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MEMORANDUM

TO: Africa Field Posts

FROM: A-AA/AFR, John F. Hicks

DATE: February 1, 1993

SUBJECT: Update and Re-issuance of Africa Bureau Instructions on Implementing; Special Procurement Policy Rules Governing the Development Fund for Africa (DFA)

I. INTRODUCTION AND BACKGROUND

Until very recently, the "Buy America" provision of the Foreign Assistance Act of 1961, as amended, FAA Section 604(a), stated in essence that FAA funds may be used for procurement outside the U.S. only if such procurement will not result in adverse effects on the U.S. economy which outweigh the economic or other advantages of less costly non-U.S. procurement. Authority to make the judgements called for in this section was delegated largely to A.I.D.'s field missions, and detailed waiver procedures were established (see AID Handbooks IB and 15).

Waiver of the Buy America requirement under these procedures required extensive written justifications, multiple clearances (by personnel not present in most missions, such as lawyers, contracting and commodity management officers) and, in some cases, Washington approvals.

These waiver procedures were particularly onerous in the Africa context due to the large number of relatively small (in dollar value) waivers required given the prevalence of incompatible voltage systems, right hand drive roadways, and the dearth of U.S. dealerships or other sources for local maintenance and spare parts necessary to keep U.S. vehicles and equipment operational and to enforce warranties. Also, thinly staffed missions in Africa could ill afford the extensive, time-consuming paperwork associated with the numerous waivers needed to avoid procurement of inappropriate goods.

Recognizing these problems, Congress included a blanket procurement source/origin exemption in the DFA when that legislation was first enacted in 1997. The current DFA exemption, FAA section 496(n)(4), enacted in F-Y 1991, states:

"PROCUREMENT OF GOODS AND SERVICES.--In order to allow the assistance authorized by this section to be furnished as efficiently and expeditiously as possible, section 604(a) of this Act, and similar provisions relating to the procurement of goods and services, shall not apply with respect to goods and services procured for use in carrying out [the DFA]"

Significantly, the report language associated with this exemption directed A.I.D. to maximize U.S. procurement whenever practicable to the extent consistent with program objectives.

II. THE PREVIOUS DFA PROCUREMENT GUIDELINES --  
WHY CHANGE NOW?

On April 4, 1988, the AA/AFR approved eleven Procurement policy Recommendations, which collectively established the basic-rules governing the implementation of the DFA procurement exemption. Some of these recommendations were designed to promote the DFA exemption's paperwork-reduction objectives, while others were intended to promote U.S. procurement in accordance with the exemption's legislative history. In retrospect, these recommendations may have been too cumbersome to achieve a clear, consistent procurement approach throughout the Bureau.

The problems that have resulted are of two types: (1) a continuation of burdensome procedures (varying from mission to mission) to justify non-U.S. procurement, and (2) occasional failures to adequately pursue U.S. procurement in a few non project assistance (NPA) programs involving cash financing of commodity imports. With regard to the former problem, the GAO, in its Report entitled "Foreign Assistance; Progress in implementing the Development Fund for Africa, dated April 16, 1991", observed that A.I.D. missions in Africa were not using the DFA procurement exemption as fully as intended, stating:

"The exemption was not effective because AID's guidance does not permit the missions to take full advantage of the flexibility offered by the Congress." /ftn 1\_/

FTN 2 GAO Report No. B242693, April 16, 1991, at P. 36.

The GAO then made the following recommendation:

"We recommend that the Administrator of AID direct the Africa Bureau to evaluate DFA procurement to determine whether AID's "buy American" guidance was indeed too restrictive. If the evaluation shows that the timeliness or appropriateness of procurement actions has not improved, we also recommend that the Administrator of AID review the DFA procurement guidance to take greater advantage of the flexibility the Congress provided." /ftn 2\_/

FTN 2 GAO Report No. B242693, April 16, 1991, at P. 36.

