

NGO FINANCIAL NEWSLETTER (TM)

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CONGRESS RESTORES \$400 MILLION TO MILLENNIUM CHALLENGE ACCOUNT IN PASSING FY 2005 FOREIGN OPERATIONS SPENDING BILL

Before recessing for Thanksgiving on November 20, the 108th Congress passed the FY 2005 Consolidated Appropriations Act (H.R. 4818), of which Division D is devoted to the Foreign Operations, Export Financing and Related Programs Appropriations Act for FY 2005, setting total foreign aid funding at \$19.8 billion, down from the President’s request of \$21.4 billion.

Except for restoring \$400 million to the Millennium Challenge Account to bring total funding in FY 2005 at \$1.5 billion, the Congress acting as a whole was stingy with funding for foreign aid this year, continuing a national election year trend. A copy of this bill may be downloaded from <http://thomas.loc.gov/home/omni2005/h4818divd.pdf>.

The bill provides \$1.55 billion for Child Survival and Health Programs and \$1.46 billion for Development Assistance. This bill provides \$441 million for bilateral international family planning programs, and \$25 million for the UNFPA. A total of \$2.3 billion is being provided in global assistance to combat HIV/AIDS, tuberculosis and malaria. An additional \$600 million in global assistance is anticipated in the Labor-HHS-Education spending bill, bringing total funding to \$2.9 billion.

International Disaster and Famine Assistance would receive \$370 million and \$49 million for Transition Initiatives. Development Credit Authority would receive \$21 million for micro and small enterprise programs, urban programs and other credit programs. \$618 million would go for USAID’s operating expenses and \$35 million for its OIG.

Total funding of USAID is \$4.2 billion, \$221 above the President’s request, but \$254 million less than in FY 2004. In addition, USAID administers a number of State Department-funded programs, as follows.

The Economic Support Fund would receive \$2.482 billion with \$360 million of this amount going to Israel, \$535 million to Egypt including \$200 million for the Commodity

Import Program, \$300 million for Pakistan, and \$250 million for Jordan. \$396.6 million would go for the Support for East European Democracy (SEED) Act for Eastern Europe and the Baltic States. Assistance for the Independent States of the former Soviet Union would receive \$560 million.

Bolivia, Colombia, Ecuador and Peru would share the bulk of \$731 million under the Andean Counterdrug Initiative. Of this amount, \$125.7 million would go for alternative development/institution building in Colombia, \$54.3 million in Peru, \$42 million in Bolivia, and \$15 million in Ecuador. Colombia would receive another \$27.6 million for the rule of law.

From the 128-page Joint House-Senate Conference Report located at <http://thomas.loc.gov/home/omni2005/stmgrh4818divd.pdf>, several insights into funding opportunities and additional contracting provisions are shown:

- . Funding for Afghanistan is pegged at \$980 million and \$403 million in humanitarian and refugee assistance for Sudan. Sec. 523 and 569. In addition, \$95 million in humanitarian assistance was provided for Sudan earlier this year in the FY 2005 Defense Appropriations Act.

- . \$400 million will be made available for Rep. Nita Lowey's favorite program: Basic Education. Sec. 567.

- . Trade Capacity-Building covering a myriad of economic activities is budgeted at \$507 million. Sec. 570.

- . USAID may provide an exception to the "fair opportunity" process for placing task orders under IQC contracts with any category of small or small disadvantaged business. Sec. 534(e).

- . Sec. 573 contains a provision introduced on the floor of the House during its deliberations that will add a requirement to small business subcontracting plans for consideration of small businesses for work performed outside the United States to the present requirement for work performed in the U.S. To review this amendment to section 8(d)(6) of the Small Business Act, see "Congressional Record" page H5861.

- . Page 16 of the Bill contains language "urg[ing] USAID to take steps to preserve the viability of leading NGO microfinance networks and to consult with the Committees on Appropriations on these measures."

- . Supporting the work of volunteers with experience in the private sector in developing countries, the Conference managers "endorse the House report language regarding the Financial Services Volunteer Corps and the Citizens Development Corps, and Senate language that endorses the International Executive Service Corps." Page 16 of the Conference Report.

. While endorsing the list of university proposals in the Senate and House reports, the Conference managers “affirm the principle of rigorous competitive selection of proposals on technical merit. On a highly exceptional basis, the Committees may request USAID to consult them on behalf of proposals deemed meritorious.” Page 17 of the Conference Report.

. USAID would be permitted to use \$37.5 million to hire 175 Foreign Service Limited employees of which not more than 75 may be hired for employment in the United States, provided it executes a one-for-one reduction in the number of its PSCs, PASAs, RSSAs and other staff. Sec. 588(a).

. Section 587(a) requires organizations receiving Migration and Refugee Assistance or Transitional Initiatives funding to adopt a code of conduct consistent with the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises’ six core principles for the protection of beneficiaries of humanitarian assistance.

Highly controversial this year is a provision barring the transfer of Economic Support Funds to a government that is a party to the International Criminal Court, but has not entered into an agreement with the United States to limit legal proceedings against U.S. personnel present in such country. Sec. 574. Potentially at jeopardy are \$250 million in support of economic growth in Jordan, and \$13.5 million to support free trade initiatives with Mexico, among a host of other countries.

Federal civilian employees will receive a 3.5% raise under the omnibus spending bill. But lawmakers dropped language forcing OMB to abandon revised rules designed to speed up the competitions run by Federal agencies to determine whether work would be outsourced to private firms.

Absent from the Conference Report is reference to a provision contained in House Report 108-599, accompanying the House-passed version of the FY 2005 foreign assistance spending bill, requesting the USAID Administrator to report annually on the extent and detail of USAID’s sole-source and limited-competition for contracts, cooperative agreements and grants in excess of \$100,000. To view this House Report, go to: [http://thomas.loc.gov/cgi-bin/cpquery/R?cp108:FLD010:@1\(hr599\)](http://thomas.loc.gov/cgi-bin/cpquery/R?cp108:FLD010:@1(hr599)).

