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# Acquisition & Assistance Policy Directive (AAPD)

**From the Director, Office of Acquisition & Assistance Issued: September 12, 2005**

## AAPD 05-09

## Expedited Acquisition and Assistance Procedures for Tsunami Relief and Reconstruction in South and Southeast Asia

Subject Category: ASSISTANCE, ACQUISITION MANAGEMENT
Type: POLICY

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AAPDs provide information of significance to all agency personnel and partners involved in the Acquisition and Assistance process. Information includes (but is not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, AAPDs may be used to implement new requirements on short-notice, pending formal amendment of acquisition or assistance regulations.

AAPDs are EFFECTIVE AS OF THE ISSUED DATE unless otherwise noted in the guidance below; the directives remain in effect until this office issues a notice of cancellation.

This AAPD: **X** Is New ☐ Replaces/ ☐ Amends CIB/AAPD No:

| Applicable to: | Precedes change to: |
|---|---|
| **X** Existing awards; ☐ Modification required<br>☐ No later than<br>**X** As noted in guidance below<br>**X** RFPs/RFAs issued on or after the effective date of this AAPD; all other Pending Awards, i.e., 8(a), sole source, IQC<br>☐ Other or N/A | ☐ AIDAR Part(s) Appendix<br>☐ USAID Automated Directives System (ADS) Chapter<br>☐ Code of Federal Regulations<br>☐ Other<br>☐ No change to regulations |

☐ New Provision/Clause Provided Herein: If checked, scheduled update to Prodoc:

*(signature on file)*

Michael F. Walsh

**PURPOSE:** The purpose of this AAPD is:

1) To inform USAID contracting staff that the Acting Administrator approved an Action Memorandum, entitled "Expedited Acquisition and Assistance Procedures for Activities and Programs Related to Tsunami Relief and Reconstruction," dated February 1, 2005, and signed on February 4, 2005, by Frederick Schieck, Acting Administrator (the "Action Memorandum"); and

2) To inform USAID contracting staff that the Administrator approved an Action Memorandum, entitled "Worldwide Competition for Tsunami-Related Contractual Activities," dated April 26, 2005, and signed on May 5, 2005, by Administrator Natsios (the "Untying Memorandum");

3) To provide implementation guidance for using the various waivers and exceptions, approved by the Acting Administrator, to facilitate and expedite implementation of programs and activities in South and Southeast Asia. These are programs that are undertaken under the policy-setting and operational guidance of the Tsunami Relief and Reconstruction Task Force, the Bureau for Asia and the Near East, and the Bureau for Democracy, Conflict, and Humanitarian Assistance.

**BACKGROUND:**

The Acting Administrator, in the Action Memorandum (Attachment 1), approved the following recommendations:

A. Approval of Obligations Not Covered by Existing Strategic Objectives (SOs);

B. Authorization for Other than Fully Competitive Procedures for Both Grants and Cooperative Agreements;

C. Authorization for Other than Full and Open Competition for Contracts; and

D. Source, Origin, and Nationality Blanket Waiver.

The Action Memorandum contains the Issue for Decision, the Essential Factors, a list of Recommendations, and the Administrator's Determination and Finding "Regarding Expedited Procurement Procedures for Programs and Activities Related to Tsunami Relief and Reconstruction" within the initial mandate of the Tsunami Relief and Reconstruction Task Force (TRRTF) and the TRRTF's successors, the Bureau for Asia and the Near East (ANE) and the Bureau for Democracy, Conflict, and Humanitarian Assistance (DCHA). The waivers approved by the Acting Administrator in that Action Memorandum are available to, and may be exercised by, the ANE and DCHA Bureaus and those operating entities implementing programs and activities in South and Southeast Asia that were initiated under the original mandate of the TRRTF or its

successor organizations.[1] Please read Attachment 1 very carefully and be familiar with its contents.

Note that the list of actions recommended and encouraged to be pursued in such acquisition and assistance includes making maximum use of wholesale instruments, such as grants-under-contracts, umbrella grants, leader/associate assistance instruments, indefinite quantity contracts, and other arrangements designed to provide fast-track assistance and contracting.

The Untying Memorandum (Attachment 3) is more fully discussed in Section D below.

**GUIDANCE ON THE USE OF WAIVER AUTHORITIES:**

M/OAA and the Office of the General Counsel, Acquisition and Assistance (GC/A&A) provide this "Guidance" to contracting and assistance personnel in preparing and awarding contracts and assistance awards for work relating to the Agency's response to the Tsunami crisis in South and Southeast Asia. This Guidance is developed in accordance with language provided in the Action Memorandum.