In response to the GAO Report, A.I.D. agreed to re-examine the DFA procurement guidance, make modifications as appropriate and re-issue the guidance with whatever revisions were warranted. The Africa Bureau review had informally determined that the guidance would be more effective if it were simplified and liberalized. However, while this review was in progress, it also became apparent that the need to maximize U.S. procurement to the extent practicable was a continuing and growing concern in Congress and within A.I.D. The Congressional concerns were reflected in proposed legislation that would have rewritten FAA Section 604 in its entirety, strictly limited procurement of non U.S. vehicles absent AA-level approval, drastically restricted the use of cash transfers, created a Buy America Advocate with IG-like powers, and repealed-the DFA's "Buy America" exemption.

In the end, only subsection (a) of FAA section 604 /ftn 3\_/ was revised, and the DFA's exemption from the requirements of-section 604(a) and similar provisions of law was not repealed, though further legislative action has been promised when the next Congress convenes on its own initiative, however, A.I.D. has under review proposals to institute a Buy America Advocate-type position and to tighten procurement rules regarding certain sensitive commodities, such as motor vehicles. Accordingly, this Africa Bureau DFA procurement guidance will be revised, if necessary, to conform to these A.I.D.-wide initiatives at the time they are to take effect.

FTN 3 See Attached Copy of new FAA Sec. 604(a).

In light of these developments, the new DFA procurement guidance, detailed in the next section, addresses a wider range of actions to maximize U.S. procurement at the program level and with regard to non-project assistance (NPA) -- areas not adequately addressed previously. At the same time, the guidance does not significantly change the procedures set out in the original DFA Procurement guidance with respect to project and OE-funded procurement, where few problems, if any, have arisen. This guidance attempts to address the sometimes inconsistent policy objectives of promoting U.S. procurement while assuring development impact, without adding unnecessarily to the administrative workload of the Africa Bureau and its missions during this time of diminishing staff resources.

### III. THE REVISED DFA PROCUREMENT GUIDANCE

#### A. Procurement Matters Not Affected by the DFA Exemption and this Guidance

As noted above, the DFA exemption relates to application of A.I.D.'s "Buy America" -- or source, origin and

nationality -- rules to DFA procurement. It does not affect application of those rules to ESF-funded program in Africa or to DA-funded activities from current or prior year appropriations.

In addition, there are numerous procurement policies unrelated to source, origin and nationality rules which are not affected by the DFA exemption and this guidance. These would include most A.I.D. Regulations 1 provisions with respect to commodity transactions and most A.I.D. Handbook 11 provisions with respect to host country contracting and Handbook 15 provisions with respect to direct contracting, including CBD notice procedures to inform U.S. sources of procurement opportunities even though the procurement may be DFA-funded. Also not affected by the DFA exemption or this guidance are provisions concerning procurement of pesticides under A.I.D. Regulation 16, Handbook 1B Chapter 6 provisions concerning Foreign Assets Control, Suspension and Debarment, Restrictive Trade Practices, Equal Opportunity and Access to A.I.D Business; Handbook 1B, Chapter 7 provision with respect to Charters, Freight Differential, Dead Freight, Dispatch, Demurrage, and Inland Transportation; Handbook 3B, Chapter 9 prohibitions with respect to commingling; and Handbook 1B, Chapter 22 provisions with respect to Marking.

## B. New Operating Principles

The following general principles will guide DFA-funded procurement in all projects and programs authorized or substantively amended after the date of this guidance. It shall not apply to previously approved multi-year projects or programs that receive routine incremental funding at a later date.

1. General. Although A.I.D. Geographic Code 935 (Free World) is the authorized source/origin/nationality Code for DFA-funded procurement, thus eliminating formal waivers, U.S. procurement is to be maximized to the extent practicable. The judgement as to practicability will vary with each situation based on factors such as sustainable use of the items to be procured, cost, quality, and effect on project or program objectives; Except in emergencies, timing shall not be deemed a factor to justify non-U.S. procurement. This will not affect a well-designed activity that includes a good procurement plan.