Elsewhere, the Foreign Affairs Authorization Act (S. 2144) did not make it out of the Senate, with its proposed increases in the cost-of-living allowance (Sec. 302), post differentials and danger pay allowances to 35% of salary (Sec. 305), and adjustment in pay authority for the Senior Foreign Service to bring it into line with the Senior Executive Service (Sec. 315). Included in this bill was authorization for the use of PVOs to help identify refugees for resettlement in emergency situations (Sec. 315).

The Congress is due to return on December 6 to clean up a glitch regarding Appropriation Committee access to taxpayers’ tax returns, after which this bill is expected to be presented to President Bush for his signature.

5-PAGE GLOBAL DEVELOPMENT ALLIANCE CONCEPT PAPER DUE DECEMBER 15

On November 5, USAID released a Global Development Alliance (GDA) Annual Program Statement (APS No. GDA-05-001) for Public Private Alliances in eight different program areas. If you haven't already seen this APS, download a copy from <http://www.fedgrants.gov/Applicants/AID/OP/WAS/GDA-05-001/listing.html>.

This APS is a continuation of a personal priority of Administrator Andrew Natsios under which USAID funded approximately 200 alliances in FY 2002-2003, with over \$500 million in USAID funding leveraging over \$2.4 billion in partner resources.

Awards made in FY 2002-2003 are broken down geographically as follows: Africa: 60 country-specific and 20 regional alliances totaling \$100 million in USAID funding; Asia & the Near East: 23 country-specific and two regional alliances totaling \$35 million; Europe & Eurasia: 20 country-specific and one regional alliance totaling \$50 million; Latin America & the Caribbean: 24 country-specific and 18 regional alliance totaling \$80 million; and Worldwide: 28 global alliances totaling \$279 million. Source: Global Development Alliance Update, October 27, 2004. For a copy of this presentation, go to: http://www.usaid.gov/our_work/global_partnerships/gda/ACVFA.ppt.

There is no dollar value limit or minimum for individual proposals or for cumulative awards made under this APS. However, as a reference, GDA incentive fund awards have been between \$300,000 and \$1,000,000. Missions may make awards outside this range. There is no provision for fee/profit to the prime recipient under grants and cooperative agreements. Programs funded may last from 12 to 60 months.

The APS instructs potential alliance partners to bring "significant new resources, ideas, technologies, and/or partners to address development problems in countries where USAID is currently working." Partners could include a wide range of organizations such as: foundations, U.S. and non-U.S. NGOs, U.S. and non-U.S. private businesses, business and trade associations, international organizations, U.S. and non-U.S. colleges and universities, etc.

USAID is particularly interested in alliance opportunities where its resources are leveraged at a two-to-one ratio. At least some portion of the leverage must be in the form of cash. The partner contribution must include non-governmental resources at least equal to 25% of the value of the expected USAID resources.

In a footnote appearing on APS page 9, USAID distinguishes cost-share which is a legally binding requirement versus leveraged resources. While not legally binding, USAID will still require annual benchmarks that include proposed results to be accomplished with USAID funds and the additional leveraging.

Applicants are required to submit concept papers limited to a maximum of five (5) pages by December 15, 2004, to Missions and USAID/Washington operating units and may receive instructions on whether or not to proceed with a full proposal. See page 10 of the APS for instructions on preparing the concept paper.

Whether or not your organization responds to this APS, there is an absolutely invaluable source of research and contact information in Annex B, which can be accessed through http://www.usaid.gov/our_work/global_partnerships/gda/GDA_Contacts.doc. This should allow even a novice to easily access key information on each Mission's strategic plan and objectives as well as provide a point of contact for follow up discussions. Besides GDA, this information could also be used for the basis of submitting an unsolicited concept paper, ideally during USAID's third quarter (April 1 – June 30, 2005).

SEVENTEEN COUNTRIES NOW ELIGIBLE FOR FULL MCA FUNDING AND 12 OTHER COUNTRIES FOR "TRANSITIONAL" FUNDING

Morocco was added by the Board of the Millennium Challenge Corporation (MCC) on November 9 to the 16 countries selected for the first round, making a total of 17 countries eligible for full Millennium Challenge Account (MCA) funding. To summarize this list, these countries are Armenia, Georgia, Mongolia, Sri Lanka, Vanuatu, Bolivia, Honduras, Nicaragua, Benin, Cape Verde, Mali, Madagascar, Morocco, Ghana, Losotho, Mozambique, and Senegal. Primarily due to exchange rate movements, Cape Verde, a first round MCA candidate country, moved above the ceiling and so was not eligible to compete for 2005, but will be eligible for 2004 funding.

To date, MCC has received 14 of 16 proposals from the first year's eligible countries. The only information available at this point is the two countries that have not as yet submitted applications are not from Africa. Without the addition of Morocco, the proposals MCC has received total over \$4 billion. Yet, MCC has only \$2.5 billion available in FY 2004 and 2005 funding. MCC's investment committee has approved going to formal due diligence on four of these proposals; namely, Honduras, Madagascar, Nicaragua and Georgia.

In terms of the threshold countries, the Board reconfirmed the status of the six carry-over threshold countries: East Timor, Kenya, Sao Tome and Principe, Tanzania, Uganda, and Yemen. One of the original threshold countries -- Albania -- moved above the per capita income ceiling and so is not eligible to compete this year. And also at this Board meeting, six more countries were added as threshold countries: Burkina Faso, Guyana, Malawi, Paraguay, the Philippines, and Zambia.

The Millennium Challenge Corporation recently made an IQC award to Crown Agents, procurement specialists and freight forwarders, to conduct procurement system reviews of its candidate MCA countries.

