voting members, and contact her/him if you need any further advice or assistance. The Contracting Officer will serve as a non-voting consultant to the committee.***
- 2. *No contact relative to the RFP should be made with individual offerors before or during the committee's proceedings without the concurrence of the Contracting Officer. Such unauthorized contact may serve to disqualify an offeror, or in extreme situations, may result in termination of the procurement action. After proposals have been received, and prior to award, no information regarding either the number or identity of the offerors or the results of the committee's deliberations shall be made available to the public or to anyone whose official duties do not require such knowledge.***
- 3. *Each voting member must evaluate every proposal utilizing only the technical evaluation criteria set forth in the RFP. A scoring sheet should be provided to each member by the Chairperson. Each member's scoring sheets should be supplemented by a narrative which describes the strengths and deficiencies of each proposal.***
- 4. *Past performance information must be obtained from the references provided by each offeror on USAID form 1420-66. Once the Agency-wide data bank is fully operational in the Office of Procurement the information will be obtained from that source.***

B. EVALUATION REPORT

After the technical evaluation is completed, the Chairperson shall send a memorandum to the Contracting Officer presenting the committee's composite score and narrative findings for each offeror:

- ! to assist the Contracting Officer in determining which offerors are technically responsible and capable of performing the contract;***
- ! to assist the Contracting Officer in determining which proposals are in the competitive range;***
- ! to serve as the basis for technical discussions; and to serve as the basis for debriefing unsuccessful offerors.***

Copies of the committee members' scoring sheets will be transmitted with the memorandum. If additional information is required to substantiate the scoring, the Contracting Officer will notify the committee.

C. COMPETITIVE RANGE

The Contracting officer is responsible for determining the competitive range of proposals. Offerors not falling within the competitive range will be notified by the Contracting Officer that their proposals are no longer under consideration.

D. NEGOTIATIONS

Written and/or oral discussions may be conducted with all responsible offerors who submitted proposals determined by the Contracting Officer to be within the competitive range. Committee members, the Chairperson, or another representative from the technical office should be prepared to participate in discussions of technical matters.

Discussions will cover both technical and cost items. The purpose of the negotiations is to improve both the technical and cost aspects of each proposal. Normally, negative technical comments made by the evaluation panel will be passed on to the offeror without further comment. It is up to the offeror to determine whether to respond.

Prior to cost negotiations, the activity manager may be requested to review the cost proposals for all competitive proposals. This review will focus on the technical aspects of the cost proposals, such as number of trips, number of days of per diem, items to be purchased, etc.

If the committee wishes to hold discussions with some or all of the offerors, these discussions must be coordinated through the Contracting Officer. When such discussions are held, questions by the committee may relate only to the content of the written proposal as submitted. Modifications to the proposal will not be requested or suggested by the committee. Changes to the proposal by the offeror may not be considered by the committee unless these changes are submitted in writing to the Contracting Officer as a formal modification to the proposal.

E. AWARD

After concluding all negotiations, the Contracting Officer will request proposal revisions and then award the contract to the responsible offeror judged able to perform the contract in the manner most advantageous to the Government, prices and other factors considered. Prior to that decision, the contracting officer will normally consult with the results package team and the committee chairperson, as appropriate.

CHAPTER III

TYPES OF CONTRACT DOCUMENTS

OBJECTIVE: *To define the types of contracts normally used by USAID and the parameters within which they can be used. The terms are not exclusive. The analysis divides the universe of contracts according to payment mechanism, type of services, size of contract and delivery mechanism.*

A. CONTRACT TYPES

The FAR provides for two families of contract types--fixed-price and cost-reimbursement. Each family consists of variations on the type but the essential characteristics within each family are the same. These "names" for the contract types refer to the payment terms. Under fixed price contracts, contractors are literally paid a fixed sum for successful delivery of whatever the contract specified. The fixed price is paid regardless of the cost of performance. Under cost reimbursement contracts, upon successful completion of the agreed upon objectives, contractors are reimbursed for all of their costs that are reasonable, allowable, and allocable under the contract.

The contracting officer chooses the type of contract. This choice can be subject to negotiation with contractors, but generally the final decision rests with USAID. Most of the time, a Contracting Officer will choose to award a contract as one particular type. Sometimes, "one size does not fit all," and it is necessary to issue a contract that is a combination of several of the main types. The characteristics of each major contract type can significantly affect overall cost of the contract and contract administration requirements.

The contract types differ in two key respects. One difference is the amount of risk placed on the Government and the contractor. The other is the degree of contract management or administration that each type places on the Government.

1. FIXED-PRICE CONTRACTS

Although there are several types of fixed-price contracts, the one most commonly used by USAID is the firm fixed-price contract. In this type, the contractor agrees to deliver all supplies or services at the times specified for an agreed upon price that cannot be changed (unless the contract is modified). If the contract price is \$100,000 and the contractor spends \$125,000, the contractor loses the difference. The contractor still must deliver all it promised and the Government need only pay the initially agreed upon price after delivery and acceptance of the supplies or services. On the other hand, if the contractor's cost were only \$80,000, it would make a profit of \$20,000. In order for the Government to use this type of contract it is necessary that there be some basis for determining that the agreed fixed price is reasonable, i.e. competition, catalog prices, cost analysis.

Firm fixed-price contracts place maximum risk on contractors and little or no risk on the Government. The contractor has made a commitment in the contract to deliver all it promised in return for the specified consideration. The Government has the right to receive what it bought for the price it promised to pay. If the contractor fails to perform at the contract price, it is liable for breach of contract, which can bring severe additional costs on the contractor. Because the risk is high to contractors, their incentive to perform according to the terms and conditions of the contract is quite high. Therefore, the Government's contract monitoring requirements are usually far less than those for cost-reimbursement type contracts.

If firm fixed-price contracts confer maximum risk on contractors while minimizing Government risk and if they minimize Government monitoring responsibility, why aren't they usually used for Federal acquisitions? The main reason is that many Government requirements cannot be translated into the definite and clear-cut specifications needed for this kind of contract. For an offeror to prepare a proposal or agree to a fixed-price contract, the specifications must be quite unambiguous and contain little or no uncertainty. If such specifications are possible, then responsible potential contractors are willing and able to develop a fair and reasonably priced offer and to assume a reasonable risk.

Many requirements in the Agency, however, cannot be specified with the certainty required for fixed-price contracts. In the absence of this certainty responsible potential contractors have no way of estimating the price of the work with the degree of accuracy needed for fixed-price contract risk.

In addition to the basic firm fixed-price contract, there are variations of the fixed-price type of contract. These are not widely used in the Agency. Contracting officers are experienced in their use and decide on their appropriateness.

2. COST-REIMBURSEMENT CONTRACTS

Cost-reimbursement contracts, the second family of contract type, are widely used in the Agency. Like the fixed-price contract, there are several variations. The most common is the cost-plus-fixed-fee contract. This type of contract is used when the uncertainties involved in contract performance are of such magnitude that cost of performance cannot be estimated with sufficient reasonableness to permit use of fixed-price type contracts. Rather than guaranteeing to perform all contract terms and conditions at the specified price, the contractor agrees to deliver its "best efforts" to perform the requirements in return for costs incurred and a reasonable profit (called "fee" in the cost-reimbursement arena). This type of contract provides for negotiations of estimated cost and a payment of a fixed dollar fee to the contractor. This fee cannot be changed unless the scope of work in the contract is changed by the parties to the contract.

Because the contractor cannot specify the exact price of performing, it agrees to a "total estimated cost." This total estimated cost represents the best estimate of both the Government and the contractor, agreed to in negotiations. It also is a contract cost limitation that the contractor cannot exceed, except at the risk of non-reimbursement. This

limit can be changed by mutual agreement of the Government and the contractor through a modification to the contract.

Every cost-reimbursement type contract contains a Limitation of Cost clause that limits the contractor from exceeding the total estimated cost. The clause requires the contractor to notify the Government when it expects to reach 75 percent of total estimated costs in the next 60 days. The Limitation of Cost clause spells out the essential nature of cost-reimbursement contracts in terms of contractor performance obligations and cost limitations. For cost-plus fixed-fee contracts, the Limitation of Cost clause can be found at FAR 52.232-20. Many USAID contracts are funded with incremental funding. In those contracts, the Limitation of Cost clause is replaced by the Limitation of Funds clause (52.232-22) which has essentially the same obligation.

The Government's risk is commensurately high. The contractor's risk is minimal in that it only promises to do its best (or "use its best efforts") to perform the work. No guarantee is given to the Government. Failure to do the specified work will not be a breach of contract, nor will it cost the contractor any money, so long as it used its best efforts. If the work is not completed and the costs have been reimbursed to the contractor, the Government has two options: it can elect not to add funds to the contract and therefore not get any further work, or it can elect to add money to the contract to fund the remaining work. This latter action is known as funding the cost overrun.

Cost overruns are an unavoidable risk of the cost-reimbursement type contract. While overruns are occasionally caused by contractor waste or inefficiency, far more often they are due to the unavoidable lack of certainty in contract requirements. Given the nature of the work acquired by cost-reimbursement contracts, contractor performance often evolves in ways neither the contractor nor the Government foresaw at the time of award.

Because of the Government risk and lack of guaranteed performance, cost-plus-fixed-fee contracts must be monitored far more closely than fixed-price types to ensure that the contractor is indeed providing its best efforts and is judiciously expending funds and controlling cost.

Within the cost-plus-fixed fee family of contracts, there are two sub-classifications:

- a. Level of effort (term): The Contractor is required to apply resources and best efforts to provide a person or team of persons to perform specified work. Prior to the Agency's re-engineering, this was the predominant type of contract used. The contract would be written for particular number of "person days", which the Government specified prior to contract award. Under a level-of-effort type of contract, there is no enforceable relationship between the effort bought and results desired.*

In certain instances, this is a good type of contract to use. When USAID does not know what results the contractor needs to achieve, as in the case of research or data gathering activities, this is a useful type of contract.

A major drawback of the level-of-effort type contract, is that once the effort has been

expended, the contract is over. Contractually, additional effort is considered additional deliverables, which requires either a new competitive contract or a non-competitive justification in accordance with FAR/AIDAR requirements.

- b. Completion: The completion form describes the scope of work by stating a definite goal or target and specifying an end product. This form of contract normally requires the contractor to complete and deliver the specified end product (goods or services) within the estimated cost, if possible, as a condition for payment of the entire fixed fee. However, in the event that the work cannot be completed within the estimated cost, the Government may require more effort without increase in fee, provided the Government increases the estimated cost.*

This is a good type of contract to use when results are known in advance, but the amount of risk to the contractor is too great for a fixed price contract to be cost effective.

In addition to the cost-plus-fixed-fee contracts, there are several other kinds of cost-reimbursement type contracts. At least four of these are used at USAID:

- ! Cost contracts. These are identical to the cost-plus-fixed-fee contract except they contain no fee. Reimbursement is made only for appropriate costs. This type is usually used for research and development work, particularly with nonprofit education or other non-profit organizations.*
- ! Cost-sharing contracts. These are cost reimbursement contracts in which the contractor receives no fee and is reimbursed for only an agreed-upon portion of costs. The contractor, in effect, agrees to share a portion of the costs in expectation of some future gain or benefit.*
- ! Cost-plus-award-fee contracts. These are similar to the cost-plus-fixed fee contract except that they set two fee levels. One is a base amount fixed at inception of the contract. The other is an award amount that the contractor may earn in whole or in part during performance. The amount of the award fee to be paid is determined by the Government's evaluation of the contractor's performance in terms of stated criteria in the contract. Periodic evaluations at stated intervals are made so that the contractor will be kept informed of the quality of its performance and the areas in which improvement is expected. The award fee inducement is to provide motivation for excellence in such areas as quality, timeliness, technical ingenuity, and cost-effective management. This type of cost-reimbursement contract requires substantive administrative effort on the part of the Government for the period, cost analysis and negotiation of subjective fee amounts. It should only be used on high dollar value activities where the expected benefits warrant the additional time and cost of administration.*
- ! Cost-plus-incentive-fee contracts. These are cost-reimbursement contracts that provide for an initially negotiated fee that is adjusted later by a formula based on the relationship of total allowable costs to target costs. When a*

fixed-price contract is not possible, and cost-control is an important concern, this is an effective type of contract to use.