2. Mission Procurement Plans. Procurement plans, which were mentioned in the 1988 DFA procurement guidance, are now mandatory for all Major country programs (i.e., Focus, Watch and Unique). Mission-wide procurement plans are to be submitted to AFR/Washington for screening and possible referral to FA for further action. These plans are to be updated annually. Project Specific Procurement plans, as before, continue to be required for each project; they must be approved by the Mission Director or other authorizing officer. Details are below.

3. \$5 Million limit. Mission approval of any procurement transaction for which the non-U.S. portion exceeds \$5 million will require AFR/Washington concurrence. /FTN 4\_/

FTN 4 This \$5 million limit (which applied to all non-DFA procurement prior to the re-issuance of DOA 405 in 1991) applies only to project and CIP procurement, since cash disbursing NPA is not considered "procurement" under this guidance. (See paragraph 5 below.) The term "Procurement transaction" has the same meaning here as in A.I.D. Handbook 1, Supplement B and 15.

4. Involving U.S. suppliers. Missions will be expected to include in their Procurement Plans (as discussed further in section III C and III C 3 below) possible approaches to involving U.S. Suppliers in the program.

5. Application to non-project assistance. (a) The purpose of DFA-funded sector non-project assistance (NPA) programs that are cash disbursing is to promote long-term sustainable development through sectoral policy and institutional reforms, not commodity procurement.

(b) If missions determine that imported commodities or types of commodities (e.g., vehicles) are critical to achievement of sectoral assistance objectives and that such commodities are to be financed with DFA funding, the assistance vehicle should be a PROJECT or, if sectoral reforms are also a key constraint, a COMMODITY IMPORT PROGRAM (CIP). /FTN 5\_/ In certain cases involving agricultural commodities, a PL 480 Title III program also might be appropriate.

FTN 5 The DFA expressly authorizes finding of sector program assistance for the purposes of achieving long-term economic development through policy reforms at the sectoral level. The legislative history is very clear that DFA funds are not to be used to address macroeconomic constraints such as balance of payments and budget support.

(c) Cash disbursing NPA should be used selectively, preferably (1) where host country foreign exchange allocation regimes are reasonably transparent and market-determined, /FTN 6\_/ (2) in countries belonging to currency unions (e.g., WAMU), or (3) when dollars can be used appropriately for repayment of eligible debts.

FTN 6 This would include most foreign exchange auction systems and open general import license systems that are not unduly limited in scope.

(d) When the host country's foreign exchange allocations are managed (e.g., it lacks a transparent, market-determined foreign exchange allocation system), cash disbursing NPA should not be used. Any exemptions must meet the following criteria:

(1) a cash-disbursing NPA program (rather than a CIP project or Title II program) is clearly required to achieve program objectives;

(2) In identifying dollar uses for dollar tracking purposes, the mission must adopt broad import categories of the kind typically used by a host country's central bank (e.g., spare parts, capital goods), which will be carefully reviewed by A.I.D./W. /FTN 7\_/ Identification of commodities by specific type (e.g., vehicles, computers, oil) is not appropriate if cash-disbursing NPA, rather than a CIP or project, is the disbursement vehicle.

FTN 7 Appropriations legislation requires that planned dollar uses in cash disbursing programs be identified in the Congressional Notification, except when an exemption is first secured through the CN process (e.g. when the host country belongs to a currency union or its foreign exchange system is transparent and market-determined). Since the CNs are cleared at the DAA level at least, NPA programs in this category will be closely scrutinized prior to approval.

(3)The mission must include measures in the program to assure that such dollars are restricted from financing imports from any donors that are tying their cash assistance./FTN 8\_/

FTN 8 - Such measures are required even where subtle forms of "tying" are utilized, such as not advertising financing opportunities in international media. When cash-disbursing assistance is provided in these non-market exchange regime situations, care must be taken to assure U.S. dollars are not used for purposes other than those broad uses specified in the agreement while, at the same time, avoiding controls that in effect transform the program into a CIP. If this line cannot be drawn by the mission, then the CIP disbursement mechanism should be used.

e) The issue of the appropriate use of cash disbursing NPA versus CIP assistance is currently under review in AID/W. The guidance contained in this section will be revised as necessary to reflect the results of this review./FTN 9\_/

FTN 9 - AID/FA's view is that when the essential objectives of an NPA activity can be achieved through a CIP, the CIP mechanism should be preferred because it offers advantages in terms of, among other aspects, "Buy-America" performance, accountability in the application of dollars, and tangible benefit to the United States economy.