THE YANKS ARE COMING, THE YANKS ARE COMING FOR AusAID FUNDING

For the first time in 2004, Australia, a member of the Organization for Economic Cooperation and Development's (OECD) Development Assistance Committee, agreed to "untie" procurement for most forms of development assistance to least developed countries (LDCs) with the exception of free standing technical assistance and food aid. Untied aid opportunities for which U.S. for-profit and nonprofit bidders are eligible can be found at: <http://webdomino1.oecd.org/comnet/dcd/untiedpubliccws.nsf>, then point and click "Project Donor," and finally go to "Australia."

In general, Australian Agency for International Development's (AusAID) tenders are available at <http://www1.ausaid.gov.au/tenders/currenttenders.aspx>. As an admirable practice, AusAID publicly identifies the names of the shortlist tenderers at: <http://www1.ausaid.gov.au/tenders/currenttenders.aspx#Shortlist>. For general searches, AusAID's homepage is <http://www.ausaid.gov.au>.

The LDCs with which Australia has bilateral aid programs include: Bangladesh, Cambodia, East Timor, Laos, Nepal, Kiribati, Samoa, Solomon Islands, Tuvalu, and Vanuatu.

To serve as a context, in 2004-2005 Australia through AusAID will provide Au\$2.133 billion (Au\$1 = US\$0.79110) in aid. AusAID provides overseas aid in six ways. First, AusAID competitively contracts for aid work to Australian and international companies. Second, AusAID funds not-for-profit organizations, such as World Vision and Oxfam, to deliver aid programs. In response to emergencies, AusAID staff travel to affected areas to provide immediate support, much the same as USAID's Office of Foreign Disaster Assistance.

AusAID works with neighboring countries to improve their governments' ability to deliver economic and community services. AusAID also contributes funding to international organizations, such as the International Committee of the Red Cross, that help people in emergencies. Finally, AusAID contributes to global and regional poverty reduction programs set up by the World Bank and the Asian Development Bank.

Australia's contracting policies are contained in the "Commonwealth Procurement Guidelines," which can be found at: http://www.finance.gov.au/ctc/publications/purchasing/cpg/commonwealth_procurement_guide.html. Those organizations interested in considering contracting opportunities at AusAID should also download a June 2004 publication "Contracting for Australian Aid" which can be found at: <http://www.ausaid.gov.au/publications/pdf/business/conout.pdf>.

According to a 2004 AIDWatch Briefing paper entitled: "Australian Aid: the Boomerang Approach," the AusAID contract market is essentially controlled by no more than ten firms. These 10 companies have received over 50% of the value of all aid contracts.

Less than 5% of the value of AusAID's contracts are in the hands of nonprofit NGOs. See: <http://www.aidwatch.org.au/assets/aw00617/CoA%20FACT%20SHEET.pdf>.

As another consideration, U.S. organizations should be aware that unlike USAID whose contract decision-making at its Missions is highly decentralized, most contracting decisions made in the field are elevated to AusAID/Canberra where awards could be redirected. U.S. firms serious about breaking into the AusAID market should consider working out joint marketing or venture opportunities with Australian counterparts. One large USAID contractor is reputedly looking to make an acquisition of an Australian contractor.

Whereas there are few examples of Australian firms doing business with U.S. firms for USAID awards, one notable exception is SAGRIC, an Adelaide firm specializing in water supply and sanitation, etc. and the second largest AusAID recipient with Au\$290.8 million in AusAID contracts, whose website is located at <http://www.sagric.com.au> and which is presently serving as DAI's subcontractor on an Iraqi reconstruction contract.

The remaining nine largest AusAID contractors in 2002/2003 according to AIDWatch were: Acil (Au\$323.8 million), GRM (Au\$197.5 million), Hassall and Associates (Au\$155 million), Melbourne University Private (Au\$131.6 million), URS Australia (Au\$96 million), International Development Support Services (Au\$90 million), Overseas Project Corporation of Vic. (Au\$75.6 million), Australian Wheat Board (Au\$69.6 million), and SMEC (Au\$61.6 million).

NIH'S NATIONAL INSTITUTE OF ALLERGY AND INFECTIOUS DISEASES AWARDS \$10.4 MILLION TO FIGHT AIDS ON THREE CONTINENTS

The U.S. Department of Health and Human Services' Center for Disease Control is not the only unit making sizable awards in the fight on HIV/AIDS. The National Institutes of Health's National Institute of Allergy and Infectious Diseases (NIAID) is making awards under the Comprehensive International Program of Research on AIDS (CIPRA).

CIPRA grants are awarded to resource-limited countries. One eligibility requirement is that applications come from countries with a per capita gross national income equal to or less than US\$5,000. Since the first awards made in September 2001, thirty-three grants have been made to researchers. More information on the CIPRA program is available at: <http://www.niad.nih.gov/daids/cipra>.

On November 18, NIAID made awards for: A Cambodian Clinical Research Network for HIV and TB to the Cambodian Health Committee of a five-year, \$2.6 million grant; HIV Pathogenesis, Prevention and Treatment in the Andes to Association Civil Impecta Salud y Educacion of a three-year, \$3.1 million grant; HIV Research Program in Thailand and Cambodia to the Thai Red Cross Society of a five-year, \$4.6 million grant; and Prevention and Treatment of HIV/AIDS in Adults and Children to Tomsk Regional Center for AIDS and Other Infectious Diseases of a two-year \$107,000 planning and organizational grant.

Separately, the U.S. Government has provided more than \$11 million in additional assistance to help Haitians rebuild after the recent tropical storms and hurricanes. President Bush signed into law a Caribbean aid package of \$100 million for hurricane relief.

GATES FOUNDATION RECEIVES 300 APPLICATIONS A DAY

In a recent Chronicle of Philanthropy article, the Bill & Melinda Gates Foundation reportedly receives about 300 unsolicited grant requests for funding a day, but it prefers to do its own research and then invite proposals from charities it believes fit its grant-making criteria.

The Foundation does not accept unsolicited proposals for its education and libraries programs, and expects to provide fewer unsolicited grants in global health as well.

Even so, the Foundation continues to read unsolicited proposals for global health and its program for providing support to charities in the Pacific Northwest.