3. **OTHER TYPES OF CONTRACTS**

Besides the fixed-price and cost-reimbursement contracts, there are other contract types. The most important, in terms of Agency use, are described briefly below. Technical officers should consult with contracting officers about use of these types.

a. Indefinite Delivery Type Contracts

If the exact delivery date is unknown when the contract is written, a choice may be made from three types of indefinite delivery contracts:

- ! A definite-quantity contract provides for delivery of a specific amount of supplies (or performance of services) within a given period, at designated locations, on the order of the Government.*
- ! A requirements contract obligates the contractor to fulfill all acquisition requirements of designated activities for specific supplies or services as the orders are placed during the contract period.*
- ! An indefinite-quantity contract (IQC) is similar to the definite quantity contract, except that no specific quantity is stated. Instead, the contract establishes minimum and maximum limits on the amount that can be ordered at one time, and on the total quantity.*

Several indefinite delivery contracts are available for agency-wide use. Awarded by USAID/Washington and missions, these contracts are for a variety of goods and services ranging from accounting services to blankets and bottles. Most are for management consulting. A consolidated listing of these contracts can be found on the external web at: http://www.info.usaid.gov/procurement_bus_opp/procurement/iqc.htm

b. Time and Materials and Labor-Hour Contracts

A time and materials contract provides for payment for supplies and services on the basis of the number of direct labor-hours required and the cost of materials used. The contract sets forth a rate of payment for each direct labor-hour; this rate, which is negotiated, includes an allowance for overhead and profit. The contract also provides that the Government reimburse the contractor at "cost" (as defined in the contract) for materials used. The labor-hour contract is a variation of the time and materials contract, differing only in that it does not provide for payment for materials. Use of the time and materials or labor-hour form of contract is suitable when neither the extent, the duration, nor the cost of the work can be estimated with reasonable accuracy at the start (for example, engineering and design services relating to production, repair, maintenance, or overhaul work).

These types of contracts are quite similar to cost-reimbursement contracts. They need intensive monitoring by technical officers to ensure that the contractor is operating efficiently and is exercising effective cost management and control. Also, like cost-reimbursement contracts, materials and labor-hour contracts have ceilings that the contractor exceeds at its own risk.

Use of "Fixed Daily Rates" under time-and-materials task order contracts has become popular in recent years. A variation of the old "multiplier" contracts, the cost of labor is supposed to include salaries, benefits, and overhead, plus profit and minimal accessorial costs such as computer rental, home office support, and office supplies.

Travel, allowances, and other miscellaneous costs are supposed to be billed separately on a reimbursable basis. These, and the "multiplier" contracts, are an extremely expensive method of delivering development assistance are vulnerable to having contractors propose highly qualified, high-salaried individuals at the top range of a fixed daily rate, and then deliver people who are not as qualified or highly paid.

The main advantage to using this particular mechanism lies in the short procurement lead-time; a task order can potentially be awarded in three weeks, and this is a very attractive alternative to the longer time needed to award a competitive RFP. However, it has not been determined whether the time savings during the award process offsets the high cost of the development assistance bought under these contracts, and if overall the Agency is delivering the most development assistance for its money.

****** *Caution: It is especially important for the cognizant technical officer to thoroughly examine vouchers under task order contracts to make sure that the Government is not being double charged for expenses. As these contracts vary widely, cognizant technical officers must become familiar with what the "loaded" rates do and do not include under each contract they manage. For example, if a loaded rate is supposed to include home office support, this cost should not be allowable as a direct charge, even if it is renamed something like "logistics," or "operations support." Contractor accounting systems will allow them to recover these costs elsewhere. Cognizant technical officers are encouraged to question costs and consult the contracting officer for support. Challenging and disallowing such improper double charges will enable more USAID funds to be spent on development activities.*

4. PERSONAL SERVICES CONTRACTS

- A.** *PERSONAL SERVICES CONTRACT is one in which an employer/employee relationship is created between the Government and the person(s) performing the services. Such a relationship exists when as a result of the contract's terms or the manner of its administration during performance, the contractor is subject to the relatively continuous supervision and control of a Government officer or employee.*

The Foreign Assistance Act of 1961, as amended, authorizes USAID to contract for personal services, provided that the contract is directly with the individual who performs the services and that the services are performed overseas. Personal services contractors are not

considered to be government employees for the purposes of laws administered by the Office of Personnel Management. They are subject to the same treatment as direct hires in other respects, however, including liability for payment of U.S. Federal income taxes on income earned overseas. There are also personal services contractors in USAID/W who are funded with appropriations that allow actions to be taken notwithstanding other provisions of law.

Any contracted services which are not included within the definition of PERSONAL SERVICES are NON-PERSONAL SERVICES.

B. Other Documents

1. Ordering Agreements

Basic ordering agreements (BOAs). A basic ordering agreement is a written understanding with a contractor containing the terms and conditions that will apply to future orders and includes a description, as specific as practicable, of the supplies to be furnished or services to be performed when ordered and a description of the method of determination of the prices to be paid. The BOA lists the activities that are authorized to place orders under the agreements, but it is not a contract and cannot be used to restrict competition.

2. Purchase Orders

Simplified procurement procedures may be followed for contracts for less than \$100,000. One of the simplified procedures is the use of a PURCHASE ORDER simplified format. A purchase order does not constitute a contract until the vendor either signs the purchase order or begins performance. Purchase orders must be either FIXED PRICE or FIXED RATE. They are not sufficient for cost-reimbursement contracting.

CHAPTER IV

COMMODITY PROCUREMENT CHOICE OF CONTRACTING AGENT

OBJECTIVE: *To discuss the advantages and disadvantages of the following agents which can be used to perform commodity procurement.*

- ! Host Country Agency*
- ! General Services Administration or the Veterans' Administration*
- ! Procurement Services Agents under IQC's*
- ! Procurement Services Agent under separate host country or direct contract*
- ! Implementation Contractor, either direct or host country*
- ! Mission Executive Office*
- ! Mission/Regional Contracting Officer*

All procurement of Automated Data Processing equipment exceeding \$100,000 must be approved by M/IRM. Guidance for requesting IRM reviews appears at the end of this Chapter.

1. Host Country

- a. Advantages: Being more directly involved in the procurement fosters the host country institution's identification with the activity and its success. It also advances the important goals of institutional development and sustainability.*
- b. Disadvantages: Often host country procurement regulations conflict with USAID regulations and are unduly burdensome and time-consuming. Corruption can be difficult to control.*

2. General Services and/or Veterans' Administration

- a. Advantages: The procurement offices of these agencies are highly qualified to buy technically complicated and sensitive items such as medicines and medical equipment. Their depth of experience is often unmatched and can ensure that highly technical procurements are successfully conducted.*
- b. Disadvantages: The time required by the General Services Administration or the Veterans' Administration to procure is often unacceptably long.*

3. Procurement Services Contractor under IQC

- a. Advantages: Properly utilized these contracts can provide professional procurement services with minimum delay.*

- b. *Disadvantages: As shown by the recent USAID/W experiment with IQCs for world-wide use, it is very difficult to design an IQC mechanism which will serve a wide range of customers.*

4. *Procurement Services Contractor under Separate Host Country or Direct Contract*

Because the value of the commodities to be purchased is not included in the contract amount but is provided outside the contract through a letter of commitment, informal limited competition is appropriate if the value of the procurement services is less than \$250,000. The following illustrative PSA fee levels are based on prior experience:

- ! *Laboratory equipment: 4-8% of FAS value of commodities.*
- ! *Vehicles: 1-25% of FAS value of commodities.*
- ! *Construction equipment: Less than 1% of FAS value of commodities.*
- ! *Computers: 2-3% of FAS value of commodities.*

- a. *Advantage: May be the most efficient for large purchases.*
- b. *Disadvantage: Not appropriate for smaller procurement requirements.*

5. *Implementation Contractor, either Host Country or Direct*

- a. *Advantages: Coordination of commodity procurement with other activities is strengthened. Some contractors such as state universities have sophisticated procurement offices which are capable of very efficient procurement operations.*
- b. *Disadvantages: Could be less than successful if the contractor is not experienced in commodity procurement. PSA subcontractors may not be a good choice since USAID, being unable to deal directly with the subcontractor, will have difficulty directing the procurement activities.*

6. *Mission Contracting Officer or Executive Officer*

- a. *Advantages: The contracting officer is professionally prepared to cover all contracting matters and to react more quickly than others to meet urgent requirements.*
- b. *Disadvantages: May lack some expertise in technical areas of commodity procurement such as specification development, shipping and insurance.*

**REVIEW OF ADP PROCUREMENT BY THE
OFFICE OF INFORMATION RESOURCES MANAGEMENT (IRM)**

Although IRM review is only required when the ADP components of purchases exceed \$100,000, IRM will provide analytical support regardless of the amount upon request. When requesting IRM review, provision of the following information will speed up the process:

- ! Activity name, number and overall purpose. It is also helpful if the name and number of the USAID/W technical backstop officer is provided.*
- ! Narrative telling what use will be made of the computer. Include any needs assessment and requirements analysis and feasibility studies.*
- ! Descriptions and estimated costs for all components of information processing activity, including hardware, software, training, maintenance and support. If a particular brand is requested, provide selection justification, brand name and model numbers. If custom programming is required, include time and cost for its development. Include description of training program and its estimated costs.*
- ! Level of maintenance and training support available from local vendor. If none, explain how support will be provided.*

IRM has professional analysts under contract to travel to Missions to assist with ADP planning. Missions need only fund the travel, per diem, overhead and fee for such visits as IRM covers the salary costs. Contact the Consulting and Information Services Division of M/IRM for details.

CHAPTER V

STATEMENTS OF WORK

OBJECTIVE: *To provide guidance on preparing statements of work for contracts.*

GENERAL

The statement of work (SOW) is probably the single most critical- document in the acquisition process. It describes the work to be performed or the services to be rendered and desired results, defines the respective responsibilities of the Government and the contractor, and provides an objective measure so that both the Government and the contractor will know when the work is complete and payment is justified. The statement of work is a very important part of the RFP and it is essential that it clearly communicate the requirements of the contract.

The SOW must be precisely worded because it will be read and interpreted by a variety of people, such as attorneys, acquisition personnel, cost estimators, accountants, and technical specialists. If the SOW does not state exactly what is wanted, or does not state it precisely, it will generate contract management problems. Ambiguous statements of work often result in unsatisfactory contractor performance, delays, disputes, and higher contract costs.

Statements of work are sometimes referred to administrative boards or the courts for interpretation. These interpretations represent what an objective third party thinks is the intention of the document. Generally speaking, the court or board will not concern itself with what the drafter intended to express, but will look at what was expressed. This determination is usually made solely on the basis of the words used and the context in which they appear.

How the statement of work is written affects the entire acquisition cycle. It determines the type of contract that is awarded, it influences the number and quantity of proposals received, and it serves as a baseline against which to evaluate proposals, and later, contractor performance. Thus, the SOW is the key element in shaping and directing all three stages of the acquisition cycle: pre-solicitation, solicitation and contract award, and post-award administration.

In the pre-solicitation phase, the SOW establishes the parameters of the Government's requirements so that the technical officer and/or SO Team Leader and contracting officer can determine the best way to accomplish them. Therefore, the SOW must articulate objectives of the activity. It must also establish actual minimum requirements for performance of the proposed work.

In the solicitation and award phase, the SOW is the vehicle that communicates the Government's requirements to prospective offerors. At this stage, the SOW guides the offerors on the content of their technical proposals. When a contract is awarded, the SOW becomes part of the contract between the two parties, stating what has been offered by the proposer and accepted by the Government.

Therefore, the statement of work defines the work to be done, including tasks the contractor must undertake, types or stages of work, sometimes the number and type of personnel, sequence of effort, and reporting requirements. The SOW must also establish a guide for technical evaluation of the proposals. Both the offeror and the evaluators need a list of factors that clearly state how the agency will evaluate the offers. The technical evaluation criteria are not part of the SOW itself but, because they relate directly to the requirements specified in the SOW, they must be carefully considered when preparing it.

