



**USAID**  
FROM THE AMERICAN PEOPLE

## ACTION MEMO FOR THE ADMINISTRATOR

DATE: August 30, 2011

FROM: GC – Lisa Gomer, Chair, Implementation and Procurement Reform Task Force/s/  
M/OAA/OD – Maureen Shauket, Chief Acquisition Officer/s/

SUBJECT: Implementation and Procurement Reform –Class Determination and Findings to  
Authorize Limiting Competition to Local Entities

### **Recommendation**

That you approve this class determination and findings (“class D&F”) authorizing operating units to limit competition to local entities for contracts up to \$5 million in order to avoid impairment of foreign assistance objectives.

Approve \_\_\_\_\_/s/\_\_\_\_\_ Disapprove \_\_\_\_\_

### **Summary and Action Requested**

In providing that “[f]unds made available under this Act may be used by the President for procurement . . . in the United States, the recipient (cooperating) country, or developing countries,” Congress in the Foreign Assistance Act of 1961, as amended (“FAA”), established a preference for cooperating and developing country (as well as U.S.) procurement sources. FAA § 604(a)(1). Local procurement in cooperating countries is recognized by many development experts as an effective development tool for building local capacity and promoting international standards for procurement reforms, transparency, and anti-corruption in cooperating countries. Strengthening of local civil society and private sector capacity to improve aid effectiveness and sustainability is Objective 2 of the Agency’s Implementation and Procurement Reform initiative (“IPR”).

The Competition in Contracting Act of 1984 (“CICA”), 41 USC § 253, requires “full and open” competition for the award of government contracts unless a statutory exception applies. CICA is implemented in FAR Part 6 (Competition Requirements) and AIDAR Part 706 (Competition Requirements). While CICA generally serves a laudable aim of maximizing the quality and minimizing the cost of services provided to the U.S. Government, it does not take into account the development principle that using local entities may in the long term result in the best development outcome, even where a non-local source may appear to provide the short-term “best value” for a particular procurement. Therefore, CICA’s “full and open” competition requirement may in certain instances run counter to U.S. development goals and impair foreign assistance objectives.

FAR Subpart 6.3 and AIDAR Subpart 706.3 provide circumstances in which exceptions may be sought from the full and open competition requirements of CICA. One such circumstance is for “countries, regions, projects, or programs for which the Administrator of USAID makes a formal written determination, with supporting findings, that compliance with full and open competition procedures would impair foreign assistance objectives, and would be inconsistent with the fulfillment of the foreign assistance program.” This action memorandum is such a formal written determination with supporting findings, and authorizes, under 40 USC § 113 and AIDAR 706.302-70(b)(3)(ii), Agency operating units to limit competition for contracts to local entities in the cooperating country.

This class D&F supplements the exceptions that are already available in the FAR and AIDAR.

### **Determination and Findings**

Developing the capacity of local government, civil society and private sector organizations in USAID’s partner countries is a primary U.S. foreign assistance objective and a means by which all other U.S. foreign assistance objectives are achieved. Federal law and numerous policy statements acceded to and made by the U.S. Government have supported greater use of cooperating country systems and an increased amount of funding of procurements within the cooperating country. FAA § 601(b)(5) directs the President to carry out foreign assistance “to the maximum extent practicable . . . through private channels and to the extent practicable in conjunction with local private or governmental participation.” In the 2005 Paris Declaration on Aid Effectiveness (“Paris Declaration”), the United States committed to “taking concrete and effective action to address . . . [w]eaknesses in partner countries’ institutional capacities to develop and implement results-driven national development strategies.” Steps toward this end are to include “using a country’s own institutions and systems” and “strengthening the partner country’s sustainable capacity to develop, implement and account for its policies.” Under the Paris Declaration, partner countries are to “take the lead in *co-ordinating aid at all levels . . . and encouraging the participation of civil society and the private sector*” (emphasis added). To develop capacity is “to be responsive to the broader social, political and economic environment, including the need to *strengthen human resources*” (emphasis added). Utilizing local entities is recognized to “generally increase[] aid effectiveness by reducing transaction costs for partner countries and improving country ownership and alignment.” The U.S. Action Plan on Harmonization for the Paris Declaration (“U.S. Action Plan”) specifically stated that “capacity building efforts must include *both state and non-state actors* and should *encourage international linkages among members of civil society, including universities, NGOs, and the for-profit private sector*” (emphasis added). Similarly, the 2008 Accra Agenda for Action (“Accra Agenda”) recognized that, “[w]ithout robust capacity—*strong institutions, systems, and local expertise*—developing countries cannot fully own and manage their development processes” (emphasis added).

These commitments are at the center of IPR, which is the first of the USAID FORWARD reforms announced by the Administrator. USAID FORWARD was in turn recognized in the Quadrennial Diplomacy and Development Review (“QDDR”) as a key step in rebuilding USAID as the world’s preeminent global development agency, one of the aims of the recently issued Presidential Policy Directive on Global Development (“PPD”). The PPD, the first-ever

presidential policy directive on development, also focused USAID on “a policy focused on sustainable development outcomes.” Moving forward, the United States is to “[p]lace greater emphasis on building sustainable capacity in the public sectors of our partners and at their national and community levels to provide basic services over the long-term” and “[u]nderscore the importance of country ownership and responsibility.”

