MEMORANDUM

TO: OIG, Everett Mosely
OIG/A, Henry L. Barrett
AIG/A, Bruce N. Crandlemire

FROM: M/OP, Timothy T. Beans
AA/ANE, Wendy Chamberlin

Subject: USAID's Compliance with Federal Regulations in Awarding the Iraq Education Contract: IG Review No. EDG-C-00-03-00011-00

The purpose of this memorandum is to formally respond to the subject audit report dated June 9, 2003, concerning USAID compliance with Federal Regulations in awarding the Iraq Education Contract. We sincerely appreciate your sharing the draft audit report with us and allowing us to comment on the report prior to its release.

The response to your findings is considered very important to both the Office of Acquisitions and Assistance (OAA) and the Asia and Near East Bureau (ANE). We hold the Office of the Inspector General in very high esteem and take any report issued by your office very seriously. However, I honestly believe a word of caution must be expressed about this and all future audit reports related to the Iraq contracts. Our response to your report will not get the public exposure your initial findings were granted. Your findings carry a high level of credibility and must be completely correct and absolutely documented or you run the risk of seriously and adversely affecting the professional reputation of this office and this Agency. Your findings can have the very positive effect of not only protecting the integrity the Agency's business to the taxpayers of this country, but can help this Office improve the way it does business. However, if findings are based upon an incorrect interpretation of Federal Acquisition Regulations, the potential exists for the report to send the wrong message,

especially given the bipartisan politics associated with anything related to the war in Iraq. The following is our official response to your audit findings:

USAID did not comply with Federal Regulations for conducting market research to identify prospective contractors

We do not agree with the statement as set forth in your audit report. USAID did have a methodology for determining which firms were to be solicited. This was the subject of several discussions that took place to determine who to include on the bidders list. The only thing lacking was a written document explaining the thought process that went on with regard to who would be solicited in order to present a more robust history of the source selection process.

You correctly stated that, in accordance with the Federal Acquisition Regulations (FAR), market research should be documented. This requirement would normally be addressed by the Contracting Officer in the negotiation memorandum. However, "market research", as set forth in Part 10 in the FAR, is used to identify sources for procurements when the Agency does not have enough knowledge of the market. The definition in FAR 2.101 describes market research as the collecting and analyzing of information about capabilities within the market to satisfy agency needs. In reading Part 10 of the FAR, it's clear that market research is used when the agency needs further information about how to meet government needs before conducting procurement. The FAR gives examples of when it's appropriate to conduct market research. Some examples are:

- To determine if sources capable of satisfying the agency's requirement exist;
- To determine if commercial items meet the agency's requirements;
- To determine the practices of firms engaged in producing, distributing and supporting commercial items, etc.

The FAR goes on to say that the market research should be "appropriate to the circumstances" of the procurement in question and that the extent of the market research can vary depending on such factors as urgency, estimated dollar value, complexity, and past experience. In the case of the Education Request for Proposal, USAID has been working in the field of education for a long period of time and has a number of education contracts and grants currently in place. USAID did not need to conduct market research in order to determine what

firms had experience in the area of education since that was well known to the Agency. USAID chose firms to bid on this urgent contract based upon the availability of a sufficient number of known USAID contractors in the field of education. USAID did comply with Federal Regulations for conducting Market Research. What your report should have stated as a headline was USAID did not document the process used to select offerors. We would have addressed this oversight during the Agency Contract Review Board (CRB) process. However, because of the very short time frames we were working under, the CRB process way waived. The contract file was reviewed by our General Counsel as well as a Contracting Officers. I do not believe that an oversight in proper documentation of how we selected the source list merits a leading headline stating that USAID DID NOT COMPLY WITH FEDERAL REGULATIONS FOR CONDUCTING MARKET RESEARCH TO IDENTIFY PROSPECTIVE CONTRACTORS. However, we fully accept your recommendation that this office maintain documentation within the contract award file demonstrating the analysis performed (or why one was not performed) and decisions made when conducting market research to identify prospective contractors when using other than full and open competition. OAA will issue a written reminder concerning this point to all our contract personnel.