At the post-award stage, the SOW provides the mechanism for defining the work or products that are to be produced and the deadlines for producing them. To be effective at this stage, the SOW should provide a guide for monitoring the progress of work by specifying what products should be delivered or tasks accomplished at specific times during the course of the contract. The SOW also should describe the products to result from the work effort and set the standards of contractor performance.

COMMON ELEMENTS OF STATEMENTS OF WORK

Because each acquisition is unique, each SOW must be tailored to the specifics of the activity. The elements of a SOW will vary with the objective complexity, size, and nature of the acquisition. In general terms, it should cover the following matters, as appropriate.

Background. *This section describes the requirements in general, non-technical terms. This section should explain why the acquisition is being pursued and how it relates to past, current, or future activities. Include a summary of statutory program, authority and any regulations that are applicable. If any techniques have been tried and been found to be effective, they should be included here.*

Program objectives. *This section should be a succinct statement of the purpose of the acquisition. It should outline the results that the Government expects and may also identify the benefit to the program that is contemplated.*

Scope of work. *This section provides an overall, non-technical description of the work to be performed. It expands on the objectives, but does not attempt to detail all of the work required. This section identifies and summarizes the various phases of the program, and defines its limits in terms of specific objectives, time, special provisions, or limitations. It must be consistent with the detailed requirements.*

Detailed technical requirements. *This is the section that spells out most precisely what is expected of the contractor in the performance of the work. It describes the specific tasks and phases of the work and may specify the total effort each task or phase is to receive. Considerations that may guide the contractor in its analysis, design, or experimentation on the designated problems should also be included here. This section identifies the requirements (i.e. training, computer modeling, tests, verification, etc), and indicates the scope of each. It gives the parameters of tests, for example, and the criteria governing the number of designs, performance, numbers of tests, etc. It also identifies any budgetary, environmental, or other constraints. If more than one approach is possible and the Government prefers a particular approach, it should be identified here. If applicable, this section should also state the criteria on which a choice of alternative approaches will be*

based. If end products or deliverables will be required under the contract, they should be clearly and firmly defined here, and the criteria for acceptance should be given. Delivery or completion schedules are expressed either by calendar date or as a certain number of days from the date of contract award. When using the latter method, specify whether work days or calendar days are meant.

Reporting schedule. This section of the SOW specifies how the contractor shows that it has fulfilled its obligations. It defines the mechanism by which the contractor can demonstrate progress and compliance with the requirements and present any problems it may have encountered. This is usually accomplished through monthly, bimonthly or quarterly progress reports. This section should discuss what areas the reports are to cover, the format, the criteria to be used in accepting reports, the number of copies the contractor should submit, and to whom they should be submitted. It is important to require the preparation and submission of technical and financial progress reports to reflect contractor certification of satisfactory progress. If possible, the reports should be coordinated to provide a correlation between costs incurred and the state of contract completion.

Special considerations. This section can be included if there is any information that does not fit neatly or logically into one of the other sections. For example, it may be used to explain any special relationships between the contractor, and other contractors working for the Government.

References. This section provides a detailed list and description of any studies, reports, and other data referred to elsewhere in the statement of work. Each document should be properly described, cited, and cross-referenced to the applicable part of the work statement. If documents will not be attached to the request for proposal, this section should tell where they can be obtained, or when and where they will be available for review.

Guidelines for Preparation of Statements of Work

In April 1991 the Office of Federal Procurement Policy issued new policy guidance applicable to all Federal Agencies that:

- ! Agencies use Performance-Based Contracting Methods to-the maximum extent practicable when acquiring services,*
- ! Agencies carefully select acquisition and contract administration strategies, methods and techniques that best accommodate the requirements, and that*
- ! Agencies justify the use of other than performance-based contracting methods when acquiring services and document affected contract files.*

For USAID purposes, Performance Based Contracting requires that statements of work shall to the maximum extent practicable describe the work in terms of "what" is to be the required output rather than "how" the work is to be accomplished. This requirement, which closely parallels USAID's current emphasis on "results", means that we can no longer as a matter of operating policy write contract statements of work that merely define the various positions on a technical assistance team. Instead we should define the results required and let prospective offerors

determine the best way to obtain those results.

In addition we should assign to contractors full responsibility for quality performance. This requires that USAID's posture be of assessing contractor performance against performance standards rather than of managing the contractor's efforts.

Results Package Teams should seek to define precise "targets" for each contemplated contract. If "targets" can be defined and a firm cost estimate can be developed a firm fixed price contract should be utilized. If a firm cost estimate cannot be developed a completion type cost reimbursement contract should be utilized. A completion type cost reimbursement contract with an incentive or award fee may be appropriate in some circumstances, but is not often used for USAID work as it is difficult to administer. A level of effort cost reimbursement contract should be considered only if "targets" cannot be defined and the team still believes that services should be purchased.

All statements of work should be reviewed in draft by the contracting officer - the earlier the better. The following guidelines are offered for SOW preparation.

A. USE SIMPLE, CONCISE ENGLISH:

State the responsibilities of the contractor and the government clearly. During its life a SOW will be reviewed by contractors, contracting officers, lawyers, government auditors, controllers, executive officers, Mission Directors, evaluation teams etc.; few of whom will be competent in all technical areas. Acronyms should never be utilized unless first defined.

B. PROVIDE ALL NECESSARY INFORMATION REQUIRED BY OFFERORS:

In addition to defining what the Contractor must do under the contract the statement of work provides the basis against which offerors prepare proposals. All information necessary to prepare a responsive proposal must be included either in the statement of work or as attachments to the request for proposals. Failure to provide all required information in the initial request for proposal will likely delay the procurement as the solicitation is amended to provide all prospective offerors with the additional information.

C. STATE RESPONSIBILITIES CLEARLY:

- 1) Clearly state the specific responsibilities of the contractor such as "The Contractor shall", "The Contractor will Do not use mushy phrases such as "it is expected that the contractor will "A report will be prepared (by whom???)", etc.*
- 2) Place the responsibility on the contractor. When dealing with organizations, place the responsibility for success on the institution, not on the persons assigned by the contractor to perform the work.*

D. DON'T CREATE UNWORKABLE RELATIONSHIPS:

Don't put the contractor into an impossible situation by making him/her responsible to more

than one person. Make clear that all technical interpretations, re-directions etc. are the sole responsibility of the one named technical representative of USAID, the Cognizant Technical Officer (CTO).

E. DON'T CONFUSE THE TWO TYPES OF CONTRACTUAL REPORTS:

AID activities often require two types of reports: those that report on the implementation of contract activities and those that are the "deliverables" of the contract activities.

Progress reports are tools to help USAID manage the contract. The AIDAR provides coverage on progress reports. The number of copies, language, and to whom they should be submitted etc. should be set out clearly.

Other reports are "deliverables" and should be set forth in detail in the statement of work.

F. KEEP IT CLEAN:

SOWs should not be cluttered with instructions to offerors, desired reporting procedures and/or evaluation criteria. While both of these are important and belong in the procurement request and RFP, they should not be included in the SOW.

GUIDELINES FOR PREPARATION OF TECHNICAL EVALUATION CRITERIA

Contract award will normally be made on a "best value" basis in which technical excellence is the most important factor but in which cost realism is important and can be the determining factor if proposals are closely ranked technically. It is the responsibility of the Activity Manager to design a package of technical evaluation criteria which will result in the selection of the best contractor. In designing criteria for an individual procurement the following should be carefully considered.

- 1. The "negotiated competitive procurement" procedure is a "subjective" one. It is not meant to be "objective." Evaluators should have wide latitude in applying the assigned weights. Attempts to break down criteria into sub-criteria and assign each a separate weighting are not founded in sound logic and could result in an evaluation wherein the proposal receiving the highest score is inferior to others or, in extreme cases, is not acceptable.*
- 2. Based upon "consensus" that the best indicator of future success is past success, quality of past performance should be assigned a weight in proportion to how well past performance will be an indicator of the offeror's ability to perform the specific contract successfully and how well it would support comparison and discrimination among competing proposals.*
- 3. For long term contracts the second best indicator of future success is the "chief of party" or "team leader." The leadership abilities of the nominee, his/her technical competence and the closeness of the nominee to the offering firm are all extremely important to the ultimate success of contract implementation.*
- 4. Under performance based contracting offerors should be granted latitude to propose a creative implementation plan rather than simply supply bodies to fill slots identified and dictated by USAID.*

Activity managers are urged to draft evaluation criteria reflecting the factors listed above - without reference to criteria utilized for prior procurements. The draft criteria should then be discussed with the Contracting Officer and compared to criteria used for previous procurements.

CHAPTER VI

CONTRACTING OFFICER AUTHORITY

OBJECTIVE: *To list those USAID offices/officials who have authority to execute contracting/assistance instruments on behalf of the USG.*

NOTE: *Limitations on the authority of Mission Directors and Executive Officers apply to the cumulative total value of the contract or agreement including the original contract and all modifications. Limitations on Warranted Contracting Officers' authority apply to the value of each individual action, not the cumulative value of the contract or agreement.*

OFFICER

AUTHORITY

Mission or Regional Contracting Officers

Contracting Officer and Regional Contracting Officers in larger missions normally have unlimited authority to sign contracts and assistance documents. Others have authority to sign documents not exceeding some stated level. These authorities are delegated to specific persons. Re-delegation is not possible.

Mission Directors

Authority to sign contracts the value of which do not exceed \$100,000 and to sign personal services contracts the total value of which do not exceed \$250,000.

The Mission Director may redelegate to named Mission US Direct Hire employees authority to sign contracts not exceeding \$50,000 using simplified acquisition procedures.

Authority to sign ADS 303 grants, and cooperative agreements not exceeding \$100,000 to U.S. and non-U.S. organizations. [Mission Directors may receive warrants to sign assistance agreements not exceeding \$1 million to indigenous organizations.] Authority to sign contracts, ADS 303 grants and cooperative agreements is delegated to the position and may be exercised by anyone serving as "Acting" Mission Director. Any authority received by warrant may not be delegated.

Executive Officers

Normally have authority to sign PSC contracts not exceeding \$250,000 and other contracts not exceeding \$100,000. This authority is delegated to specific persons and can not be redelegated.

CHAPTER VII

REQUESTING CONTRACT/GRANT/AGREEMENT ACTIONS

OBJECTIVE: *To introduce essential substantive aspects of the A&A Module of the New Management System.*

All actions requesting the negotiation of contracts, grants, cooperative agreement, PASAs and RSSAs and amendments thereto are initiated through the A&A (Acquisition and Assistance) Module of the computer based NMS (or through MAARDS until the time when the NMS is fully operational.)

Both the A&A module and MAARDS are for the most part mechanical changes from the previous PIO/T, PIO/C, PIO/P system. This guidebook does not provide general guidance in the use of the system or in the preparation of MAARDS.

Guidance is provided, however, in the following substantive areas which have been changed with the introduction of the NMS (and MAARDS). These areas which are discussed below are:

- ! Line Item Numbers*
- ! Resource Category Codes*
- ! Product Service Codes*

- I. LINE ITEM NUMBERS (LINS):** *Any activity supported and any commodity or service purchased by USAID must be identified by Line Item Number (LIN). In addition LINS are the units for creating budgets and for specifying delivery requirements. The rules differ for different types of instruments as set forth below:*
 - A. Grants and Cooperative Agreements:** *Each grant and cooperative agreement may have ONLY ONE LIN - identified as the entire Program Description.*
 - B. Contracts - Commodities:** *Each different item to be purchased will be assigned a Line Item Number.*
 - C. Contracts (other than personal services contracts):** *Most statements of work will define one or more specific activities to be performed by the contractor. Each of these items will be assigned a LIN. Under cost reimbursement contracting each LIN will be assigned a separate cost reimbursement budget. Separate delivery dates may be assigned for each LIN. Separate LINS are required for equipment (see Note 1) , training (see Note 2) and fee.*
 - D. Personal Services Contracts:** *Each category of cost, i.e. salary, differential, allowances, travel etc. be assigned a separate LIN.*

II. Product Service Codes (PSCs): Each LIN must be assigned a Product Service Code, a four digit code maintained by the General Services Administration, that identifies the predominant product or service being procured. The codes are available on-line by using the "code look-up" feature in A&A. The negotiator and contracting officer will be responsible for ensuring that the proper code is selected. The code 9999 shall be used for all line items that are intended to result in a grant, cooperative agreement, PASA or RSSA.