**Applicability:** The authorities approved in the attached Action Memorandum are available for use for acquisition and assistance (A&A) actions carried out by USAID in response to the Tsunami crisis in South and Southeast Asia only. The ANE and DCHA Bureaus have determined that any USAID operating unit approving Tsunami-related activities may apply its existing activity approval authorities to use the expedited procedures. (See ADS 201, Programming Policy, for activity approval documentation requirements, and ADS 103, Delegations of Authority.) However, the operating unit must ensure that the following statement, or a statement substantially the same as the following, is incorporated into the request to the pertinent Contracting Officer (CO) or Agreement Officer (AO). The operating unit must specify which Recommendation(s) is/are being invoked.

> Recommendation(s) _____ in the "Expedited Acquisition and Assistance Procedures for Activities and Programs Related to Tsunami Relief and Reconstruction" apply to this activity.

In order for COs and AOs to easily locate the above statement, requesting officers should try to include it in the same place each time in the request. For activities in A&A on the Web and/or requests in A&A NMS, the requestor in the operating unit should include this statement in the Planning Module, under the Request Description field. In Modified Acquisition and Assistance Request Documents (MAARDs), the requesting office should include the statement in Block 10, "Instructions to Authorized Agent." COs and AOs do not have authorization to use these expedited A&A procedures unless the

[1] OAA began preparing this AAPD soon after the Action Memorandum was drafted and shared it with Agency COs and AOs over the ensuing months. Although the AAPD is only now officially issued, most COs have had these procedures and have been, in general, following them.

request specifically invokes the Administrator's approvals from the Action Memorandum in Attachment 1.

**Specific Guidance for Each Recommendation:**

A. Approval of Obligations Not Covered by Existing Strategic Objectives (SOs)

This recommendation applies primarily to the activity approval process, as covered in ADS 201, and only indirectly affects USAID's A&A staff. All other relevant actions addressed in ADS 201 (particularly 201.3.12, Pre-Obligation and Activity Planning Requirements) are still required, unless otherwise waived in the Action Memorandum.

B. Authorization for Other than Fully Competitive Procedures for Both Grants and Cooperative Agreements

The approval of this recommendation constitutes the written justification required in paragraph (1)(e) of ADS E303.5.5d to use other than full and open competitive procedures, under the authority of paragraph (5) of ADS 303.5.5d. Note that this recommendation contains two parts. The first part applies to awarding non-competitive amendments to existing awards, while the second part applies to using less than fully competitive procedures for new awards. AOs must work closely with the requiring office to determine what should be the "practicable" number of sources to solicit, given the urgency of the particular activity responding to the Tsunami crisis. However, the AO has the ultimate authority to decide. AOs are responsible for documenting in the award file all actions they have taken to implement this authority, including how they decided the extent of competition. AOs should also include in the award file a copy of the Action Memorandum and any approval extensions or modifications.

C. Authorization for Other than Full and Open Competition for Contracts

1. General Instructions

After the operating unit specifies that this recommendation applies to the activity (see Applicability section above), the CO must work closely with the requiring office to determine the most effective level of competition. The Determination and Finding in Tab A states that, prior to using other than full and open competitive procedures for a particular procurement, requesting offices will consider the feasibility of using full and open competition or other contracting authorities, such as contracting with the Small Business Administration under the 8(a) Program. The CO has the ultimate authority to decide what is "practicable" under the specific circumstances.

2. Documentation Requirements

The Tsunami Action Memorandum relies upon AIDAR 706.302-70(b)(3)(ii) which states:

> This authority may be used for: (ii) Awards 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.

JOFOC Template (Attachment 2): On January 6, 2005, USAID's Office of Inspector General issued a report titled "Audit of USAID's Compliance with Federal Regulations in Awarding the Contract for Security Services in Iraq to Kroll Government Services International Inc." (the "Kroll Audit"). In the Kroll Audit, the IG specifically found that despite the blanket waiver authority to award contracts using other than full and open competition for activities in Iraq, the relevant FAR and AIDAR provisions still required the CO to draft a written justification that "shall contain sufficient facts and rationale to justify the use of the authority and specifies 11 information items that it should include as a minimum" pursuant to FAR 6.303-2. Kroll Audit, p. 8.

The IG concluded this finding by recommending that "adequate and complete documentation must be prepared and retained in all procurements when using less than full and open competition. This documentation should adequately explain the contractor selection and why multiple contractors could not or were not considered for the procurement." Kroll Audit, p. 8.