### C. Former Procurement Guidance Principles that have been Retained

The following principles are subject to the exceptions noted in section III A, above.

1. Field authority retained. Implementation of most DFA exemption authority remains in the field, subject to the new \$5 million limit discussed above. Thus, in generally authorizing code 935 procurement for DFA activities, we

also are granting Field Posts the authority to restrict such procurement only to the U.S., the host country, or A.I.D. Geographic Code 941 countries, if consistent with program objectives. In this regard, Handbook limits on local shelf items procurement are inapplicable. Code 935 will apply to DFA grants to PVOs. However, U.S. order-of-preference language should be included such grants.

2. Procurement plans. (a) As indicated in the 1988 DFA Procurement Guidance, field posts must continue to prepare procurement plans in connection with each new Project Paper and Program Assistance Approval Document (activity procurement plans), and, in the case of Major country programs, an overall mission DFA procurement plan. These plans must assure the maximum practicable level of U.S. procurement./FTN 10\_/

FTN 10 - The 1988 Guidance states on p. 4: "To implement the DFA waiver, Missions must develop procurement plans in connection with their approved Project Papers or Program Approval Assistance Documents, or in an overall Mission DFA-Procurement Plan, all of which assure a high level of U.S. source procurement consistent with . . . these instructions."

(b) Activity procurement plans will be reviewed and approved by the authorizing official, with technical clearances (RCMO, RCO, RLA) as appropriate. Once approved, such plans shall be submitted to AFR/Washington and retained in the official files. Plans must: indicate the intended amount, in-dollars and by percentage, of each activity's total LOP procurement; indicate U.S. procurement in all categories (i.e., commodities, technical assistance and offshore training); and explain, in each case of non-U.S. procurement, why U.S. procurement is not practicable (in terms of suitability, quality, cost, sustainability, genuine emergency or other specific reasons).

(c) Mission procurement plans are required for all Major country programs. They should contain:

(1) aggregated procurement information for the whole portfolio summarized for the same categories covered by the Mission's activity procurement plans;

(2) a forward view highlighting in brief the Mission's projections regarding future procurement (based upon its NPDs, concept papers, CPSPs and other forward planning documents) and its best estimates regarding future host country imports likely to be financed under DFA-funded NPA activities, based upon the country's projected import patterns; and

(3) the Mission's suggestions on ways to involve U.S. suppliers more fully in the program; Missions should elaborate as appropriate where projections indicate that substantial amounts of manufactured goods, agricultural product or motor vehicles are likely to be imported, in the aggregate, one or more A.I.D.-funded transactions or NPA programs within next 2 to 3 years.

Mission procurement plans are to be submitted to AFR/Washington with the Annual Budget Submission. Further guidance as to format will be provided with the Bureau's supplemental ABS guidance. Upon completion of the ABS reviews, the AFR Geographic Offices will identify those Mission procurement plans in their respective areas which appear to contain significant opportunities for U.S. suppliers. The Geographic Offices, in consultation with ONI, will then confer with the Directorate for Finance and Administration to determine appropriate follow-up action with the U.S. private sector.

#### D. Special Cases

The following guidelines involve procurement of ocean shipping air travel and transportation services, agricultural commodity motor vehicles, pharmaceuticals, fertilizer, construction services and participant training. In some cases, non-U.S. procurement is allowed upon a written approval of the principal A.I.D. officer, while in others, non-U.S. based procurement is permitted without special documentation requirements. Both situations are, of course, subject to the principles and restrictions addressed in sections III A and B above. Where special documentation requirements exist, these are not considered waivers, but merely the recording of an informed procurement judgment, and they do not require any technical clearances such as the RLA, RCMO or RCO. This is in keeping with the legislative intent to eliminate complex waiver requirements for DFA-funded procurement.