Approximately 53% of the \$7.2 billion in funds the Foundation has awarded to date has gone to Global Health with education the second biggest funding priority at just over 30%. Between the dividends that the Foundation earns on Microsoft stock and the future donations from the Gates family, the Foundation endowment is expected to grow from the present \$30 billion to \$100 billion.

The philanthropy of the Gates Foundation is in stark contrast to the giving to overseas projects last year. International giving totaled an estimated \$3 billion last year, a slight decrease from 2002, when grants to organizations abroad equaled \$3.2 billion, said a report released by the Foundation Center entitled "International Grant Making III: An Update on U.S. Foundation Trends" available for \$40 from the Foundation Center, 79 Fifth Avenue, New York, NY 10003-3076, tel. (800) 424-9836. The report predicted an increase in giving internationally in 2004 due to a rebound in the stock market and the rise in the number of foundations with international programs.

Other findings from the report on international grant-making, include:

- . International giving accounted for 13.8% of all foundation grant dollars in 2002. In 1998, the share was 10.9%
- . Giving to health programs abroad grew the most from 1998 to 2002, 32% of international grants made for such purposes. The report said that the Bill & Melinda Gates Foundation contributed to the increase
- . Asia and the Pacific region received the largest percentage of grant dollars -- 23.3% -- from American foundations. China was the country funds most frequently mentioned as an area of increased support.

NEW USAID EMBLEM PROPOSED TO BE AFFIXED ON ALL GRANT- AND CA-SUPPORTED PROGRAMS

In Interim Update 04-10, dated November 1, USAID Administrator Andrew Natsios announced a new global branding and proposed changes to its marking policy.

USAID is initiating a proposal to revise, extend and enhance its marking requirements, as outlined in Automated Directives System Chapter 320. This policy change would require organizations that receive grants and cooperative agreements, as well as contracts, to mark all programs, projects, activities, and public communications as funded by USAID.

USAID is launching a new global branding effort. It has updated its logo. This symbol has been modified slightly to improve readability and reproduction quality.

USAID has also developed a brand name and tagline that clearly communicates that its assistance is “From the American People.” USAID’s logo and brand name will be used consistently on everything from publications to project plaques, food bags to folders. For information and downloadable files for the updated logo and new brand name, go to <http://www.usaid.gov/branding>.

This initiative is subject to public rulemaking in the Federal Register before being mandatory.

SARBANES-OXLEY-LIKE CORPORATE GOVERNANCE STANDARDS PROPOSED TO BE IMPOSED ON NONPROFIT AGENCIES PARTICIPATING IN THE JAVITS-WAGNER-O’DAY CONTRACT PROGRAM

The Committee for Purchase from People Who Are Blind or Severely Disabled (Committee) proposed on November 12, 2004, a number of sweeping corporate governance reforms to be implemented by nonprofit agencies awarded Government contracts under the authority of the Javits-Wagner-O’Day (JWOD) Act. These standards would include, among other things, standards concerning the practices of board of directors and the reasonableness of executive and other employee compensation. See 69 Fed. Reg. 65395-65401.

In a proposed new Section 51-2.10 to Title 41 of the Code of Federal Regulations, each nonprofit agency that would like to qualify for participating in the JWOD Program would have to comply with the following Committee-approved governance standards:

1. Board of Directors does not include family members of the agency’s management team
2. Board of Director’s Chairperson may not as serve as the agency’s CEO
3. Has an audit committee than oversees the independent auditing firm
4. Board of Directors reviews and certifies executive compensation

5. Board of Directors has adopted a conflict of interest policy
6. Turns over the Board membership on a recurring schedule

7. Board of Directors reviews and validates all IRS Form 990 and all attachments
8. Has at least one financial expert serving on the Board of Directors
9. Publishes and make public the minutes of the Board of Directors meetings.

FEDERAL TECHNICAL DATA TO BE MADE AVAILABLE THROUGH FEDTEDS.GOV

The FAR Councils are proposing to amend the Federal Acquisition Regulation (FAR) to provide for the access and distribution of solicitation requirements or other documents (e.g., technical specifications, maps, building designs, schedules, etc.), when controls are necessary according to agency procedures, through the Federal Technical Data Solution found at <http://www.fedteds.gov> in lieu of the Governmentwide Point of Entry at Fedbizopps. 69 Fed. Reg. 63435 of November 1, 2004.

DBA INSURANCE COVERAGE NOW AVAILABLE TO USAID GRANTEES AND COOPERATIVE AGREEMENT-HOLDERS

An NGO Financial Newsletter reader contacted us early this past month with a question about the applicability of Defense Base Act (DBA) workers' compensation insurance coverage to U.S. expats working on USAID grants and cooperative agreements. Figuring the answer to be a no-brainer since DBA insurance has always applied just to contracts and subcontracts with performance outside the U.S. and never to grants or cooperative agreements, our editor went through the motions of calling Rutherford International, the designated broker for Fidelity & Casualty Company of New York, the insurance company with the USAID contract for DBA Workers' Compensation coverage.

Well, lo and behold, he almost fell off his chair when he found out from Ms. Sue Somers of Rutherford that since October 22, 2004, coverage of the DBA workers' compensation rates of \$2.15 per \$100 of expat remuneration or payroll has been extended on a voluntary, not a mandatory, basis as in the case of USAID prime and subcontracts, to all USAID grants and cooperative agreements with performance outside the U.S. This rate should be especially attractive to those grantees and cooperative agreement-holders with staff working in Afghanistan and Iraq and in other difficult-to-obtain worker-insurable countries.

This coverage applies, as such, to U.S. nationals, U.S. residents, green card holders, and those hired in the U.S. It does not cover third country nationals and cooperating/host country nationals (CCNs/HCNs) with the exception of such personnel working in a country listed on the waiver list (which can be obtained from Rutherford International) that does not have a valid worker's compensation scheme, in which case DBA would apply to all workers on a USAID contract, grant or cooperative agreement, including American hires, TCNs and CCNs/HCNs.