Despite the language in the Tsunami Determination and Finding ("The use of this waiver replaces the need for the justification for other than full and open competition otherwise required by FAR 6.303 when specific contracts are competed under it."), the IG, in its Kroll Audit Report, maintains that the AIDAR and the FAR require additional written justification in accordance with FAR 6.303, and the CO must not rely upon the waiver in place of a justification, as discussed in FAR 6.303.

Because the language in the Tsunami Determination and Finding does not meet the documentation standard for a justification, as recommended in the Kroll Audit, this AAPD establishes documentation procedures for COs who plan on awarding Tsunami-related contracts on an other than full and open competition basis, using the authority in Attachment 1. Before awarding a contract using this authority (as opposed to using another AIDAR or FAR exception to full and open competition), the CO must generate a "Justification for Other Than Full and Open Competition" (JOFOC) memorandum for the award file that includes the information in the attached JOFOC template (Attachment 2). Before finalizing a JOFOC in accordance with these documentation requirements, contracting officers must clear their JOFOC with their Regional Legal Advisors or GC/CCM in Washington.

NOTE: Any individual, whether in a program/technical office or the contracting or agreement officer, who intends to use either the assistance or the acquisition approval under the Action Memorandum to award a grant, cooperative agreement, or contract on

a sole source basis, must be sure to carefully control the information exchanged with the potential awardee to prevent the appearance of giving that potential awardee a competitive advantage, should the award be converted to a competitive action. Guidance on this matter can be found in the FAR, ADS 303, the ADS 201 mandatory reference, "Legal and Policy Considerations When Involving Partners and Customers on Strategic Objective Teams and Other Consultations" (at http://www.usaid.gov/policy/ads/200/2016s1.pdf), and Contract Information Bulletin (CIB) 99-17.

D. Source, Origin, and Nationality Waiver

Approval of this Recommendation constitutes a written waiver of USAID's source, origin, and nationality requirements in 22 CFR 228, to include Geographic Code 935, with a preference for procurement of U.S. source, origin, and nationality to the extent practicable. The Action Memorandum also recognizes that "the preference for U.S. procurement would be subject to the terms and conditions of any promulgated, published policy of USAID effective at the time of the procurement." However, a follow-up Untying Action Memorandum, signed by the Administrator on May 5, 2005 (Attachment 3, the Untying Memorandum), removed the preference for U.S. procurement in the original Action Memorandum (except for the large, non-priority Indonesian design-bid-build contracts). For USAID's published policy, see ADS 221, USAID's Procedures for Implementing International Agreements for Tied and Untied Aid, which includes an "untying agreement" that may apply to certain individual procurements, as more fully described in that chapter. COs and AOs must direct any questions about the applicability of this chapter to the Office of the General Counsel, Contracts and Commodities Management (GC/CCM). COs and AOs are responsible for documenting in the award file all actions taken in determining the appropriate source/origin/nationality for a procurement.

**Additional Action Memorandum Items:**

Although not separate Recommendations in the attached Action Memorandum, COs and AOs are encouraged to use other available authorities and procedures, such as:

* ADS 308 for grants to Public International Organizations,

* FAR 19.5 for set-aside contracts to small business concerns,

* FAR 19.8 for awards under the Small Business Administration's 8(a) Program,

* FAR 19.13 for awards under the Historically Underutilized Business Zone (HUBZone) Program

* FAR 19.14 for awards under the Service-Disabled Veteran-Owned Small Business (SDVOSB) Program, and

* ADS 321 for assistance awards to Minority Serving Institutions (MSIs).

The Office of Small and Disadvantaged Business Utilization (OSDBU) is available to help identify small business, 8(a), and SDVOSB concerns. The MSI Coordinator in OSDBU can provide information on MSIs.

**Reporting to the Agency Competition Advocate:**

For each award using any of the Recommendations in Attachment 1, COs and AOs are responsible for electronically forwarding the following information, in the following format, to the Agency Competition Advocate at the following e-mail address: Agency Competition Advocate (Advocate@usaid.gov). Use the following format for the message: "Subject: Award Using Expedited A&A Procedures for Tsunami-Related Activities."

1. Award number (be sure this number clearly indicates if the award is an initial award, a modification or amendment, a purchase order, a task order, or a modification to either a purchase order or task order).

2. Name of awardee.

3. Obligated amount of award.

4. Total estimated cost of award.

5. Period of performance (effective date and estimated completion date).

6. A summary statement describing the resulting award.

7. Specific Action Memorandum Recommendation(s) used in the award, and a brief summary of competition decisions (sole source, basis for limiting the number of sources for a competition, etc.).