III. RESOURCE CATEGORY CODES (RC) Each LIN must also be assigned a Resource Category Code. The most often used RCs are as follows:

<i>Grants/Cooperative Agreements</i>	<i>410463</i>
<i>Contracts (other than personal services contracts)</i>	
<i>Nonfederal Audits</i>	<i>252364</i>
<i>Management and Professional Support Services</i>	<i>251396</i>
<i>Studies, Analyses, Evaluations</i>	<i>251390</i>
<i>Program Management and Professional Support Services (for most implementation contracts fall within this code.)</i>	<i>251456</i>
<i>Program Studies, Analyses and Evaluations</i>	<i>251455</i>
<i>Program Equipment</i>	<i>310461</i>
<i>Personal Services Contracts (use as applicable)</i>	
- <i>Compensation (including differential)</i>	<i>118065</i>
- <i>Benefits(FICA, allowances, insurance etc.)</i>	<i>121034</i>
- <i>Allowances (education, housing etc.)</i>	<i>xxxxxx</i>
- <i>To post travel</i>	<i>210242</i>
- <i>To post per diem</i>	<i>210243</i>
- <i>Home Leave Travel</i>	<i>210257</i>
- <i>Home Leave Per Diem</i>	<i>210258</i>
- <i>R&R Travel</i>	<i>210262</i>
- <i>R&R Per Diem</i>	<i>210263</i>
- <i>Educational Travel</i>	<i>210265</i>
- <i>Site Visit Travel</i>	<i>210331</i>
- <i>Site Visit Per Diem</i>	<i>210332</i>
- <i>Other Travel</i>	<i>210356</i>
- <i>Other Per Diem</i>	<i>210357</i>
- <i>Transportation of HHE</i>	<i>220151</i>
- <i>Air Freight</i>	<i>220259</i>

CHAPTER VIII

CONTRACT ADMINISTRATION

OBJECTIVE: *To describe those contract administration actions which must be taken after a contract has been signed and that require some joint consideration/action by the activity manager and the contracting officer. Many administrative actions, such as the payment of vouchers, do not require input from the contracting officer.*

Also, there is a short guide on contract administration for the Cognizant Technical Officer (CTO) attached to this chapter that is intended to provide some general guidance on requirements for contract administration to help ensure effective contracting. The guide is based on one developed by the General Services Administration, so not all of the guidance is pertinent to the type of contracting that USAID normally does. However, the basic ideas are important, and all of the issues addressed in it may arise from time-to-time. A checklist for the CTO is included at the end of the guide.

1. APPROVALS: *Cost reimbursement contracts provide that a contractor must seek the approval of the contracting officer before:*

- ! entering into subcontracts*
- ! charging any salaries exceeding the ES-6 level to the contract*
- ! changing key personnel*
- ! undertaking international travel*
- ! providing TCN and CCN employees compensation or benefits that are not equivalent to those received by TCNs and CCN employed by the Mission*
- ! other approvals specified in the contract*

Prior to granting any of these approvals, the contracting officer will consult with the activity manager. The following guidance applies.

Subcontracts

Contracting officer consent is required for all cost reimbursement and fixed rate subcontracts, and for all fixed price subcontracts exceeding \$25,000; however, USAID's role with regard to subcontracts should be circumspect. By becoming involved in subcontract negotiations, the Government assumes part of the responsibility which should rest solely on the contractor for the success of the activity.

TCN and CCN Employees

The AIDAR requires that TCN and CCN contractors and contract employees can not receive any of the following without the specific authorization of the Mission Director or Assistant Administrator with program responsibility:

- !** *Payment in excess of the prevailing compensation paid to personnel performing comparable work in the cooperating country as determined by the USAID Mission.*
- !** *Differential.*
- !** *Allowances.*

2. LOGISTICS SUPPORT

Most cost-reimbursement activity implementation contracts provide for the contractor to receive logistics support from the host country and/or the USAID Mission. If this support is not provided on a timely basis, the Contractor may notify the contracting officer who, upon advice of the CTO, will either issue a change order to allow the Contractor to utilize funds already in the budget to purchase the missing support, or will deny the request.

3. AMENDMENTS

When contemplating the modification of a contract/grant/ agreement, one must consider the type of change required. Each requires different documentation. Guidance is provided below for both the current MAARD system and the A&A module of the NMS.

a. Administrative Change:

MAARD: *A new face sheet MAARD setting forth the change in accounting data etc.*

A&A: *An amendment to the electronic MAARD making the necessary changes.*

b. Incremental Funding:

MAARD: *A new face sheet MAARD setting forth the increased funding provided.*

A&A: *An amendment to the electronic MAARD setting forth the increased funding.*

c. Cost Overrun:

MAARD: *A new full MAARD. On page 2 the increase in cost/price is noted. An attachment to the MAARD must set forth the rationale for funding the overrun.*

A&A: *An amendment to the electronic MAARD setting forth the increase in the Government estimate. An attachment must set forth the increase in the Government cost estimate.*

d. Substantive Changes with No New Procurement/Assistance (e.g. time extensions):

MAARD: A new MAARD face sheet describing the change(s).

A&A: A modification to the existing electronic MAARD.

e. Amendment Constituting New procurement/Assistance:

MAARD: A new full MAARD with justification for noncompetitive procurement.

A&A: A modification to the existing electronic request adding the additional work, budget, etc.

4. TERMINATION

USAID contracts provide for unilateral termination of contracts in whole or in part for default and for convenience of the Government. Contracts may also be amended bilaterally to cut back the scope of work - achieving the same result as a "termination." Each mechanism is discussed below:

a. Default Termination

A fixed price contract may be terminated for default if the contractor does not comply with the delivery terms. A cost reimbursement contract may be terminated if the contractor has failed to make progress in the work to the extent that performance is endangered. Prior to issuance of a notice of termination, the Contracting officer must send the contractor a "cure-letter" setting forth the nature of the "default" and giving the contractor the opportunity to remedy the situation. If the contractor does not "cure" the default within ten days a termination notice may be issued by the Contracting Officer. Following receipt of the termination notice the contractor must terminate all activities as indicated and take all possible actions to minimize additional costs. A settlement is then negotiated. In theory the Government is entitled to recover specific costs including costs of reprocurement. In practice, however, Contractors normally contest default terminations in US courts. Such courts normally conclude that the Government shared the "fault" and therefore change the terminations into terminations for the Convenience of the Government.

b. Termination for the Convenience of the Government

A contract may be terminated in part or in full if the Contracting officer determines that such termination is in the Government's best interest. Examples are where the Government has decided that it no longer requires the goods or services purchases and those in which foreign policy considerations make continuation of the contracted activities ill-advisable. Normally the Government may not terminate for convenience if it intends to reprocure the same services from another source. The contractor's obligations following termination are the same as for termination for default. Upon receipt of the contractor's claim, a settlement is negotiated between the parties.

c. *Bilateral Amendment Cutting Back Scope of Work*

Because it is often used when a termination for default should be used, a termination for convenience may be injurious to a contractor's reputation even though the termination in no way reflected a deficiency on the performance of the contractor. Accordingly, when a contract must be ended and the contractor has performed well, it may be preferable to modify the contract to delete the remainder of the scope of work rather than terminate for convenience.

5. *EXPIRATION/CONTINUATION*

Well before the expiration date of the contract, the SO/RP team must determine whether there will be a continuing need after the expiration of the contract for the goods or services being provided. The SO/RP team must determine whether re-procurement will be necessary. The SO/RP team should discuss with the contracts office as soon as possible the options for reprocurement, such as a new competitive contract, a task order, an 8(a) contract, or potentially a non-competitive extension in appropriate circumstances that are justified as discussed in Chapter 2 of this Guidebook.

6. *CONTRACT CLOSE OUT*

All USAID missions should have formal systems in operation for the close-out of contracts/grants. Whenever a document expires the system should automatically go in motion to ensure that the Controller, CTO, Contractor and contracting office perform their closeout responsibilities. While many of the actions are simply paperwork, it is vital that the disposition of all non-expendable property be properly authorized and documented.

Within 90 days following physical completion of the work under a contract, the Office of Procurement in USAID/W initiates action to close out the contract officially. This entails the completion of several prescribed forms by various USAID offices (e.g., the Inspector General, Financial Management, Security) confirming that all substantive and administrative actions required by either the contractor or USAID have been satisfactorily taken. The procedures in FAR 4.804-5 (<http://www.arnet.gov/far/97-06/html/04.html>) should be followed. For contracts administered by USAID/W, the FAR procedures are supplemented by OPAM 85-7, dated November 12, 1985 (<http://www.usaid.gov/M/OP/P/opams85.htm>). For contracts administered by USAID Field Missions CIB 90-12, dated June 8, 1990 (<http://www.usaid.gov/M/OP/P/cibs90.htm#90-12>), supplements the FAR procedures.

As his/her part in the close-out of a contract, the CTO confirms physical completion of the work under the contract and administratively approves the final voucher for payment. As necessary, he/she also provides the physical oversight to assure the proper disposition of any 1) nonexpendable, government-furnished property, 2) contractor-acquired, non-expendable property-under a cost reimbursement contract, 3) Classified materials in the contractor's possession, and 4) contractor-produced technical reports. He/she may also be called upon to provide input in support of the contracting, finance, and audit office functions in close-out.

7. CONTRACTOR PERFORMANCE EVALUATION

USAID has a closed loop agency-wide system for evaluating contract performance, gathering the results of those evaluations and using the information as a major evaluation factor in the selection of new contractors. Contract Information Bulletin 97-28 describes the system in detail.

The system requires the Contracting Officer to notify the CTO when evaluation reports must be completed. (At the end of the period of performance for contracts of less than one year duration and at least once every two years and not more than yearly for contracts exceeding one year in duration as agreed between the contracting officer and the CTO.) Annual evaluations shall be initiated in the month of April unless the CO determines otherwise. USAID Standard Form 1420-66 is utilized for recording the evaluations.

When completed evaluations are filed in the contract file and in a central USAID/Washington, Office of Procurement file. That file is utilized by all technical evaluation panels to evaluate competitive proposals against the "quality of past performance criteria.

GUIDE FOR COGNIZANT TECHNICAL OFFICERS

This appendix provides guidance on the actions that the Cognizant Technical Officer may undertake with regard to any contract being used to implement the activity for which the CTO is responsible. (The CTO may undertake similar actions with regard to grants and cooperative agreements to the extent they are appropriate under assistance instrument.) The Contracting Officer shall generally identify certain actions required of the CTO in a written letter of designation. This guidance covers the major areas of CTO responsibility under contracts: monitoring performance, coordinating with the CO, problem resolution/liaison functions, and inspection and acceptance. A CTO checklist appears as an annex at the end of this Appendix.

1. Monitoring

The CTO should develop, with the assistance from the contracting office, a plan for monitoring and reporting the contractor's technical efforts. At a minimum, the plan should address what means will be used to verify key cost elements and how the CTO will determine contractor progress. In some circumstances, it may be appropriate for the CTO to observe the contractor at work to determine if performance is in compliance with the contract, particularly if the contract provides specific performance requirements. The CTO should notify the CO of intended site visits so the CO can suggest areas to cover. The purposes of these site visits may include checking actual contractor performance against scheduled and reported performance, seeing if facilities and working conditions are adequate, and verifying that the employees changed to a cost-reimbursement contract are actually working on that contract.