For more information about this development, contact either Sue Somers or Diane Proctor of Rutherfoord International at telephone: (703) 813-6506, fax: (703) 354-0370 or email SSomers@rutherfoord.com.

FASB ISSUES STATEMENT 151 ON INVENTORY COSTS IN LINE WITH IASB

The Financial Accounting Standards Board (FASB) issued a new standard on inventory costs that converges with the international standard. FASB Statement 151, amending ARB No. 43, Chapter 4, requires companies to recognize in earnings abnormal amounts of idle plant expense, excessive spoilage, freight and handling costs in the period when those costs are incurred and requiring the allocation of fixed production overhead to inventory based on the normal capacity of the production facilities.

Meanwhile, costs resulting from normal levels of production should still be treated as inventory costs and get capitalized – or written down over time – on the books.

Manufacturers, including pharmaceutical companies and computer makers, will be most affected by the standard. In the past, there had been confusion as to whether companies should capitalize -- or expense – those unusual amounts of expense associated with production below normal levels.

The rule takes effect with annual reports beginning after June 15, 2005 – or January 1, 2006, for those on a calendar year basis.

PCAOB ISSUES INTERNAL CONTROLS GUIDANCE FOR PUBLIC COMPANIES

Regulators of the Public Company Accounting Oversight Board (PCAOB) issued guidance to help companies and their auditors comply with a new requirement under the Sarbanes-Oxley Act to conduct an annual review of public company internal controls.

The guidance, presented in a question-and-answer format, is available at the PCAOB website at <http://www.pcaobus.org>. The topics covered include whether outside auditors can rely on the work of internal auditors and auditor's responsibilities for informing management and corporate boards of significant deficiencies and material weaknesses that are uncovered, but fixed before the assessment date.

In response, the PCAOB stated that external auditors may rely on the work of internal auditors in some cases as they review a company's internal controls. However, outside auditors cannot use internal auditors for direct help in conducting tests of controls and must perform enough of the testing themselves to support their conclusions on whether a company has adequate controls over its financial reporting process.

Regarding the timing issue, the PCAOB said auditors must inform corporate managers and directors of any "significant deficiencies and material weaknesses" uncovered in the

course of the audit, including those corrected by management before the assessment is made.

IRG ESCAPES MAJOR DISALLOWANCE OF POST DIFFERENTIAL AND DANGER PAY FOR SIX-DAY WORKWEEK ON IRAQI CONTRACT

The International Resources Group (IRG) asked the then cognizant Administrative Contracting Officer, Neil Price, in Baghdad whether IRG's interpretation of AIDAR Clause 752.7028 Differential and Allowances to allow payment of post differential and danger pay on all authorized hours worked and paid at the base rate of compensation for direct-hire employees, not limited to the 40-hour workweek, was valid. On July 8, 2003, Mr. Price, now posted at USAID/Kiev, concurred with IRG's interpretation, and IRG proceeded with this understanding that it had the Contracting Officer's determination of the allowability of these costs. August 14, 2004 Letter of Alvera Reichert, USAID Contracting Officer and OAA – Baghdad Office Director.

Subsequent to the Contracting Officer's determination in IRG's case, in audits conducted by the Defense Contract Audit Agency (DCAA) of the Iraqi reconstruction contracts, major disallowances of contractor post differentials and danger pay allowances were presumably reported on DCAA's audits of most other USAID Iraqi contracts and subcontracts, based upon a later purported determination made by Jeffery Bell, USAID's Office of Acquisition and Assistance's Deputy Director for Operations, limiting post differential and danger pay to the 40-hour workweek.

By way of background, AIDAR 752.7028(a) Post Differential limits this allowance to the percentage of salary provided to USAID employees in accordance with the Department of State Standardized Regulations (DSSR) Chapter 500, except for the limitation contained in Section 552 "Ceiling on Payment." DSSR 040k(3) defines basic compensation as the "rate of compensation fixed by administrative action ...without taking into consideration any additional compensation such as overtime pay."

Furthermore, Section 552 places a ceiling on such payments not to exceed the annual salary authorized at Executive Schedule II. However, an exemption exists in this Section for employees assigned or detailed to with danger pay, widespread warfare, US troop involvement in hostilities, such as in the case of Iraq.

The allowability of post differential and danger pay allowances to a six-day workweek revolves around an interpretation of what is meant by "base compensation," as found at AIDAR 731.205-6(b) for contracts with commercial organizations, AIDAR 731.371(b) for contracts with educational institutions, and AIDAR 731.772 for contracts with nonprofit organizations, as further limited to "direct compensation" found at AIDAR Clause 752.7007(a).

First of all, in an interpretation frequently received from USAID's present and past Ombuds[wo]men, base compensation has been inferred to exclude differentials, allowances and fringe benefits, but its applicability to additional base compensation, as in

this instance when direct-hires are authorized to work and are being paid for a sixth weekday, has not been tested.

But if it has been the policy and practice of a contractor to pay such allowances on extended workweeks, such compensation could be allowable under language found at AIDAR 752.7007(a) where it states: “Direct compensation of the Contractor’s personnel will be in accordance with the Contractor’s established policies, procedures, and practices ...”. However, this provision goes on to limit the contractor’s discretion when it closes this paragraph by stating “...and the cost principles applicable to this contract.”

More critically, it is the customary compensation practice of many private sector firms to treat pay for extended workweeks as base compensation, especially since no premium hourly rate of pay is involved, as would be paid for overtime.

Mr. Bell’s strict interpretation of the allowability of these compensation elements, applied ex post facto, is, as a consequence, causing morale problems among many contractor personnel who had been paid post differential and danger pay on the six day workweek under their original Iraqi employment contracts, but because of this new interpretation are not being paid for these compensation elements under the reaward of these very same contracts. This interpretation could also have legs by being applied to all USAID prime and subcontract direct-hire personnel working for other Missions requiring a six-day workweek.