As seen above in the text of FAA § 601(b)(5), the Paris Declaration, the U.S. Action Plan, and the Accra Agenda, country ownership and capacity building are not limited to the public sector—it is also important that the U.S. government work with local members of civil society, such as “universities, NGOs and the for-profit private sector.” Local procurement in cooperating countries is recognized by many development experts as an effective development tool for providing administrative and financial management training and experience to cooperating country CSOs and local businesses, thereby strengthening their operational and administrative capacity as legitimate entities working in close concert with their governments to own their country’s development in the future. Local procurement also promotes and helps establish international standards for procurement reforms, transparency, and anti-corruption in cooperating countries. The Agency has recognized that increasing engagement with and funding of local CSOs and private sector businesses will increase the capacity of local entities to partner more effectively with USAID, other donors, other local CSOs and businesses, and cooperating country governments. Agency officials actively involved in IPR initiatives anticipate that these reform efforts will promote greater local ownership of development, enhance local capacity and accelerate the sustainability of local organizations, thereby advancing the objectives of country, regional and worldwide USAID assistance programs.

The PPD recognizes that developing local economies is not only beneficial for the citizens of that country but also for the United States, by “[f]oster[ing] the next generation of emerging markets.” Such emerging markets become valuable trade partners for the United States, not only as places of investment but also as export markets for U.S. products. As you said in your January 19, 2011 speech at the Center for Global Development, “[O]ur assistance is not just from the American people. It’s also for the American people. Our assistance develops the markets of the future. Longtime aid recipients like India, Indonesia, Poland and South Korea have become strong trade partners and markets for American goods and American services. . . . [T]he developing world looms large in America’s economic fortunes.”

While CICA generally serves a laudable aim of maximizing the quality and minimizing the cost of services provided to the government, because it is a law of general application it does not take into account the U.S. Government commitments in the area of global development and U.S. development policy to make use of local entities in the cooperating country in order to build capacity and promote country ownership, and thereby implement our development efforts most effectively and sustainably. CICA was identified by the Agency’s Office of General Counsel as a potential impediment to the greater use of local entities in fulfillment of IPR Objective 2, and the Agency requested legislation permitting an exception to competition for local entities. The requested language was approved by OMB, and the Senate Committee on Foreign Relations has included the requested language in its draft bill S.1426, which contains in Section 418(f) specific

authority to limit competition to local entities for procurements under \$5 million.<sup>1</sup> While this determination and findings will no longer be necessary if this language is passed into law, your approval of this class D&F under the existing legal authorities cited below will grant Agency officials substantial additional flexibility to procure locally prior to enactment, or if the legislation is not enacted.<sup>2</sup>

As noted above, local capacity development is a primary foreign assistance objective and a means by which all other U.S. foreign assistance objectives are achieved. Because the performance of a USAID direct contract itself builds local capacity, partner country local capacity is not developed and all other U.S. foreign assistance objectives are not achieved as quickly, as thoroughly or as sustainably by awarding contracts for Agency requirements up to \$5 million to non-local entities, including U.S. businesses. Moreover, fostering competition among local entities capable of fulfilling USAID requirements up to \$5 million also develops local capacity to meet ongoing local, regional and partner country requirements in a sustainable manner. Finally, limiting competition to local entities avoids any chilling effect on local entity interest that might otherwise be present if USAID were to conduct full and open competition. Therefore, not limiting competition for Agency requirements up to \$5 million to local partner country entities impairs local capacity development and, thereby, all other U.S. foreign assistance objectives.

As a central pillar of your reform initiative, your approval of the use of the AIDAR impairment authority to limit competition to local entities will highlight and promote Agency efforts to sustainably build local capacity, encourage cooperating country procurements, streamline the process for operating units when limiting competition to local firms on a case-by-case basis, inspire Agency officials to undertake local procurements, and send a strong signal that the Agency is committed to advancing commitments made under the Paris Declaration, the Accra Agenda, IPR, and USAID FORWARD, and U.S. obligations under FAA § 601(b)(5).

In consideration of the above, this class D&F may be used to limit competition for contracts up to \$5 million to local entities in the cooperating country when operating units determine that local capacity will be built through performance of the resulting contract(s). For purposes of this class D&F, “local entities” are contractors that meet the nationality criteria in Annex A.<sup>3</sup>

## **Authority**

As noted above, CICA, which requires “full and open” competition, is implemented in FAR Part 6 (Competition Requirements) and AIDAR Part 706 (Competition Requirements). FAR Subpart 6.3 and AIDAR Subpart 706.3 provide circumstances in which exceptions may be sought from

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<sup>1</sup> Section 418(f) of S.1426 provides, “Subject to paragraph (2), the Administrator may use amounts made available under this Act or otherwise appropriated for the Department of State, Foreign Operations, and Related Programs, to award contracts or other instruments in which competition is limited to local entities.”