The CTO should review, analyze, and evaluate the contractor's progress, performance, and compliance for conformance with technical, price, and schedule provisions of the contract.

a. Deliverables:

The CTO has responsibility for monitoring deliverables and performance under the terms of the contract. The CTO cannot change or waive a delivery date for any reason and is responsible for notifying the CO of delivery or non-delivery. Failure of a contractor to deliver equipment or services in a timely manner may entitle the Government to some form of consideration. Failure of the CTO to notify the CO of late deliveries may waive the rights of the Government to this consideration. Requiring acceleration of delivery is also not within the authority of the CTO. A contractor may submit a claim against the Government on the basis of accelerated delivery. If the CTO requests an accelerated delivery, it may result in an unauthorized commitment which could make the CTO personally liable for the increased cost.

The receipt of deliverables under the contract must also be documented by the CTO for purposes of prompt payment. The Government must pay its bills within a specified period of time or pay the contractor interest. Failure to document receipt of deliveries could result in interest penalties.

The CTO is responsible for monitoring all contract performance, not just tasks which can be tracked by a completion date. Normally, the contractor submits progress reports at regular intervals.

The CTO should recommend to the CO acceptance or rejection of all contract deliverables. If the work is judged unsatisfactory, the CTO and the CO must determine what further actions are required, seeking the advice of legal counsel if necessary.

b. CTO File

The CTO should maintain a contract work file. The contract work file would contain all relevant documentation such as notes of conversations with the contractor, written instructions given to the contractor, and similar items as called for by the CO.

The CTO should document all significant actions including any technical directions given to the contractor in the work file or a separate action file. This file should contain enough detail so that if a contract dispute or claim occurs, the CO or Board of Contract Appeals can reconstruct what the CTO did or did not do. Because it is often difficult to determine what might be the subject of a dispute or claim, the CTO should adequately document significant actions that might develop into a problem later. The file should also contain copies of the contract, all modifications, the CTO designation letter from the CO, and all correspondence between the CTO and the contractor or the CO. The file must be maintained intact and updated by each successor CTO until the contract ends.

c. Change Orders

The CTO must report all problems and requests for changes to the CO or formal action and approval. The CTO should assure that changes in the work to be performed or any change in the delivery schedule are formally put into effect by written supplemental agreements or change orders. The CO must issue these documents before the contractor proceeds with the changes. Such changes must be within the scope of the contract.

d. Modifications

The CTO recommends modifications to the terms and conditions of a task order, delivery order or contract.

e. **Financial Reports**

In conjunction with the CO as appropriate, the CTO analyzes the contractor's technical and financial reports and provides evaluations of contractor performance to the CO, upon request. The CTO compares actual progress/costs to planned progress/costs in order to evaluate the contractor's efforts in terms of the contract's specifications. The CTO will judge if actual progress indicates that performance is on schedule.

In these analyses, the CTO attempts to assure that the Government does not pay excess costs because of a contractor's inefficiency (e.g. missed schedules, unacceptable reports, etc). If either analysis suggests current or potential problems, the CTO must notify the CO.

2. **Coordinating with the CO**

a. **Problems and Changes**

The CTO must advise the CO of the following situations: possible changes in contractor management or key personnel; potential labor disputes or problems; any disputes with the contractor, technical or otherwise. If the contractor's management changes, the CTO should analyze for the CO the probable changes in performance of the contract. If the contract contains a key personnel clause, the CTO should assure that the named key personnel are actually working on the contract and that their level of effort meets requirements.

b. **Contractor Inadequacies or Discrepancies**

The CTO should immediately alert the CO if any of the following occur so that corrections can be made before the problems become significant.

Delinquencies - The CTO must notify the CO when deliveries might be delinquent regardless of the reason, including labor disputes. This notification will allow the CO to take formal action to protect the Government's contractual rights.

Unsatisfactory Performance - If the CTO identifies unsatisfactory performance, the CO must be notified. The CO that can obtain the contractor's commitment for corrective action, withhold contract payments, or terminate the contract.

Changes in the Contract - When work under the contract changes, even if the CTO believes the changes are within the terms and conditions of the contract, the CO must be notified.

c. *Technical Analyses and Evaluations*

The CTO should provide technical analyses and evaluations in preparation for negotiations and to assist the CO in negotiating a fair and reasonable price for each task order and change order.

d. *Continuing the Contract*

If the need for the goods or services being provided under the contract will continue beyond the time the contract is set to expire, the CTO should be aware of future plans regarding continuation of the effort and should contact the CO at least 90 days before the necessary acquisition lead time date to develop a renewal strategy.

If the contract contains priced options, the CTO should notify the CO within a reasonable time period before the contract's expiration date whether or not priced options will be exercised. Fixed-price options are included in a contract so that, if the contractor's performance is satisfactory, the Government can obtain additional supplies/services, at previously determined prices, in subsequent time periods. The CTO should be aware of how many options the contract has, coordinate with other personnel in the initiating office to determine if an option should be exercised, and ensure that a procurement request is forwarded to the CO for action.

e. *Delivery or Performance of a Contract*

The CTO should furnish the CO a notice of satisfactory or unsatisfactory completion of delivery or performance of a contract.

f. *Ethics Requirements*

The CTO should immediately notify the CO of any suspected procurement fraud, bribery, conflict of interest, or other improper conduct and then report promptly and directly to the Inspector General (or the equivalent office).

3. *Problem Resolution/Liaison Functions*

Technical, Management, and Operational Problems

The CTO should coordinate any technical direction in advance with the CO and reduce that direction to writing, with a copy to the CO. If the contractor thinks the technical direction requires work above and beyond that covered by the contract, the matter must be referred to the CO.

Cost-reimbursement contracts provide more flexibility in technical direction than fixed-price contracts. In cost-reimbursement contracts that cover areas where new directions may present themselves as work unfolds, the Government may include a provision for Government guidance of the contractor's efforts.

The CTO performs technical and management analyses of proposed task and change order charges, and compares them with the independent Government Cost Estimate and with actual costs for similar previous tasks.

The CTO attempts to resolve technical, management, and operational problems between contractors and users.

4. Inspection and Acceptance

a. Approve Invoices for Payment

The CTO should review the contractor's invoices to ensure that they accurately reflect the work completed in accordance with the requirements of the contract.

b. Review and Discussion with the CO

The contract specifies the criteria for inspection and acceptance of deliverables. The CTO should review the contract inspection and acceptance provisions and discuss any issues with the CO. Inspection and acceptance must be performed in accordance with the contract provisions. Any change, no matter how minor or obvious, must be referred to the CO. The CTO should never interpret a contract provision during acceptance testing. If the provision does not clearly speak for itself, it should be referred to the CO or resolution.

c. Acceptance Testing

In the testing of equipment or commercial software the items tested should either meet the requirement, or they do not. Adequate documentation by the CTO during testing is essential. This documentation should be forwarded to the CO upon completion of acceptance testing.

5. CTO Prohibitions

The CTO may not take any actions that require authorization by a Contracting Officer. The CTO may not:

- ! Make commitments or promises to any contractor relating to the award of a contract;*
- ! Solicit proposals for enhancements to the contract;*
- ! Modify the stated terms of the contract;*
- ! Issue instructions to a contractor to start or stop work;*
- ! Approve items of cost not specifically authorized by the contract;*
- ! Direct changes such as time of delivery;*

! Sign supplemental agreements;

! Render a decision on an dispute or any question of fact under the Disputes Clause of the contract;

! Take any action with respect to termination, except to notify the CO of circumstances which would appear to warrant such action;

! Authorize delivery or disposition of Government-furnished property;

! Give guidance to a contractor, either orally or in writing, which might be interpreted as a change in the scope or terms of the contract;

! Discuss procurement plans or any other advance information that might provide preferential treatment to one firm over another.

Violation of any of the above may be a violation of law with grave consequences for the Agency, firm and persons involved.

CTO CHECKLIST

The following is a summary of the CTO's responsibilities when acting as a representative of the Contracting Officer:

- ! Establish and maintain a separate file for documents and correspondence pertaining to the contract. Upon completion of the contract, forward this file to the CO for inclusion in the official contract file.*
- ! Keep a copy of the contract and become familiar with its terms and conditions.*
- ! Keep a copy of the letter of appointment from the Contracting Officer and understand the limits of authority.*
- ! Spot check to see that contractor personnel are on the job and performing their assigned tasks.*
- ! Take appropriate steps to ensure that all Government property, including that acquired under the contract, is used properly and that satisfactory measures are taken to protect and safeguard it.*
- ! Document significant actions, conversations, etc. as they occur.*
- ! Monitor funds closely on a regularly scheduled basis.*
- ! Put task assignments or instructions to the contractor in writing.*
- ! Inform the CO of unforeseen conditions or any contemplated changes.*
- ! Give prompt attention to correspondence from the contractor which requires approval or signature.*
- ! Maintain reasonable contact with the contractor to become aware of and gain an understanding of its problems and work schedules.*
- ! Report to the CO any labor disputes, problems or violations which have a potential for impairing the contractor's ability to perform.*
- ! Notify the CO of a pending CTO reassignment.*
- ! Monitor the contractor's performance.*
- ! Inform both the contractor and the CO promptly of any unsatisfactory performance.*
- ! Ensure the accuracy of all reports submitted by the contractor.*

! Submit progress, performance, and receiving reports as required by the Contracting Office.

SAMPLE

**FORMAT FOR APPROVAL OF SALARIES IN EXCESS
OF THE ES-6 LEVEL**

Salary Approval Control No: (XXX-98-)

(Date)

ACTION MEMORANDUM FOR THE USAID PROCUREMENT EXECUTIVE

THROUGH: *(MISSION DIRECTOR)*

FROM: *(ACTIVITY MANAGER)*

SUBJECT: *Waiver for Consultancy Fee for under Contract XXX-0000-C-00- -00, with*

BACKGROUND: *The general provisions of the subject contract provide that compensation which exceeds the maximum payable annual or daily rate of a ES-6 will be reimbursed only with the prior approval of the Contracting Officer.*

Appendix G to the AIDAR provides that contracting officer approvals of salaries exceeding the ES-6 rate are to be based upon a memorandum from the Activity Manager through the Mission Director approved by the Agency Procurement Executive.

The current maximum daily rate for a ES-6 is \$... per day.

DISCUSSION: *(Use this section to make your case for an exception. Describe the required services, the reason the nominated person is the best available to perform the work, the current salary record of the individual, and why the success of the activity requires that individual at the proposed salary.)*

RECOMMENDATION: *That you approve a compensation rate for of \$... per day for*

Approved:
Date:

Disapproved:
Date:

CHAPTER IX

ADMINISTRATION OF ASSISTANCE INSTRUMENTS

Objective: *To explain policies and standards for obtaining consistency and uniformity in awarding and administering grants and cooperative agreements to institutions of higher education, hospitals, other non-profit organizations and commercial organizations.*

Responsibility

A. Agreement Officers

The Agreement Officer signs on behalf of USAID under a duly authorized warrant issued by the Assistance Executive; Mission Directors and USAID Representatives receive warrant authority by virtue of position. The Agreement Officer bears the legal responsibility for the award and therefore, only the Agreement Officer can take action to enter into, change or terminate the award on behalf of USAID. The Agreement Officer is responsible for ensuring that USAID exercises prudent management over assistance funds by:

- 1. Interpreting USAID's assistance policies and procedures and coordinating with the Strategic Objective or Results Package (SO/RP) Team, applicants and recipients to ensure consistency of interpretation;*
- 2. Determining the appropriate type of instrument to be used, in accordance with ADS 304;*
- 3. Guaranteeing the integrity of the competitive process by:*
 - ! Approving the Annual Program Statement or the Request for Application prior to publication*
 - ! Obtaining a written evaluation report from the competitive review panel asserting that the review and evaluation of all applications was in keeping with USAID policies and essential procedures*
- 4. Making a responsibility determination regarding a potential recipient's management competence in implementing a planned activity in accordance with USAID policies and essential procedures;*
- 5. Developing the instrument which sets out the results that the recipient plans to achieve and all understandings between USAID and the recipient. Where applicable shall clearly delegate appropriate responsibilities to other USAID officials in the Schedule of the award;*

