

OFFICE OF INSPECTOR GENERAL



October 17, 2003

MEMORANDUM

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

FROM: AIG/A, Bruce N. Crandlemire /s/

SUBJECT: USAID's Compliance with Federal Regulations in Awarding
the Health System Strengthening in Post-Conflict Iraq
Contract (AIG/A Memorandum 03-005)

SUMMARY

The Office of Inspector General (OIG) has completed a review to determine compliance with federal regulations in awarding the contract for health system strengthening in post-conflict Iraq to Abt Associates.

The OIG determined that the U.S. Agency for International Development (USAID) complied with the applicable federal regulations for authorizing other than full and open competition, assessing the contractor's ability to perform, conducting the pre-solicitation, selection and negotiation processes, and in making the award.

While the OIG did note general compliance with procedures in making the award, the Office of Procurement (M/OP) did not obtain the advice of legal counsel in making a decision to exclude a firm, which met invitation criteria, from the solicitation. M/OP did not invite this firm because it already had a contract to provide personnel support for USAID's efforts in Iraq, and USAID was concerned that the existing personnel support contract might result in an actual or apparent conflict of interest with this health contract. However, M/OP did not, as specified in the

Federal Acquisition Regulation (FAR), obtain the advice of counsel in evaluating this perceived conflict of interest and in making the decision to exclude this firm. Such an opinion from USAID's general counsel (GC) would help to ensure that USAID had an adequate basis for its decision.

BACKGROUND

USAID is awarding 10 or more contracts for reconstruction activities in Iraq. As of the date of this memorandum, USAID has awarded nine contracts estimated to cost a total of \$1.5 billion for economic governance, personnel support, seaport administration, local governance, education, infrastructure reconstruction, monitoring and evaluation, health, and airport administration. In addition to these nine contracts, USAID has also awarded grants, cooperative agreements, and interagency agreements.

On January 16, 2003, the Office of the USAID Administrator authorized expedited acquisition and assistance procedures for activities and programs in response to the crisis in the Near East. This approval allowed USAID to award these contracts using other than full and open competition requirements as is authorized under 40 USC 474. This statutory authority requires the awarded contracts to be supported by written justifications and approvals as described in the FAR. This statutory authority also requires that agencies shall request offers from as many potential sources as is practicable under the circumstances.

USAID exercised this authority on March 3, 2003 and issued a Request for Proposal (RFP) to two prospective offerors to bid on the contract for strengthening the Iraq health system. The firms were given until March 17, 2003 to respond to the RFP. Both firms submitted proposals in response to the RFP. On April 30, 2003, USAID awarded Abt Associates a cost-plus-fixed-fee completion type contract for approximately \$43.8 million.

USAID awarded this contract under expedited acquisition and assistance procedures in order to meet urgent Iraq requirements. According to the Office of Procurement's fiscal year 2003 annual procurement planning guidance, the procurement time to award a contract under limited competition, on average, requires about seven months once an acceptable statement of work or program description is received. In this case, the Office of Procurement awarded the Iraq health contract, using limited competition, in approximately four months.

REVIEW RESULTS

The OIG reviewed USAID documentation and interviewed USAID and offerors' representatives to determine the events that took place and decisions made supporting the: 1) authorizing authority for using other than full and open competition, 2) contracting officer's determination of contractor ability to perform the work under the contract, 3) pre-solicitation process, 4) selection and negotiation process, and 5) award process. For the above five processes, USAID complied with applicable federal regulations except for the below mentioned requirement to consult with GC.

Based on a review of USAID's contract files and underlying supporting documentation, as well as interviews with its M/OP, GC and Bureau for Asia and the Near East (ANE) staff, the OIG determined that M/OP and ANE did not consult with GC, as required by the FAR, before excluding a firm from the invitation to bid on the contract¹.

General Counsel Not Consulted in Making Conflict of Interest Determination

Due to the potential for an actual or apparent conflict of interest, M/OP excluded a firm, which met invitation criteria, from the list of firms invited to bid on the health systems strengthening contract. M/OP and ANE staff were concerned about a potential conflict of interest because the excluded firm already had a contract with USAID to provide personnel support for USAID's operations in Iraq. Under the personnel support contract, the firm was slated to provide a health officer to the USAID mission in Iraq, and M/OP and ANE staff stated that this health officer would be involved in the day-to-day monitoring of the health contract. Thus, M/OP and ANE thought that the firm's supporting staff could potentially monitor and/or evaluate their own firm's performance under the health contract, if the health contract were awarded to this firm.

Regarding conflict of interest concerns, FAR Subpart 3.101 specifies that "the general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest." FAR Subpart 9.504 further requires that the contracting officer "(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and (2) Avoid, neutralize, or mitigate significant potential conflicts before contract award." M/OP

¹ The OIG has not attempted to make and has not made a determination as to whether the exclusion of the contractor was appropriate.

met these requirements in concurring with ANE's decision to exclude this firm from the invitation to bid.

However, FAR Subpart 9.504 also states that "contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts." Neither M/OP nor ANE consulted USAID's GC in making the determination to exclude this firm. As a result, at the time of our review, no legal analysis had been conducted of the support service contract to determine if there was a legal justification, based on FAR and other regulations, to exclude this firm from bidding on future Iraq related contracts. With the legal review, USAID would have a legal basis to support its decision for this particular contract. Nevertheless, for all future Iraq related contracts in which this firm qualifies as a potential bidder, OP should obtain a legal opinion from GC before excluding this firm from the bidding competition.

RECOMMENDATION No. 1

The Office of Inspector General recommends that M/OP use a checklist of contract procurement steps, which among other things, will ensure that it requests and obtains an opinion from USAID's Office of General Counsel on conflict of interest issues regarding potential bidders.

RECOMMENDATION No. 2

The Office of Inspector General recommends that M/OP obtain an opinion from USAID's Office of General Counsel, which specifies whether the firm providing personnel support services to USAID in Iraq should have been excluded from the invitation to compete for the Health System Strengthening in Post-Conflict Iraq Contract.

USAID COMMENTS ON OUR REVIEW

In its response to Recommendation No. 1, USAID stated that it did not find a need for this recommendation because there was not an issue of OP's cognizance of the FAR, but rather an issue of follow-through to make certain the requirement was fulfilled. Furthermore, USAID referred to the existing "Acquisition & Assistance Policy Directive 99-17" (AAPD) on conflict of interest and a blank checklist summarizing procurement steps and

clearances, as further reasons negating the need for this recommendation.

Although AAPD 99-17 generally refers to FAR Subpart 9.5 "Organizational and Consultant Conflicts of Interest", it does not specifically mention the need to contact GC when conflict of interest issues arise. In addition, OP provided us a sample contract negotiator's checklist with their response to the draft memorandum. This checklist did not contain a section on conflict of interest nor did it contain a step to contact GC regarding conflict of interest issues. We believe the use of a contract procurement checklist, which includes a step to refer conflict of interest issues to GC, would help to ensure OP compliance with this section of the FAR.

USAID concurred with our finding that it did not obtain the advice of counsel, as required in the FAR. In response to Recommendation No. 2, USAID subsequently obtained the required opinion from GC. In its written response, GC concluded that the firm was appropriately excluded from bidding on this contract. As a result, final action has been taken on Recommendation No. 2.

Please provide us within 15 days information related to actions planned or taken to implement Recommendation No. 1. We appreciate the courtesies extended to the OIG staff on this review, and we are continuing to examine other Iraq contracts.

cc: AA/LPA, E. Fox
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GC, J. Gardner