Insufficient documentation to determine compliance on exchanges of information with prospective contractors

With regard to the second finding concerning a meeting that representatives from the ANE Bureau had with various agencies, as well as one of the offerors, on the Education RFP, OAA firmly believes that there was no organizational conflict of interest (OCI), or unfair competitive advantage that occurred as a result of Creative Associates, International (CAI) attendance at the November meeting. In reviewing the notes of the meeting, the discussion notes centered on the state of education in Iraq. The minutes of the meeting address the current challenges and problems with the education system in Iraq and did not in any way lead directly, predictably, or without delay to a Statement of Work (SOW). These facts are used in the background portion of the SOW, which is perfectly acceptable. Even if there were the appearance of a competitive advantage as a result of that meeting, the situation was mitigated by the fact that the exact same background information on the state of education in Iraq was presented to all offerors in the background section of the SOW. FAR specifically says that this is an acceptable way to mitigate any competitive advantage a firm might have as a result of meetings like those that happened in November. It must be kept in mind that the roundtable meeting was held almost three and a half months before the release of the RFP.

In addition, a very important piece of information was missing from the initial report. It is written as if CAI, as a company, was invited to the roundtable. In fact, Dr. Frank Dall, not CAI, was invited to participate in the roundtable based strictly on the basis of his seven prior years of experience in directing the regional office of UNESCO/UNICEF that covered education in Iraq from neighboring Jordan. He was invited after an extensive search identified him as literally the only available education authority to have worked directly with the Saddam regime. It would appear to be logical to have someone of his stature and experiences participate in a roundtable discussion on the current state of the educational system in Iraq.

Agency legal counsel has pointed out to us that there are three fallacies in the IG Report, and that the Report appears to indicate a lack of IG understanding of what constitutes an "organizational conflict of interest" or "unfair competitive advantage". First, the Report refers repeatedly to CAI's purported "competitive advantage." However, even assuming CAI garnered a "competitive advantage" out of its attendance at the November meeting (and OAA does not believe it gained any meaningful advantage by its attendance), no legal right to redress may be based on mere "competitive advantage." Indeed, competitive advantages abound in the marketplace --one being the large advantage of incumbency, when a current contractor competes against others for the same or similar work in a replacement contract. What must be found before a procurement can be overturned is the legally minimum requirement of "unfair competitive advantage," a term of art in legal parlance.

Second, as explained by USAID procurement counsel (GC/CCM), the absolute minimum legal requirement for a finding of unfair competitive advantage/OCI in this case is, alternatively, that (1) a tangible, physical writing or design element created solely by the selected contractor, in this case CAI, must find its way into the SOW of the ensuing contract; or (2) one of a very small number of "competitively useful" facts must have been shared with the winning contractor, but not with other organizations. "Competitively useful" information is limited to a handful of items that relate to a specific contract, such as overall budget information and specific source selection/evaluation plans that are not shared with all bidders to the Solicitation. There is no indication in the meeting minutes or from attendees at the November Roundtable that terms of a specific contract procurement were discussed there. In

fact, the technical office has stated in writing that at the time of the roundtable meeting, the Bureau had not made a final determination as to whether education would even be a focus area of concern resulting in release of an RFP. Neither a USAID strategy nor any Scope of Work was discussed at the November meeting. So no matter what else occurred at the November 2002 Roundtable meeting, neither of the above two requirements giving rise to OCI could possibly have been met.

One of the authorities recommended by Agency procurement counsel to IG for its audit was the Supplementary Reference to ADS Series 200 entitled, "LEGAL AND POLICY CONSIDERATIONS WHEN INVOLVING PARTNERS AND CUSTOMERS ON STRATEGIC OBJECTIVE TEAMS AND OTHER CONSULTATIONS." GC/CCM reports that IG misused this Reference in its Report and, perhaps more importantly, ignored the following section, which, in essence, presents the November 2002 Education Roundtable scenario. ("SOT" in text below refers to an expanded Strategic Objective Team typically used by Agency Missions and by definition including some, but not all, outside organizations expert in a particular field. The SOTs which meet prior to the identification of a particular contract are analytically indistinguishable from the Education Roundtable hosted by USAID in November 2002.)

> "B.6. Examples of SOT activities that do not raise an issue of OCI
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> SOTs generally may undertake the types of activities illustrated in the examples below without the need for case-by-case consultation with their RLA/attorney advisor and contracting officer. If SOT's clarify through ground rules or SOT charter documents that outside organizations will not be involved once possible contract procurements are identified, systematic record keeping (e.g., meeting minutes) is not necessary.