6. *Negotiating costs in the financial plan of the award in accordance with OMB and USAID standards.*
7. *Assuring that there are no restrictions in the award that go beyond the provisions of the applicable OMB Circulars, USAID Regulation 26, or applicable Standard Provisions, unless a deviation has been approved;*
8. *Processing necessary deviations;*
9. *Executing the award, and maintaining contact with the responsible SO/RP team, the designated Cognizant Technical Officer and the recipient for proper award administration. The Agreement Officer is the mandatory control point of record for all official communications and contacts with the recipient which may affect the award budget, the program description or any terms and conditions of the award;*
10. *Preparing and executing amendments to awards as necessary;*
11. *Initiating actions when suspensions or terminations are necessary;*
12. *Maintaining the official Agency files for each grant or cooperative agreement in accordance with the guidelines provided on file documentation; and*
13. *Carrying out all other responsibilities as further detailed in this Chapter and 22 CFR 226.*

B. Cognizant Technical Officer

The Cognizant Technical Officer is responsible for ensuring that USAID exercises prudent management over assistance funds by:

1. *Preparing competitive announcements or writing a justification for an exception to competition in accordance with this Chapter;*
2. *Conducting the process of technical selection of recipients, including performing a past performance review and conducting a cost realism analysis;*
3. *Determining if the applicant's Program Description is responsive to a published USAID competitive notice or is otherwise in keeping with established USAID Strategic Objectives;*
4. *Recommending the expected level of cost-sharing in accordance with specific program requirement and 303.5.10;*
5. *Processing all necessary internal USAID authorization papers to request that the Agreement Officer consider awarding a grant or cooperative agreement to a selected applicant;*

6. *Assisting the Agreement Officer in determining the potential recipient's level of technical and managerial competence;*
7. *Monitoring and evaluating the recipient and the recipient's performance during the award in order to facilitate the attainment of program objectives by:*
 - ! *Maintaining contact including site visits and liaison with the recipient;*
 - ! *Reviewing and analyzing all performance and financial reports;*
 - ! *Assuring compliance with the terms and conditions of the award;*
 - ! *Carrying out all responsibilities as delegated by the Agreement Officer in the Schedule of the award or noted under the "Substantial Involvement" section of Cooperative Agreements; promptly notifying the Agreement Officer of any developments which could have a significant impact on the award;*
 - ! *Preparing internal documents to support amendments to the award;*
8. *Evaluating the recipient's program effectiveness at the end of the program and submitting a final report to the Agreement Officer.*

ADMINISTRATION OF AWARDS

Award administration encompasses all dealings between USAID officials and the recipient from the time the award is made until the end of USAID support. The specific nature and extent of administration will vary from award to award in the normal exercise of Federal stewardship responsibilities. It can range from reviewing and analyzing performance reports, performing site visits to a more technically developed substantial involvement by USAID under a cooperative agreement.

Oversight of Assistance award is shared between the Cognizant Technical Officer and the Agreement Officer. While there is a clear division of responsibility the functions are closely related and cannot be performed in isolation from each other.

Awards to US organizations shall be subject to 22 CFR 226 and the Standard Provisions for U.S. Nongovernmental Grantees; awards to non-U.S. organizations shall be subject to the Mandatory and Optional Standard Provisions for Non-US organizations. (See ADS 303)

Agreement Officers shall serve as the mandatory control point of record for all official

communication that would constitute an amendment to the award. Agreement Officers shall receive copies of all performance and financial status reports, as appropriate. Cognizant Technical Officers shall be responsible for reviewing all performance and financial reports for adequacy and responsiveness and shall request the Agreement Officer take necessary action where reports are not received, are determined to be inadequate, or a problem is apparent. It is essential that the Cognizant Technical Officer and Agreement Officer work as a team in order to effectively administer assistance instruments.

The Cognizant Technical Officer should maintain close contact with the Agreement Officer to keep that Officer up-to-date on recipient performance and submit copies of status reports as required by the Mission Director or Bureau DAA to the Agreement Officer.

The Agreement Officer shall provide for the continuing oversight of the financial management aspects of the award through reviews of reports, correspondence, site visits or other appropriate means. When deemed necessary the Agreement Officer shall request or arrange for special audits.

Post award orientation with the Recipient and Technical Officer is encouraged to clarify the roles and responsibilities of the USAID officials who will administer the award. If specific authority is being delegated to the Technical Officer, it shall be so stated in the Schedule of the Award.

Site visits are an important part of effective award management. Joint site visits by the Agreement Officer and the Technical Officer are encouraged, since they can often be more effective review of the project. As soon as possible after each visit a brief report should be prepared highlighting the findings. A copy of each report shall be placed in the official award file.

The Cognizant Technical Officer is responsible for preparing internal USAID documentation to the satisfaction of the Agreement Officer to support amendments to the award.

The Agreement Officer shall determine that the award does not contain administrative approvals which are in conflict with the stated regulations and policies. The Agreement Officer shall be responsible for all award suspension and termination actions.

CHAPTER X

PATENTS

OBJECTIVE: *To provide basic information on the responsibilities of CTO with regard to patents under USAID contracts, grants and cooperative agreements in order to promote the use of inventions arising from USAID-supported research or development, to ensure that the inventor's and USAID's rights regarding inventions that are conceived or first actually reduced to practice under a USAID funding agreement (contract, grant or cooperative agreement) are protected, and that taxpayer's rights to the technology are protected.*

GENERAL: *The Bayh-Dole Act of 1980, Title 35 of the U.S. Code, and the Federal Technology Transfer Act of 1986 establish the rights and responsibilities of the U.S. Government with regard to patents under U.S. government funding arrangements. ADS Chapter 318 provides more complete information on Patents.*

POLICY: *USAID's contractors and recipients are subject to applicable regulations governing patents and inventions, including the government-wide regulations issued by the Department of Commerce at 37 CFR Part 401, "Rights to Inventions Made by Nonprofit and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements"; Federal Acquisition Regulation (FAR) Subpart 27.2, "Patents"; and Subpart 27.3, "Patent Rights Under Government Contracts" and any clauses or provisions on patents or inventions included in the specific contract, grant or cooperative agreement with USAID. Contracting Officers must incorporate these requirements in USAID contracts and assistance instruments when appropriate. The Federal Acquisition Regulations contain applicable clauses, USAID Regulation 26 covering grants and cooperative agreements with U.S. non-governmental organizations includes the requirements, and USAID has a Patents provision for use in grants and cooperative agreements with non-U.S. organizations.*

USAID's rights and responsibilities with regard to subject inventions are also set forth in 37 CFR Part 401 and FAR Subparts 27.2 and 27.3. The CTO is responsible for taking necessary actions under the provisions of FAR Subparts 27.2 and 27.3 and 37 CFR Part 401 with regard to USAID's rights to subject inventions. This includes being responsible for granting the funding recipient extensions in time for disclosure, election to retain title, and filing at the CTO's discretion and determining whether to shorten the time for election of title.

INVENTION DISCLOSURE, ELECTION OF TITLE, AND FILING OF PATENT APPLICATIONS BY FUNDING RECIPIENT

The funding recipient (contractor or assistance recipient) must disclose each subject invention to USAID, through the CTO, as prescribed in the applicable regulations. The funding recipient must elect in writing whether or not to retain title to any such invention by notifying the CTO in accordance with the applicable regulations. In any case where publication, on sale, or public use has initiated the one-year statutory period wherein valid patent protection can still be obtained in the United States, the CTO may shorten the period of election of title to a date that is no more than 60 days prior to the end of the one-year statutory period.

At the request of the funding recipient, the CTO may, at his/her discretion, grant an extension of the time for disclosure to USAID, election, and filing. The CTO must refer any reports of inventions to the Global Bureau's Office of Program Development and Strategic Planning (G/PDSP) for entering into the EDISON reporting and tracking database system operated by the National Institutes of Health.

U.S. GOVERNMENT RIGHTS

The funding recipient may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions and exceptions of applicable regulations, this Chapter and 35 U.S.C. 203. With respect to any subject invention in which the funding recipient retains title, the Federal Government shall have a non-exclusive, non-transferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the U.S. the subject invention throughout the world.

The funding recipient has rights and responsibilities with regard to subject inventions which are set forth in the applicable regulations. Where the regulations require or allow USAID to take action or authorize action by the funding recipient, unless the regulations, contract clause, or assistance agreement provide otherwise, the CTO shall be responsible for taking such actions and granting approvals in consultation with the Office of General Counsel.

It is also important to remember that whatever rights the Federal Government has in any patent apply also to contractors and recipients under their agreements with USAID. When the Government is entitled to royalty free use, the right does not end by virtue of its being exercised under a USAID contract or assistance instrument.

CHAPTER XI

SOURCE, ORIGIN AND NATIONALITY

OBJECTIVE: *To summarize USAID's source, origin and nationality policy, to define classes of transactions for which waivers are not required and to discuss waiver requirements.*

POLICY: *USAID's policy on source, origin and nationality establishes requirements that goods and services must meet to be eligible to be purchased with program funds. Goods must have been mined, grown or produced in the US or other eligible country (origin), be located in the US or other eligible country (source) and be bought from US or other eligible country suppliers (nationality). The policy no longer includes restrictions on components from countries outside the authorized geographical code (except for "kits," "shipments of spare parts" and "systems.")*

Services must be provided by US or other eligible country suppliers (nationality). Nationality is determined by place of business and citizenship of an individual, ownership of business, management and control of a non-profit, and there is a special rule for businesses based in the U.S. that do not qualify under the ownership rule.

Note: The nationality policy does not apply to the nationality of recipients of grants and cooperative agreements.

The complete policy on source, origin and nationality is set forth in ADS 310 and 22 CFR Part 228.

AUTHORIZED GEOGRAPHIC CODES:

- 1) *Code 000 (United States) is the authorized Geographic Code for procurement of goods and services:*
 - a. *Under all grants to host countries, except those to countries which are designated by the U.N. as "Least Developed Countries" (LLDCs) and grants to countries included in Code 110 (New Independent States);*
 - b. *Under economic support fund loans;*
 - c. *By USAID (USAID-direct contracts) using funds that are not already obligated in a bilateral agreement which authorizes another Geographic Code;*
 - d. *By contractors under USAID-direct contracts if the funds are not already obligated in a bilateral agreement which authorizes another*

Geographic Code;

- e. By recipients under grants and cooperative agreements to non-governmental organizations having a total procurement element in excess of \$250,000, except those which are financed under a bilateral agreement which authorizes another Geographic Code.***
- 2) Code 110 (New Independent States) and Code 000 are the authorized Geographic Codes for procurement of goods and services under grants to any of the New Independent States.***
- 3) Code 941 (the United States and less developed countries, excluding foreign policy-restricted countries) is the authorized Geographic Code for procurement of goods and services:***

 - a. Under grants to LLDCs; and***
 - b. Under development loans.***
- 4) Code 935 (any area or country including the cooperating country, but excluding foreign policy-restricted countries) is the authorized Geographic Code for procurement of goods and services:***

 - a. Using funds that are covered by the statutory exemption for the Development Fund For Africa (this takes precedence over the restrictions in 310.5.1a, paras. 1 and 2);***
 - b. Under grants to non-governmental organizations with a total procurement element of \$250,000 or under, using in order of preference - Code 000, the cooperating country, Code 941, and Code 935.***
- 5) The cooperating country is an eligible source in accordance with the Chapter on local procurement The regulations are set out in 22 CFR 228.40.***

CLASSES OF TRANSACTIONS FOR WHICH SPECIAL AUTHORIZATION OR WAIVERS ARE NOT REQUIRED:

- ! Individual transactions (contracts/subcontracts) under \$5,000 from Code 935 countries.***
- ! Personal Services Contracts with citizens of Code 935 countries.***
- ! Purchases under GSA ordering contracts.***
- ! Participant Training: Participant training may be conducted in Code 941 countries -***

the developing-free world and the US, except for:

- ! those countries which are donors to the host country*
- ! those countries considered "unfriendly" by the U. S. Department of State*
- ! those countries in which travel by U. S. citizens is restricted.*

[Waivers to permit participant training in other countries may be approved by the Mission Director when instruction at the training site and country selected is critical to achieving strategic objectives. the participant has proficiency in the language of instruction in the selected country, AND similar training is unavailable in the U.S. or in a 941 country.]