We are sure that we have not heard the last of this issue. Whereas no traditional USAID contractor may be prepared to take on this issue alone, we are sure that some of the larger contractors now bidding on USAID contracts or the Professional Services Council will be involved sooner or later in this issue.

This episode once again highlights the importance of obtaining an advance agreement under FAR 31.109 for any “special or unusual costs” like these, since the burden falls upon the contractor to cure patent ambiguities under G.L. Christian Associates [160 Ct.Cl. 1, 312 F2d 418 (1963)]. Contractors would also be well advised to thoroughly review and update, as appropriate, their compensation policies over expats and others because of these major cost disallowances.

FEDERAL LAWSUIT SEEKS \$373 MILLION FROM WASHINGTON GROUP INT’L AND PARTNERS FOR GEOGRAPHIC CODE 000 VIOLATION

The U.S. Government is accusing Boise-based Washington Group International (formerly Morrison Knutsen), Contrack International and Egypt’s Hassan Allam Sons of running a “sham” joint venture to win USAID/Cairo-financed construction contracts worth about \$373 million.

The lawsuit filed in U.S. District Court on November 5 alleges Washington Group International had a secret agreement with the Egyptian partner to help do the work, in

violation of contract rules requiring the companies to be based in the United States, the complaint says.

The lawsuit centers on five projects begun more than a decade ago and financed by USAID. The projects included fixing or expanding water and wastewater treatment plants in Egyptian cities including Luxor. USAID did not discover the problem until 2002. Washington Group Int'l is still working on USAID-funded projects in Egypt.

Government attorneys say Washington Group Int'l wouldn't have gotten the work had USAID officials known it was working with an Egyptian partner. The Government is asking the court to force Washington Group Int'l and its partners to return all payments received for the work and pay civil penalties.

ABT ASSOCIATES SET BACK AGAIN IN OVERTURNING USAID/NEW DELHI CONTRACT AWARD FOR LACK OF COST REALISM

At B-294130.2, October 12, Abt Associates was once again thwarted in overturning a \$10.9 million cost-reimbursement contract award made by USAID/New Delhi to TCG International to procure technical assistance to India for Phase III of the Financial Institutions Reform and Extension (Debt Market) (FIRE-D III) program. To review this decision, go to <http://www.gao.gov/decisions/bidpro/2941302.htm>.

Abt Associates asserted that the Mission had not performed a proper cost realism analysis of TCG's proposal where TCG had reduced its initial price from \$12.9 million to its final proposed price of \$10.9 million versus Abt Associates' price of \$12.4 million. Abt Associates asserts that USAID inappropriately determined that TCG's final cost proposal was realistic.

More specifically, Abt Associates maintains that USAID improperly accepted TCG's cost reductions for travel (\$245,348), per diem (\$508,885), and field office (\$465,023), because these reductions were not accompanied by supporting information.

In this regard, TCG reportedly reduced its travel cost by reducing the proposed number of international and domestic trips and extending the duration of each trip. TCG reduced its per diem costs based on its projection that 60% of those costs would be incurred in smaller, less expensive cities, and based on a negotiated discount with hotels where its staff would stay. TCG also reduced its field costs by proposing to rely on temporary offices located with consultants and partner institutions, rather than by establishing its own separate field offices.

Abt Associates contended that the Agency should not have accepted the proposed cost reductions for travel and field offices because TCG did not explain or justify the decision to reduce the number of trips and extend their duration, and did not offer support to demonstrate that the proposed field office arrangements would be available. Abt Associates also asserted that USAID should not have accepted the proposed reductions in per diem costs because TCG did not offer any support for its claim that 60% of those

costs would be incurred in smaller, less expensive cities, or for the hotel discounts. According to Abt Associates, the solicitation requires at least 50% of FIRE-D III activity to take place in larger cities, and that it is unlikely that TCG was able to negotiate hotel discounts.

In its written decision, GAO noted that USAID conducted a detailed, comprehensive evaluation of the proposed costs based on TCG's approach to the contract. Specifically, USAID verified the cost of domestic and international travel by comparing the proposed fares to available fares. USAID also determined the realism of the per diem rates by checking those rates against the Federal Travel Regulations and by comparing them to other offerors' proposed rates. Finally, USAID verified rents with the Housing office in India by comparing them to both the market rates published in the "Times of India" and to the rates in USAID's Overseas Real Property inventory. Based upon this analysis, USAID concluded that the costs proposed by TCG were achievable and realistic based on the proposal submitted.

This decision follows an earlier, probably much reviewed decision found at <http://www.gao.gov/decisions/bidpro/294130.htm>, where Abt Associates' protest of TCG's alleged organizational conflict of interest was denied because it was not filed before proposal submission. This decision will, no doubt, be relied upon for the timing of lodging any protests with GAO over Pfizer's and McKesson's status on Chemonics International's and DynCorp's, respectively, proposed teams on the now indefinitely delayed \$7 billion Supply Chain Management System PEPFAR contract competition.

Abt Associates has on file another protest, docketed at B-294130.3, with a December 1 decision due date. Uncharacteristically, there are nine other contract protests involving USAID contract competitions filed with GAO at this time.

GAO RECOMMENDS CONTRACTOR SELECTION BE REASSIGNED TO ANOTHER CONTRACTING OFFICER

When was the last time you heard of a Contracting Officer being relieved of making a contractor selection? Well, it happened in connection with a U.S. Department of Health and Human Services' contract award, in the matter of University Research Company, LLC, B-294358, October 24. Go to: <http://www.gao.gov/decisions/bidpro/294358.htm>.

A protest filed by University Research Company (URC), a firm which along with its affiliate, Center for Human Services, is a major USAID player, challenging the adequacy of a HHS Contracting Officer's award determination is sustained where the Contracting Officer ultimately conceded that the award was mischaracterized in the source selection document the award recommendation of Agency project officers, whose participation in the evaluation of proposals is anticipated by the Agency's acquisition regulation -- i.e., the Contracting officer wrote that the project officers recommended award to the awardee, when, in fact, they recommended award to the protester -- and, as a result, the Contracting officer fails to state any basis for rejecting their award recommendation.