<sup>2</sup> AIDAR 706.302-70(b)(2) permits other than full and open competition for an award of \$250,000 or less by an overseas contracting activity, but this authority is not limited to local competition. This determination and findings is being made under AIDAR 706.302-70(b)(3)(ii); it is conceivable that an additional exemption codifying this limit to local competition will be contained in an AIDAR revision to come.

<sup>3</sup> The definition is the one used by the proposed revisions to 22 C.F.R. 228 in 76 FR 51916 currently in the public comment period of administrative rule making. If the definition changes in any final rule promulgated as a result of that process, the operative definition for purposes of this D&F will be the final, enacted definition.

the full and open competition requirements of CICA. One such circumstance is for “countries, regions, projects, or programs for which the Administrator of USAID makes a formal written determination, with supporting findings, that compliance with full and open competition procedures would impair foreign assistance objectives, and would be inconsistent with the fulfillment of the foreign assistance program.” This class D&F is such a formal written determination with supporting findings, and authorizes, under 40 USC § 113 and AIDAR 706.302-70(b)(3)(ii), Agency operating units to limit competition for contracts to local entities in the cooperating country.

## **Guidance**

Please note that while this class D&F may be used to limit competition to local entities for contracts up to \$5 million, in many circumstances, it may be desirable to engage in full and open competition or to limit competition under some other justification permitted under FAR Subpart 6.3 or AIDAR Subpart 706.3. In some cases, such as when there is only one responsible source (FAR 6.302-1), this may mean limiting competition to a field *not* including local entities, for reasons of necessity. Or, in fulfillment of IPR Objective 3, it may be desirable to limit competition to U.S. small or disadvantaged businesses using special small business authorities such as set-asides under FAR Part 719. While consistent with this determination and findings, and IPR Objective 2, local entities should be utilized to the extent practicable and consistent with Agency policy when it is determined that local procurement would further the Agency’s development goals. However, it may be possible that for certain procurements, the best development outcome, including the fostering of increased competition among USAID contractors, is to be gained by competition that includes U.S. businesses, including small businesses, rather than just local entities. Operating units should determine, as part of their procurement planning, whether the use of local entities and/or the use of U.S. businesses, including small businesses, will result in the best development outcome. Nonetheless, the possibility of such alternate determinations for particular procurements does not undercut the general determination presented here that full and open competition impairs foreign assistance objectives by limiting the use of local entities.

Contracting Officers (“COs”) must approve a separate justification and approval (“J&A”) for each use of this class D&F when limiting competition to local organizations. The J&A will cite this class D&F as the authority for the action; the CO must include a copy of the class D&F in the contract file. FAR 6.305 requires COs make J&As publicly available within 14 days. COs may use the J&A template attached hereto. Please note that, even for procurements made using this class D&F, offers shall still be requested from as many potential local offerors as is practicable under the circumstances. AIDAR 706.302-70(c)(1). Adequate competition for purposes of appropriate use of this class D&F is where market research indicates there are potentially three (3) or more local offerors who are capable of fulfilling the government’s requirement at a fair market price. This class D&F may not be used to make “sole-source” awards or where there are less than three (3) potential local offerors identified. However, the identification of three (3) potential local offerors is all that is required to hold a competition limited to local entities- competitions in which less than three (3) local entities submit offers or bids may still result in an award using the authority of this class D&F if the CO can document in the J&A that adequate price competition or other applicable FAR standards are met for

determining the price to be fair and reasonable. Additionally, this class D&F may also be used to make more than one award under the same competition if the solicitation reserves the right to do so and multiple awards will support local capacity development.

COs will comply with the public disclosure requirements at FAR by posting both the

- Agency hyperlink for this class D&F, which will be posted by the Agency Competition Advocate (ACA) to the external Business and Regulations page at <http://www.usaid.gov/business/regulations/>; and
- Cleared and approved J&A for each contract action using the authority of the A/AID-approved class D&F for limiting competition to local entities.

These procedures are in compliance with the revision to ADS 302 that was recently approved as part of the \$5 million non-competitive follow-on reforms.

## **Annex A**

To be considered a “local entity” for purposes of this class D&F, a contractor must:

- (a) if an individual, be a citizen or lawful permanent resident of a country in the cooperating country,
- (b) if a for-profit organization,
  - (1) be organized under the laws of the cooperating country,
  - (2) have its principal place of business in the cooperating country, and
  - (3) be majority beneficially owned by individuals who are citizens or lawful permanent residents of the cooperating country, or
- (c) if a not-for-profit organization performing as a contractor or subcontractor,
  - (1) be organized under the laws of the cooperating country,
  - (2) have its principal place of business in the cooperating country, and
  - (3) be managed by a governing body, the majority of whom are citizens or lawful permanent residents of the cooperating country.

“Cooperating country” means the country receiving the USAID assistance, and includes all the countries receiving assistance under a regional program or project.