1. Ocean Shipping. Cargo Preference Act rules apply to DFA funded commodity purchases. Thus, at least 50% of the gross tonnage of all A.I.D.-financed, commodities under the FAA, including those financed under the DFA, shipped on ocean vessels must be shipped on U.S. flag commercial vessels if such are available (as determined by FA/OP/TRANS), at fair and reasonable rates. These rules apply with all existing implementing details and procedures. Ocean shipping on non-U.S. flag vessels may be financed if necessary to meet the objectives of the DFA program, as long as the U.S. flag cargo preference requirements are met.

2. Air Transportation and Travel. Although "Fly America Act" rules do not apply to DFA-financed transactions, field posts are required, subject to documented exceptions, to limit all air travel and transportation to and from the United States to U.S. Flag carriers. Principal A.I.D. officers are expected to use their exceptional authority in these matters sparingly.

3. Motor Cycles. The authorized source for procurement of motor vehicles is A.I.D. Geographic Code 935. As before, no "special circumstance" waiver is required to be executed by the principal A.I.D. officer to procure such vehicles from non-U.S. sources using DFA funds (OE and ESP-financed vehicle procurement is tied to A.I.D. Geographic Code 000). However, missions should hold procurement of non-U.S. vehicles to an absolute minimum. In those instances where U.S.-manufactured vehicles could be made available to meet the requirements of a DFA-funded activity, in terms of a required specifications and spare parts and maintenance capabilities within country field posts are expected to procure them for the activity. Finally, missions should adopt monitoring procedures and other appropriate measures to assure that NPA activities (particularly cash-disbursing sector assistance programs) do not directly or otherwise end up financing, in the aggregate, large amounts of non-U.S. motor vehicles.

4. Construction Services. Where adequate competition among qualified U.S. firms exists for DFA-funded construction activities in excess of \$5,000,000, or for engineering services procurement, the required source for such purchases is the United States, subject to documented exceptions of the principal A.I.D. officer. Where U.S. firms will implement a DFA-funded construction activity, the nationality of construction firm employees shall be in accordance with Handbook 1B paragraph 5D7b, subject to documented exceptions of the principal A.I.D. officer.

5. Agricultural Commodities. No agricultural commodity or product thereof financed under the DFA may be procured from non U.S. sources when the domestic price of the agricultural commodity is less than parity, unless the commodity in question cannot reasonably be procured in the United States in fulfillment of the objectives of the DFA assistance activity. This policy is subject to documented exception by the principal A.I.D. Officer.

6. Fertilizer. DFA-funded procurement of fertilizer is restricted to U.S. sources, except when there are, or are expected to be, significant U.S./offshore price differentials or any adverse impact on domestic availability or price, as determined by FA/OP.

7. Pharmaceuticals, pesticides and other highly restricted commodities. For strong public health reasons, the required source for DFA-funded pharmaceuticals remains the United States. For similar reasons, only certain A.I.D.-approved pesticides are eligible for A.I.D. financing. Other restrictions apply with respect to rubber compounding chemicals and plasticizers. Procurement of these commodities continues to be governed by the provisions of A.I.D. Handbook 1B, Chapter 4C.

8. Participant Training. Third country participant training in A.I.D. Geographic Code 899 countries may be financed under the DFA without the special approval of R&D/OAT. Principal A.I.D. officers are expected to use this authority sparingly and to fund virtually all long-term training in the United States or the host country.

#### E. AFR/Washington Concurrence

Whenever this guidance refers to the need for AFR/Washington concurrence, it is intended that such action occur within the AFR Bureaus' delegated authorities. Given the pervasive authorities delegated to geographic and other Office Directors under Delegation of Authority No. 553, it is anticipated that the concurrence functions contained in this guidance will be exercised by the relevant office Director. The concurrence itself must be in writing (e.g., cable or fax), must be part of the formal project or program files and should contain only the clearances deemed

appropriate by the relevant office Director.