This protest arose out of a dispute between the Agency's project officers who, under the Agency's rules, are permitted to separately comment on proposals received and the Contracting Officer. At an 8-hour meeting between the project officers and the Contracting Officer, there was a detailed debate with the project officers about their evaluation conclusions without agreement being reached. According to the Contracting Officer, the project officers showed "resigned acceptance" of the Contracting Officer's decision to make the award to the awardee. Yet, the project officers corroborated the Contracting Officer's characterization that there was not agreement at the end of the meeting.

Despite this lack of unanimity of the awardee's preference, the Contracting Officer stated in the source selection determination document that the awardee should receive the award based on "technical superiority, reasonable and realistic estimated costs, low cost risk and offers the best overall value to the Government." With serious concerns about the award and because the Agency had not scheduled a debriefing, but was proceeding with transitioning the contract from URC, URC filed for injunctive relief with the U.S. Court of Federal Claims. After receipt of its debriefing, URC filed this protest.

During a hearing held at GAO, the Contracting Officer acknowledged receiving the project officers' memorandum recommending award to URC. The Contracting Officer then testified that there was a misstatement of the project officers' recommendation in the source selection determination document -- i.e., the project officers recommended award to the awardee, when, in fact, they recommended award to URC -- and that the Contracting Officer knew the statement was incorrect when it was written.

By virtue of the Contracting Officer's actions in failing to disclose the project officers' recommendation and failing to provide any contemporary basis for rejecting it, GAO found more than an adequate basis to establish prejudice needed to prevail in a protest. GAO also felt that the effect of the Contracting Officer's actions on this procurement weigh against the Contracting Officer's continued involvement in this matter. In arriving at this recommendation, GAO was also heavily influenced by the Contracting Officer's involvement in limiting the record initially produced in this protest.

One final point needs to be stated. This case, albeit extraordinary given the Contracting Officer's questionable actions, does not invalidate the discretion of a Contracting Officer, the source selection authority, to reject the recommendation, and the underlying conclusions, of the project officers who provided input based on their review of the proposals. In such an eventuality, the Contracting Officer would have to state her/his own conclusions and rationale for the source selection determination and, in the case of this Agency, disclose the project officers' recommendation and provide a basis for rejecting it.

ASBCA REJECTS PAYING HOST COUNTRY STATUTORILY-IMPOSED YEAR-END, LUNAR NEW YEAR AND SPRING BONUSES ON CONTRACT EXTENSION

This appeal arises from the Contracting Officer's decision that denied the contractor's \$399,002.43 claim for recovery of bonuses payments to its employees located in South Korea under a U.S. Army base maintenance contract. The contractor's claim included amounts for a year-end bonus, Lunar New Year's bonus and spring bonus required to be paid by the employer under a U.S.-Korea regulation. The lunar bonus and the year-end bonus were equal to four months pay for each covered employee.

The contractor asserted that it was required to pay the bonuses and, but for the government's two-month extension, no covered employee would have become eligible to receive such bonuses. However, the uniform monthly prices in its fixed-price contract did not permit the contractor to recover the actual bonus payments accrued during any month of the year.

The Government contended that the contract was a firm fixed-price contract that placed upon the contractor the risk of paying the year-end lunar bonuses, and the FAR 52.217-8 Option to Extend Services clause required the contractor to continue performance for the two-month extension "at the rates specified in the contract" and did not provide additional compensation for the cost of such bonuses.

In deciding this case, the Board held that the contractor had failed to establish that the FAR 52.17-8 clause permits it to recover the bonuses paid to its employees whose entitlement thereto arose during the extension period, or that the contract may be reformed due to a mistake in bid. JWK International Corporation, ASBCA No. 54153, October 27, 2004. See <http://www.law.gwu.edu/ASBCA/decision/pdf2004/54153.pdf>.

OTHER NOTEWORTHY GAO PROTEST DECISIONS IN NOVEMBER

In Digital Technologies, Inc., B-291657.3, November 18, 2004, where award was canceled after awardee under small business setaside was declared other than small by the Small Business Administration, the U.S. Department of Agriculture's decision to amend the solicitation and provide offerors opportunity to submit revised proposals instead of making award to the next offeror in line for award under original evaluation was reasonable in view of material increase in estimated quantities and the addition of a geographically remote performance site.

A protest challenged the U.S. Marine Corps' decision not to set aside this procurement for Historically Underutilized Business Zone (HUBZone) small businesses is sustained where the decision was based on insufficient facts to establish reasonableness of conclusion that HUBZone business concerns of which the Agency was aware were not interested in, and/or capable of, performing the requirement. SWR, Inc., B-294266, October 6, 2004.

A protest that the U.S. Army Materiel Command's issuance of a delivery order to a firm pursuant to its General Services Administration (GSA), Federal Supply Schedule contract was improper is sustained where the product to be furnished is outside the scope of the firm's GSA schedule contract and the Agency unreasonably determined that the selected product met the solicitation specification. Armed Forces Merchandise Outlet, Inc., B-294281, October 12, 2004.

Separately, Chapman Law Firm (Chapman) filed a protest before the U.S. Court of Federal Claims in connection with a HUD contract competition. Chapman Law Firm v. U.S. and Harrington, Moran, Barksdale, Inc. (Fed. Cl. 04cv1553C, November 23, 2004). Chapman alleges that the Small Business Administration failed to conduct a good faith investigation of its size protest of HMBI. SBA determined that HMBI was in fact a small business. Chapman brought this action alleging that SBA acted arbitrarily and capriciously for failure to consider certain information and requests the court to remand the matter back to the SBA. The court dismissed the case finding the matter is not justiciable in that the contract awardee's self-representation of its small business status is presumed to be valid. Because Chapman failed to file its size appeal prior to award, the contract is presumed to be valid according to FAR 19.302(g)(2).