NOTE: *Waivers are required to purchase motor vehicles of non-U.S. source/origin even when the transaction takes place under an agreement which authorizes procurement from outside the United States or falls under a class of transactions for which waivers are not required for other commodities.*

WAIVERS: *All waivers must be based on the criteria set forth in ADS 310. They may apply to individual transactions or to classes of transactions. All waivers must be assigned a waiver control number and be reported to USAID/W by cable. The Mission Director normally have been deleted authority to approve all waivers.*

Waivers should indicate which of the three requirements - origin, source and/or nationality - is being waived. A waiver of source/origin includes a waiver of nationality for those goods.

IDENTIFICATION OF PRINCIPAL GEOGRAPHIC CODES

The USAID Geographic Code Book (See ADS CD Resource Library) sets forth the official description of all geographic codes used by USAID in authorizing or implementing documents, to designate authorized source countries or areas. The following are summaries of the principal codes:

- (a) *Code 000 -- The United States: The United States of America, any State(s) of the United States, the District of Columbia, and areas of U.S.-associated sovereignty, including commonwealths, territories and possessions.*

- (b) *Code 899 -- Any area or country, except the cooperating country itself and the following foreign policy restricted countries: Afghanistan, Libya, Vietnam, Cuba, Cambodia, Laos, Iraq, Iran, North Korea, Syria and the People's Republic of China.*

- (c) *Code 935 -- Any area or country including the cooperating country, but excluding the foreign policy restricted countries.*

- (d) *Code 941 -- The United States and any independent country (excluding foreign policy restricted countries), except the cooperating country itself and the following: Albania, Andorra, Angola, Armenia, Austria, Australia, Azerbaijan, Bahamas, Bahrain, Belgium, Bosnia and Herzegovina, Bulgaria, Belarus, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Italy, Japan, Kazakhstan, Kuwait, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia*, Malta, Moldova, Monaco, Mongolia, Montenegro*, Netherlands, New Zealand, Norway, Poland, Portugal, Qatar, Romania, Russia, San Marino, Saudi Arabia, Serbia*, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan*, Tajikistan, Turkmenistan, Ukraine, United Arab Emirates, United Kingdom, Uzbekistan, and Vatican City.*

* *Has the status of a "Geopolitical Entity", rather than an independent country.*

CHAPTER XII

LOCAL PROCUREMENT

OBJECTIVE: *To provide an overview of Local Procurement.*

BACKGROUND

Previously the title to this chapter was "Local Cost Financing." Prior to 1990 Local Cost Financing could be authorized on a blanket basis for an activity. If it was authorized, the Host Country Institution could purchase goods and services in the host country (within specified limitations) without consideration of sources outside the host country. USAID's role in "Local Cost Financing" was very limited. Specific USAID approval of the various steps in the procurement process was not required nor was it necessary for the host country to include mandatory contract clauses in local contracts. Such authorizations are not possible for activities authorized after August 1990 or for new components of old activities authorized after August 1990. AUTHORIZATIONS OF LOCAL COST FINANCING MADE BEFORE AUGUST 1990 ARE, HOWEVER, STILL VALID.

DISCUSSION

For activities authorized after August 1990 procurement outside of the US is allowable only if a source/origin/nationality waiver is approved for specific transactions or classes of transactions, or one of the specific exceptions in the Local Procurement section of Regulation 28 applies (22 CFR 228.40).

LOCAL PROCUREMENT (22 CFR 228.40)

Local procurement in the cooperating country involves the use of appropriated funds to finance the procurement of goods and services supplied by local businesses, dealers or producers, with payment normally being in the currency of the cooperating country. Unless otherwise specified in an implementing document, or a waiver is approved by USAID in accordance with subpart F of this part, local procurement is eligible for USAID financing only in the following situations:

- a) Locally available commodities of U.S. origin, which are otherwise eligible for financing, if the value of the transaction is estimated not to exceed the local currency equivalent of \$100,000 (exclusive of transportation costs).*
- b) Commodities of Geographic Code 935 origin if the value of the transaction does not exceed \$5,000.*
- c) Professional services contracts estimated not to exceed the local currency*

equivalent of \$250,000.

- d) Construction services contracts, including construction materials required under the contract, estimated not to exceed the local currency equivalent of \$5,000,000.*
- e) Under a fixed-price construction contract of any value, the prime contractor may procure locally produced goods and services under subcontracts.*
- f) The following commodities and services which are only available locally:*
 - 1) Utilities, including fuel for heating and cooking, waste disposal and trash collection;*
 - 2) Communications: telephone, telex, facsimile, postal and courier services;*
 - 3) Rental costs for housing and office space;*
 - 4) Petroleum, oils and lubricants for operating vehicles and equipment;*
 - 5) Newspapers, periodicals and books published in the cooperating country;*
 - 6) Other commodities and services (and related expenses) that, by their nature or as a practical matter, can only be acquired, performed, or incurred in the cooperating country, e.g., vehicle maintenance, hotel accommodations, etc.*

REQUIREMENTS

Contractors and recipients procure local goods and services in accordance with the terms of their agreements with USAID. When the Host Country procures local goods and services, the requirements of Host Country Contracting with regard to USAID approvals and mandatory USAID clauses now apply to local procurement as specified in ADS 311. Advertising in the US is, however, not required. In addition, the following "price requirement" is applicable:

The buyer shall pay no more than the lowest available price, including transportation. The term "reasonable price" as used in agreements means the price which satisfied this test.

The requirement that the buyer pay no more than the lowest available price, will be satisfied if the buyer has followed sound procurement practice and accepts the most advantageous offer, price and other pertinent factors considered, such as quality of the goods and services, delivery time, transportation costs, payment terms, availability of spare parts, installation and repair services. When competitive offers are not available, as in the case of sole-source procurement, some form of cost or price analysis should be used to establish the reasonableness of price.

For procurement through formal competitive bidding procedures, the lowest responsive bid normally will be accepted as meaning the lowest available price.

CHAPTER XIII

RESTRICTIONS ON GOODS AND SERVICES

OBJECTIVE: *To provide an overview of legal and regulatory requirements with regard to procurement of certain commodities and services.*

INELIGIBLE COMMODITIES AND SERVICES

ADS Chapter 312 sets forth the policies on ineligible and restricted commodities. Some ineligible services are covered as well. The following commodities and services may not be financed with USAID funds.

Commodities:

- !** *Military equipment*
- !** *Surveillance equipment*
- !** *Commodities for Support of Police, Prisons or other Law Enforcement Activities*
- !** *Abortion Equipment and Services*
- !** *Luxury Goods and Gambling Equipment*
- !** *Weather Modification Equipment*

Services:

- !** *Supporting police, prisons or other law enforcement activities.*

- !** *Personal services not provided for by statute (e.g., in the FAA or based on "notwithstanding" authority) and those not purchased directly from the person performing the services.*

- !** *Inherently Governmental functions, i.e. those functions which require either the exercise of discretion in the application of Governmental authority, the use of value judgements in making decisions for the Government, or that involve the contractor in monetary transactions and entitlements such as revenue disbursements, and the administration of public trust. Prohibited activities for USAID include: negotiation with the Host Country, making personnel decisions, making decisions regarding the allocation of U.S. Government resources.*

- !** *There are other services such as evaluating activities and programs which may approach being "inherently governmental functions". In such cases USAID must retain control over and remain accountable for policy decisions that may be based, in part, on a contractor's performance and work products. (Complete guidance is found in USAID/W Notice entitled "Policies and Guidelines on the Use of Nonpersonal Service Contracts in USAID/W dated June 29, 1992.)*

In addition, special restrictions apply to USAID financing of agricultural commodities, pesticides, pharmaceuticals, contraceptive products, motor vehicles, used equipment and fertilizer. See ADS Chapter 312 and consult the Contracting Officer for more guidance. Also Policy Determination 73 imposes some restrictions on activities related to increasing non-U.S. exports of certain

commodities.

CHAPTER XIV

SOCIAL CONSIDERATIONS IN CONTRACTOR SELECTION

OBJECTIVE: *To outline the social considerations in contractor selection.*

It is US Government policy to provide maximum practicable opportunities in its acquisitions be given to small and disadvantaged firms. The Gray Amendment to the FAA which set goals and authorized special mechanism for meeting those goals is no longer in force; however, USAID strongly supports the award of contracts to small and disadvantaged firms.

The 8(a) procedure described in Chapter III remains available for awarding contracts to disadvantaged firms without competition. Mission managers should regard this system as a tool which can be used creatively to save valuable implementation time while ensuring quality performance.

CHAPTER XV

PROCUREMENT INTEGRITY

OBJECTIVE: *To outline the procurement integrity requirements of the Federal Procurement Policy Act as amended in January 1997.*

A. SAFEGUARDING AND MARKING OF INFORMATION

Procurement Integrity (PI) legislation prohibits disclosure of contractor bid or proposal information and source selection information before the award of the contract except as specifically provided for in FAR 3.104-5, unless the contracting officer or head of the contracting activity authorizes disclosure in accordance with FAR 3.104-5.

Contractor bid or proposal information includes:

- ! cost or pricing data;*
- ! indirect costs and direct labor rates;*
- ! proprietary information appropriately marked by the contractor.*

Source selection information includes:

- ! bid prices, or lists of bid prices, before bid opening;*
- ! proposed costs or prices, or lists of proposed costs or prices;*
- ! source selection plans;*
- ! technical evaluation plans;*
- ! cost or price evaluations of proposals;*
- ! competitive range determinations;*
- ! rankings of bids, proposals or competitors;*
- ! reports and evaluations of source selection panels, boards, or advisory councils;*
- ! other information marked as "SOURCE SELECTION INFORMATION - See FAR 3.104" based on a case-by-case determination.*

All employees must safeguard "source-selection information" and "proprietary information" included in contractor proposals.

B. DISCLOSURE TO UNAUTHORIZED PERSONS

During the conduct of any Federal agency procurement of property or services, no person who is given access to proprietary or source selection information regarding such procurement shall knowingly disclose such information, directly or indirectly, to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

C. EMPLOYMENT DISCUSSIONS

Under the new regulations there is no requirement that the Head of the Contracting Activity (generally the Mission Director or Director of the Office of Procurement) approve a request for recusal by an employee covered by the new act when the official wants to enter into employment discussions with a contractor who might be competing on a pending contract action. However, when an official who is participating personally and substantially¹ in a Federal procurement for a contract in excess of the Simplified Acquisition Threshold (currently \$100,000) is contacted by a person who is a bidder or offeror in that procurement regarding possible non-Federal employment for that official, the official shall

- (a) Promptly report the contact in writing to his or her supervisor and to the Designated Agency Ethics Official (GC/EA); and*
- (b) (1) Reject the possibility of non-Federal employment; or
(2) Disqualify himself or herself from further personal and substantial participation in that procurement until such time as the agency (the Head of the Contracting Activity) has authorized the official to resume participation. While the regulations generally leave it up to the employee to recuse him/herself, an employee may be subject to administrative action if he/she refuses to terminate employment discussions with a contractor where such discussions interfere substantially with the employee's ability to perform assigned duties.*

Additionally, if an agency official who is participating personally and substantially in a Federal procurement for a contract in excess of the Simplified Acquisition Threshold (currently \$100,000) does want to discuss possible non-Federal employment with a bidder or offeror in the procurement (pursuant to (b)(2) above), the official shall submit to the Head of the Contracting Activity, prior to initiating or engaging in such discussions, a written notice of disqualification from further participation in the procurement. Concurrent copies of the notice shall be submitted to GC/EA, the contracting officer, and the official's immediate supervisor. As a minimum, the notice shall:

- (a) Identify the procurement;*
- (b) Describe the nature of the official's participation in the procurement and specify the approximate dates or time period of participation; and*
- (c) Identify the bidder or offeror and describe its interest in the procurement.*

If an employee does recuse him/herself and then wishes to resume participating in a matter

¹ To participate personally and substantially means active and significant involvement of the individual in activities directly related to the procurement. Participating "personally" includes direct and active supervision of a subordinate's participation in the matter. Participating "substantially" means that the employee's involvement is of significance to the matter.

regarding the contractor, he/she MUST first obtain approval from the Head of the Contracting Activity.