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Attachment

FAA Sec. 604 Procurement. -- (a) Funds made available under this Act may be used for procurement outside the United States only if the president determines that such procurements will not result in adverse effects upon the economy of the United States or the industrial mobilization base, with special reference to any areas of labor surplus or to the net position of the United States in its balance of payments with the rest of the world, which outweigh the economic or other advantages to the United States of less costly procurement outside the United States, and only if the price of any commodity procured in bulk is lower than the market price prevailing in the United States at the time of procurement, adjusted for differences in the cost of transportation to destination, quality, and terms of payment.

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ACTION MEMORANDUM FOR THE ASSISTANT ADMINISTRATOR

FROM: GC/AFR, Edward Spriggs  
AFR/DP, Margaret Bonner

SUBJECT: Updated DFA Procurement Guidance

PROBLEM:

Your approval is required to issue the first update of the DFA Procurement Guidance since it was originally issued in April of 1988.

DISCUSSION:

The Africa Bureau has now had in excess of four-years' worth of experience in implementing assistance activities financed under the DFA and its exemption from "Buy America" provisions of the Foreign Assistance Act. The exemption was included in the DFA by Congress for the purpose of facilitating use of DFA funds in Africa where, for historical reasons, U.S. made goods and services were not available. This, in turn, led to the need for numerous time-consuming procurement source/origin waivers. The DFA's exemption has relieved much of the paperwork and delay that were part and parcel of the formal waiver process. Now Missions need only utilize project procurement plans to justify non-U.S. procurement for an entire activity.

Generally, the system initiated in 1988 has worked well. Several recent developments, however, have made it incumbent on the Bureau to revise and strengthen the guidance in key areas. First, the GAO, in its generally favorable April 1991 report on the uses of DFA funds, mildly criticized A.I.D. for continued overly burdensome procedures to justify non-U.S. procurement even with the DFA exemption. Second, AFR Missions gradually began using NPA cash disbursing assistance with increasing frequency, and on a few occasions the host country marketplace used the dollars to finance importation of significant quantities of non U.S. goods, particularly vehicles. Third, these latter incidents have resulted in several scathing and public attacks on Agency procurement practices or at least the results thereof.

The attached updated DFA procurement guidance is intended to address several key problem areas that have surfaced over the years and to place the DFA exemption on firmer footing. Under the new guidance:

- Missions will prepare procurement plans that will enable both the field and AID/W to better identify opportunities for U.S. firms to participate in A.I.D.-financed procurement transactions;
- A new guidance section has been added that clarifies the appropriate uses of dollars in cash-disbursing NPA programs, consistent with the recently issued NPA Guidance, in order to limit the chance that such assistance

might finance significant numbers of non-U.S. goods, particularly vehicles;

-- The \$5 million limit on field authority to procure non U.S. goods, which existed before the Administrator abolished the limit in 1991, has been re-instituted; and

-- Special guidance highlighting the-sensitive area of motor vehicle procurement has been included which, along with procurement plans that identify in advance potential market opportunities for U.S. suppliers, should make it unnecessary to impose numerical limits on foreign vehicle procurement.

The guidance has been vetted thoroughly-throughout-the Bureau, the field and A.I.D./Washington over a period of seven months. The Deputy Associate Administrator for Finance and Administration has cleared, with the addition of a footnote preserving FA's position in favor of the CIP mode (see footnote 9). GC/CCM, which advised FA on this issue, has also cleared, as has ONI. Other office clearances remain valid because no substantive changes affecting the concerns of those offices, have been made since the original clearance was provided. In sum, the updated DFA procurement guidance is now ready to be issued.

RECOMMENDATION:

That you approve the attached update to the 1988 DFA procurement guidance.

Approved: \_\_\_\_\_/s/\_\_\_\_\_

Disapproved: \_\_\_\_\_

Date: February 1, 1993