IRS INCREASES STANDARD MILEAGE RATES FOR 2005 AND CLARIFIES EMPLOYMENT TAX TREATMENT FOR SIGNING AND RETENTION BONUSES

In IR 2004-139, November 17, 2004, the Internal Revenue Service (IRS) released the optional standard mileage rates for use for 2005 in computing deductible costs of operating an automobile for business purposes. Beginning January 1, 2005, the standard mileage rates for the use of a car (including vans, pickups or panel trucks) will be 40.5 cents a mile for all business miles driven, up from 37.5 cents a mile in 2004.

The 3-cent increase in the business mileage rate is the largest one-year rise ever. The primary reasons are higher prices for vehicles and fuel during the year ending in September.

The General Services Administration has not as yet adjusted its mileage reimbursement rate for government contractors next year which remains at 37.5 cents per mile. See 68 Fed. Reg. 69618, December 15, 2003.

Last week, the IRS clarified that employment taxes must be paid, and income taxes withheld, on signing and retention bonuses paid. Revenue Ruling 2004-109, issued on November 23, 2004, addresses situations such as signing bonuses paid in connection with the first contract between an employer and new employees as well as retention or longevity bonuses paid. This ruling reverses four previous rulings released by the Service since 1958 on this issue.

In another revenue ruling, 2004-98, released October 18, 2004, the IRS held that certain amounts paid to an employee as "reimbursements" for a parking expense that the

employee supposedly “paid” through a salary reduction are wages for purposes of FICA, FUTA (not applicable to tax-exempt organizations), and Federal income tax withholding.

“CREATE” ACT CLEARED FOR WHITE HOUSE’S APPROVAL

On November 20, the House passed without objection the Cooperative Research and Technology Enhancement (CREATE) Act (S. 2192) which would allow the U.S. Government to approve patents on inventions developed collaboratively between academia and industry.

The legislation became necessary after a 1997 Federal Circuit Court of Appeals decision in *OddzON Products, Inc. v. Just Toys Inc.* by clarifying that prior inventions of team members will not serve as an absolute bar to the patenting of the team’s new invention when the parties conduct themselves in accordance with the terms of the bill.

The bill provides that subject matter developed by another person and a claimed invention shall be deemed to have been owned by the same person or subject to an obligation of assignment to the same person if: “(i) the claimed invention was made by or on behalf of parties to a joint research agreement that was in effect on or before the date the claimed invention was made; (ii) the claimed invention was made as a result of activities undertaken within the scope of the agreement; and (iii) the application for patent for the claimed invention discloses the names of the parties to the agreement.”

UPCOMING SEMINARS

For the Winter/Spring 2005, we offer our three-day "USAID Administrative Compliance Requirements" and two-day "Financial Management of USAID Awards" seminars at:

- . Abuja, Nigeria/Family Health International’s Center/December 6-10, 2004
- . Gaborone, Botswana/Grand Palm Hotel/January 24-28, 2005
- . Cairo, Egypt/Conrad International Hotel/February 13-17
- . Miami, Florida/Grand Regency Hotel/February 28-March 4
- . Bangkok, Thailand/Holiday Inn Silam/March 14-18
- . Yerevan, Armenia/Marriott Hotel/April 18-22
- . Washington, DC (Arlington, VA)/Holiday Inn Rosslyn/May 2-6
- . London, UK/Express by Holiday Inn/June 6-10

Other seminars being offered at the Rosslyn Holiday Inn in Arlington, VA:

- . "Competing for USAID Contracts in 2005" November 29-30, 2004
- . "Seeking USAID Grants and Cooperative Agreements in 2005" Dec. 1-2
- . "Mastering USAID's Rules and Regs" December 3

- . "Accounting for Grants & Cooperative Agreements" May 9-10, 2005
- . "Maximizing Recovery of Indirect Costs" May 11-12
- . "Preparing for Sarbanes-Oxley" May 13

- . "Accounting for Federal Contracts & Subcontracts" May 16-17, 2005
- . "Allowances, Differential, Pay, Travel Under USAID Awards" (NEW) May 18-19
- . "Mastering USAID's Rules and Regs" May 20

Seminar Fees: 1-Day Seminar: US\$295, 2-Day Seminar: \$395 in 2004 (\$445 in 2005), 3-Day Seminar: \$545; take a 10% discount when registration is for more than one course by the same participant.

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Our "USAID Accounting Policies and Procedures Manual Software" with 177 policies and 51 processes and our 155-page "NGO Field Office Finance Manual Software" contain prewritten policies and procedures for an organization's headquarters and field office accounting operations which will allow you to customize your own policies and procedures manual in as little as a day.

Operated in a Windows environment, separate software packages are available for nonprofit organizations and for-profit concerns. You may inspect a sample of the USAID Accounting Policies and Procedures Manual for nonprofit organizations at: <<http://www.his.com/~cpm/PandPAIDNPdemo.pdf>> and for commercial organizations at: <<http://www.his.com/~cpm/PandPAIDCdemo.pdf>> and the NGO Field Office Finance Manual at: <<http://www.his.com/~cpm/fomandemo.pdf>>. The price of each is only US\$395.

INDIRECT COST RATE PROPOSAL PREPARATION AND NEGOTIATION OF NICRAs

Mr. Stross is an expert in preparing indirect cost rate proposals, establishing separate Facilities and Administration (F&A) rates, negotiating NICRAs with USAID's Overhead/Contract Closeout Branch, conducting sensitivity analyses of optimum cost recovery structures, restructuring indirect costs, preparing Cost Accounting Standards (CAS) Disclosure Statements, and conducting fiscal assessments of organizations' indirect costs.

INTERNET-BASED CONSULTING

Either over the Internet or by telephone, Robert Stross, who prepares this Newsletter and has over 35 years in the Federal marketplace, provides consultations under retainer to a limited number of NGOs on the range of accounting, bidding, pricing, indirect costing, teaming and contracting, regulatory compliance, and audit resolution issues involving USAID. Inquire about this service and his low initial retainer and hourly rate.

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