Employment discussions are covered by 18 U.S.C. 208, a criminal statute and the government wide Standard of Conduct regulation, which precludes a Government employee from participating personally and substantially in any particular matter that would affect the financial interests of any person with whom the employee is negotiating for employment. The rules covering 18 U.S.C. 208 have not been changed. The 208 rules will continue to be covered in annual ethics training and through agency notices.

D. POST-EMPLOYMENT PROVISIONS

Note that the old PI post-employment restrictions will continue to apply to any former officials whose employment by a Federal agency ended before January 1, 1997. For former officials whose employment by a Federal agency ended on or after January 1, 1997, the following rules will apply.

If your involvement in the procurement ended on or before December 31, 1996, and you leave government service on or after January 1, 1997, you are not covered by either the old or new procurement integrity legislation, however, other post employment rules continue to apply.

An important point to note is that for POST EMPLOYMENT PURPOSES, the new legislation only covers the award and administration of contracts in excess of \$10 million. Thus, for post employment purposes, if the contract is not in excess of \$10 million, there are no PROCUREMENT INTEGRITY restrictions regarding future employment with an awardee or subcontractor.

Who and What is Covered

An individual formerly employed by a Federal agency may not accept compensation from a contractor as an employee, officer, director, or consultant of that contractor within a period of one year after that individual -

- (a) Served, at the time of selection of the contractor, as the procuring contracting officer, chief of a financial or technical evaluation panel, or, though not generally used in USAID, the source selection authority or member of the source selection board in a procurement in which that contractor was selected for award of a contract in excess of \$10,000,000. (The fact that an employee served on a technical evaluation panel which reviews proposals for technical merit for awards in excess of \$10,000,000 is not enough to bring the employee under the coverage of the legislation. The employee must have served as the CHIEF of the technical, or financial, evaluation panel); or*
- (b) Served as program manager (e.g., SO Team Leader, Results Package Team Leader, manager of an activity not covered by an SO, or equivalent position) , deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 awarded to the contractor; or*

(c) *Personally made for the Federal agency a decision -*

- (1) *To award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of \$10,000,000 to that contractor;*
- (2) *To establish overhead or o--her rates applicable to a contract or contracts for that contractor that are valued in excess of \$10,000,000;*
- (3) *To approve issuance of a contract payment or payments in excess of \$10,000,000 to that contractor;*
- (4) *To pay or settle a claim in excess of \$10,000,000 with that contractor.*

The new rules prohibit receipt of any type of compensation from the contractor (subcontractor) regardless of whether it is work under the contract with respect to which the former employee took the actions described in (a) through (c) above. In other words, if you are covered by the legislation, you may not work for the contractor at all for the one year period of time. The only exception allows such individuals to accept compensation from any division or affiliate of the contractor that does not produce the same or similar products or services as the entity of the contractor referred to in (a) through (c) above.

Post-employment restrictions in addition to those in the PI legislation are covered by 18 U.S.C. 207, which is a criminal statute. These restriction have not changed and have been described in various agency notices and in annual ethics training.

CHAPTER XVI

ORGANIZATIONAL CONFLICTS OF INTEREST

OBJECTIVE: *To provide an overview of both FAR and USAID policy regarding Organizational Conflicts of Interest (OCI) and to define the responsibility of Cognizant Technical Officers with regard to OCI.*

POLICY

The Federal Acquisition Regulation (FAR) states that an Organizational Conflict of Interest exists if a person is "unable or potentially unable to render impartial assistance or advice to the Government, the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."

The FAR requires contracting officers to avoid, neutralize or mitigate significant Organizational Conflicts of Interest before contract award.

USAID/General Notice entitled "Organizational Conflicts of Interest" dated January 5, 1994 and clarifying correspondence from USAID/W go beyond the FAR requirements and establish the following USAID worldwide policy regarding Organizational Conflicts of Interest.

1. Firms Performing Activity Design Services

A firm (Note A) having a significant role in the design of a USAID funded activity may not compete for the implementation of that activity. This policy does not directly apply to:

! individual contractors

! contractor employees

! host country contractors

! firms performing very preliminary and general design work, not foreseeably connected to particular activities

! firms awarded design contracts prior to January 6, 1994 and delivery orders under IQCs awarded prior to January 6, 1994

! firms performing design work when that work is not severable from the work of at least one other contractor, and the contractors are not working under teaming or prime/subcontractor arrangements.

! implementation work performed under an existing task order contract .

2. *Firms Performing Activity Evaluation Services*

A firm performing an evaluation of a USAID activity (Note B) may not be awarded a USAID contract (other than a design or evaluation contract) anywhere in the world in the "sector" covered by the evaluation for a period of three years following the completion of the evaluation. "Sector" is defined to include those subject areas in which the contractor would be likely to compete against firms which it has evaluated, and those subject areas in which the firm is likely to have a competitive advantage from information gained during the prior work with or concerning competing contractors. The policy does not apply to:

- ! individual contractors*
- ! contractor employees*
- ! host country contractors*
- ! firms awarded evaluation contracts prior to January 6, 1994*
- ! delivery orders under IQCs awarded prior to January 6, 1994.*

3. *Firms Performing Audit Services*

A firm performing an audit of a USAID activity/contract may not awarded a USAID contract other than an audit contract for a period of three years following the completion of the audit. The policy does not apply to:

- ! individual contractors*
- ! contractor employees*
- ! host country contractors*
- ! firms awarded audit contracts prior to January 6, 1994*
- ! delivery orders under IQCs awarded prior to January 6, 1994.*

Note A: The term "firm" includes organizations which are not separate legal entities from the restricted contractor. Organizations which are affiliated in name only are not considered to be part of the "firm" and therefore should not be subject to restrictions. This often applies to local affiliates of US CPA firms. All members of "consortia" are considered to be members of the "firm" unless there compelling evidence that a conflict of interest does/will not exist.

Note B: These restrictions do not apply to evaluation of a Mission's portfolio, to widespread program sector evaluations or to evaluations of grants or cooperative agreements.

WAIVERS: *Waivers to these USAID policies may be made only by the Agency Competition Advocate in USAID/W.*

RESULTS PACKAGE TEAM RESPONSIBILITY

Any USAID employee who is aware of a real or possible organizational Conflict of Interest should immediately notify the Contracting Officer or the legal advisor serving the Mission.

CHAPTER XVII

HOST COUNTRY CONTRACTING

OBJECTIVE: *To provide an overview of Host Country Contracting rules, regulations and policies.*

GENERAL: *Guidance, policy and rules for host country contracting are published in ADS 305 and in the Country Contracting Handbook (CCH). The Handbook is divided into four sections:*

- 1. Professional and technical services,*
- 2. Construction services,*
- 3. Equipment and materials, and*
- 4. Cost Principles.*

In addition to containing USAID requirements, the CCH includes guidance to procuring agencies that is not mandatory. In addition to sample RFPs, IFBs and contract formats many optional clauses that can protect the interest of the host country agency are included.

REQUIREMENTS:

General: *Missions must closely monitor all Host Country Contracting exceeding \$250,000. Professional contracting officers are required to be directly involved in all the stages of Host Country Contracting, exercising these responsibilities with the advice and counsel of the mission legal advisor.*

Specific: *Certification of Host Country Agency:* *Prior to authorizing Host Country Contracting the Mission must be satisfied that the procuring agency is capable of conducting the procurement. Normally the Mission Controller conducts such reviews.*

HOWEVER, for all procurement exceeding \$250,000 the Mission Director must make a determination in writing (using specified language) that the Host Country Contracting agency has the capability to undertake the procurement. The contracting officer, legal advisor and controller must be involved in the review upon which the certification is based.

Approvals: *The following must be formally approved by the Mission Director for all host country procurements exceeding \$250,000:*

- ! Notices to prospective offerors or bidders, e.g. CBD notices.*
- ! Lists of prequalified offerors, prior to issuance of solicitation.*
- ! Complete solicitation document.*
- ! The contractor selection method.*
- ! The selected contractor or supplier.*

- ! Any action to terminate negotiations with the highest ranked offeror or to reject all bids.
- ! The contract, prior to execution.
- ! Signed contracts, before financing.
- ! Subcontracts.
- ! Contract amendments and change orders.

In addition any host country contract exceeding \$10,000,000 or extensions of more than one year of such contracts must be approved prior to execution by the USAID Procurement Executive in USAID/Washington.

Competition: *Host country contracts for professional services must be negotiated (rather than bid) through technical competition (cost/price competition is not allowed); all other contracts must be based on formal competitive bids, except when noncompetitive procurement or informal procurement is authorized. Pre-qualification of contractors is allowed.*

Evaluation Panels: *For all procurements exceeding \$250,000, a representative of the Mission must be included on the host country's proposal evaluation panels as an observer to ensure that a fair evaluation is conducted in accordance with the method and criteria set forth in the solicitation document. The Contracting Officer or a person approved and briefed by the Contracting officer shall be the representative and shall attend all substantive meetings of the panel.*

Advertising: *Contracts exceeding \$100,000 for professional and technical services (except those directly with individuals) and for equipment and materials must be advertised in the Commerce Business Daily, and so must contracts exceeding \$500,000 for construction services. Equipment and material procurements exceeding \$25,000 must be advertised in the appropriate USAID Bulletin as well as in the CBD.*

Contract Clauses: *The mandatory clauses listed in ADS Chap 305 and set forth in the CCH must be included in all Host Country contracts.*

Defense Base Act Insurance: *All contracts under which non-host country citizens will be performing services overseas shall require the provision of Defense Base Act Insurance or a Dept of Labor waiver for those employees.*

CHAPTER XVIII

ACQUISITION AND ASSISTANCE RESOURCES ON THE INTERNET

Many acquisition and assistance related documents are available on M/OP Policy's home page, accessible through USAID Intranet corporate web. Just go to the OP Policy Division's home page under "Site Map" and click on the document you wish to download. This website also includes links to external resources. Listed below are a number of websites that provide useful information related to acquisition and assistance issues.

- Acquisition Reform Net:** <http://www.arnet.gov>
- Code of Federal Regulations:** <http://www.law.cornell.edu/regs.html> OR
<http://asa.ugl.lib.umich.edu/chdocs/federalregs/cfrtoc.html>
- Commerce Business Daily:** <http://www.ld.com/cbd/today/index.html>
- Contract Information Bulletins (CIBs):** <http://poseidon.usaid.gov/M/OP/P/polpubs.htm>
- Debarred List Search:** <http://purch1.lbl.gov/debar.htm>
- Executive Orders:** <http://library.whitehouse.gov/?request=ExecutiveOrder>
This site is a searchable database of Executive Orders of the President.
- FAR (Federal Acquisition Regulation):** <http://www.gsa.gov/far>
- FAR Search:** www-far.npr.gov:80/Harvest/brokers/ARNFARs/quirey.html
- Federal Register:** http://www.access.gpo.gov/su_docs/aces/aces140.html
- GAO :** <http://www.gao.gov>
This site contains a variety of useful information, including GAO Reports, recent Bid Protests, GAO Policy and Guidance materials (no Redbook on Appropriations Law yet, but they do have the short guide to Bid Protests), and recent Comptroller General Decisions
- General Services Administration:** <http://www.gsa.gov>
This site provides access to the Federal Acquisition regulation and much more.
- USAID/Office of the General Counsel:** <http://www.usaid.gov/A/GC>
- OFPP Policy Letters:** http://www-far.npr.gov/References/Policy_Letters
- OMB:** <http://www.whitehouse.gov/WH/EOP/OMB/html/ombhome.html>
This site contains many of OMB's documents including OMB Circulars and certain federal budget information.
- Per Diems: Foreign** <http://bman.uucom.com/perdiem/foreign.html>
- Per Diems: CONUS** <http://www.fss.gsa.gov/perdiem.html>

U.S. Code:

<http://www.law.cornell.edu/uscode>