An expanded SOT (including both USAID staff and outside organizations) holds a series of meetings to compose a list of possible future activities in furtherance of its child survival strategic objective. As in example one, the SOT has ground rules that clarify that only core SOT members will make decisions regarding future funding and choice of instrument. The series of meetings results in a list of possible future activities. However, no decision is taken and no specific implementation instrument is identified.

In these examples, there is no problem of potential OCI. Communications with outside organizations on basic strategies or Agency initiatives and possible future activities generally do not raise OCI issues. Discussion clearly stops before identifying specific contracts. In examples one and two, ground rules established beforehand clarify that it is SOT procedure to stop discussion at this point. It is thus not necessary for these SOTs to keep systematic written record of their discussions on these matters.

While the November 2002 Education Roundtable did not establish written "ground rules" prior to the meeting, counsel advises that ground rules did not have to be established as it was a one-of-a-kind meeting to address existing conditions and concerns prior to a potential war and clearly no specific procurement was identified or discussed.

Third and finally, contrary to the implication in the IG Report, the Roundtable meeting notes were, in fact, shared with all bidding organizations (see discussion above on the background section of the SOW). GC counsel advises that it is well established that no "unfair competitive advantage" could result from a mere time advantage that CAI may have had over other offerors in possessing such information (which in any event was not "competitively useful") so long as all offerors had adequate time to respond to the RFP information and prepare their offers.

Your audit report states that “Given the magnitude of the contract and the need for confidence in USAID’s procurement process, we believe that additional review is in order”. Accordingly, the OIG recommends that “The Director, Office of Procurement conduct a full and detailed review of the contract process to determine whether an unfair competitive advantage exists that impacts the contract award for the Iraq education sector.” We could not agree with you more about the importance of confidence in the procurement process. There is nothing more important to the Chief Acquisition Officer than to maintain integrity in this process and ensure fairness to all parties that choose to deal with USAID. That is why it is absolutely imperative that the IG fully and thoroughly audit these contracts before making assumptions about their findings. We sincerely appreciate the opportunity to discuss your findings prior to their release. In fact, OAA told the IG that it did not believe an unfair competitive advantage existed and gave a number of reasons to back our position. However, the OIG report

stated that you did not agree with USAID procurement officials' position that an unfair competitive advantage did not exist.

We have looked into this issue, both from a legal and contractual point of view, and do not find that an "unfair competitive advantage" existed in this procurement. Indeed, Agency Procurement Counsel has stated that, as a matter of law, neither unfair competitive advantage nor OCI could possibly have arisen, based on any reasonable reading of the facts.

The OAA does agree that it would be a better business practice if the project offices gave OAA and GC representatives the opportunity to participate in any meetings that included potential offerors on an upcoming procurement. This is good business practice and would help avoid even the arguable appearance of a conflict of interest in the future. In a memorandum to me dated June 18, 2003, Mr. Gordon West makes the following statement:
"In response to the recommendations in the subject memo ANE plans to issue a bureau notice advising technical staff to coordinate with contracting officers and attorney advisors when entering into discussions with partners during the initial stages of a procurement. The notice will also advise technical staff to consult when planning round table meetings and discussions on subjects where future procurements are possible in the sector or country. The notice will advise technical staff to maintain sufficient records of meetings with outside organizations. The Bureau is currently working with OP and attorney advisors to develop the notice, and we expect it will be issued by the end of June."

I believe this fully meets the recommendations made to the ANE Bureau.

We also really appreciate you pointing out that we had absolutely no knowledge of this meeting prior to disclosure in your initial report. Had we been present, we could have taken steps to more thoroughly document the file. I believe that the acceptance of this IG recommendation will ensure an even more transparent pre-procurement process, even in an emergency war environment. USAID agrees with the recommendation put forth concerning inclusion of procurement and legal representatives on meetings prior to a potential procurement. However, we respectfully request, at a minimum, that the initial findings should be revised to include the information that is now available about the content of the November meeting.

In conclusion, we sincerely want to thank the IG for the critically important work you all continue to perform for this Agency and we look forward to all future cooperation we can provide on future audit reviews.

cc:
John Marshall
Ann Quinlan
Jeff Bell
Gordon West
Karon Wilson