**POINT OF CONTACT**
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Attachment 1 - Expedited Acquisition and Assistance Procedures for Activities and Programs Related to Tsunami Relief and Reconstruction (including Tab A)

Attachment 2 – Justification for Other than Full and Open Competition Template

Attachment 3 – Action Memorandum entitled "Worldwide Competition for Tsunami-Related Contractual Activities"

U.S. AGENCY FOR
INTERNATIONAL
DEVELOPMENT

February 1, 2005

# ACTION MEMORANDUM

TO: The Acting Administrator

FROM: AA/ANE, James Kunder /s/
A/AA/DCHA, William Garvelink /s/
GC, John S. Gardner /s/

SUBJECT: Expedited Acquisition and Assistance Procedures for Activities and Programs Related to Tsunami Relief and Reconstruction

## ISSUE FOR DECISION

Whether to approve the use of other than full and open competition in soliciting and awarding contracts and grants, as well as other waivers, to facilitate and expedite the procurement process for conduct of the USAID relief and reconstruction efforts related to the recent tsunami in South Asia.

## ESSENTIAL FACTORS

In the aftermath of the tragic tsunami of December 26, 2004, USAID is acting quickly to establish the Tsunami Relief and Reconstruction Task Force (TRRTF) to lead the Agency's response to the fast-changing crisis.

In order to conduct relief and reconstruction activities in the most expeditious manner possible, to save lives and to assist affected countries to respond to the public health crisis and to rebuild their economies, an essential aspect of the U.S. Government's response to the tsunami will be the need to quickly initiate a multitude of activities, in both relief and

reconstruction, that respond to the humanitarian and economic crises occasioned by the tsunami. Accordingly, the Administrator has determined that USAID should develop a multi-faceted program to assist those affected by the tsunami, to be carried out through the TRRTF and also implemented in part by Missions in affected USAID presence countries. While the general nature of the goods and services needed for this effort is known, details of the exact requirements for assistance will be refined over time, based in large part on the work of the TRRTF.

The quick delivery of humanitarian relief and quick commencement of reconstruction projects will help enhance the capacity for the people of the affected countries to rebuild and recover as expeditiously as possible. The United States must achieve positive, immediate impact in getting the process of relief and reconstruction underway. Any delay in making assistance available will seriously affect the ability of the United States to achieve its foreign policy goals, including the goal of maximizing immediate humanitarian relief. In short, achievement of U.S. foreign policy and development policy objectives related to the tsunami crisis requires constructive, demonstrable results within a short timeframe.

ANE and DCHA, among others in USAID, will take the lead for the Agency in planning and implementing the proposed program of assistance. USAID will need to use every resource at its disposal to be able to respond quickly and appropriately to the crisis and meet the objectives of the foreign assistance program. Accordingly, consistent with, and drawing upon recent experience with the emergency programs in Afghanistan and Iraq, we have identified the areas of normal USAID implementation procedures, which, with specific regard to the urgent needs of those affected by the tsunami, may lead to unacceptable delay in program implementation. In particular, one "lesson learned" from our efforts in Afghanistan and Iraq is that relief and reconstruction must begin hand-in-hand; we cannot simply wait for the "relief" period to end before beginning planning for and implementation of reconstruction activities. To this end, we recommend that you approve the following blanket waivers that are needed to enable us to expedite and implement activities undertaken in response to the crisis.

The waivers would be effective immediately, would be applicable to all acquisition and assistance to be carried out by USAID for the tsunami response program discussed herein, and would remain in force throughout the life of any activity carried out or initiated under these waiver authorities.

As a matter of law and policy, USAID's normal preference is to follow standard procedures, including full and open competitive procedures, for routine procurements. This enables USAID to obtain the benefits that flow from the standard terms and procedures that have been developed over the years on a Government-wide basis. While we recognize that, in emergency circumstances, these interests must give way to the overriding objective of providing humanitarian assistance on a timely basis, the rationale for streamlining procurement and other project implementation requirements may be less compelling during the longer-term reconstruction phase of our tsunami-related efforts. The benefits that flow from competitive procedures could well outweigh the advantages of expedited or modified procedures. Accordingly, the use of the authorities approved in this memorandum will be reviewed annually and, should conditions warrant, we would make a recommendation as to whether the waiver authorities should be extended or modified (e.g., by limiting subsequent uses of the authorities to particular countries or activities). If approved, the waivers would cover tsunami-related activities in non-presence countries as well as presence countries. The waivers would also cover activities funded from all sources of Agency funding – including U.S. owned/controlled local currency or jointly programmed host-country owned local currency accounts. Finally, the waivers would apply to prior year funding as well as current and future fiscal year appropriations (unless special rules for these appropriations are enacted by the Congress).

Guidance as to the specific use of the waiver authorities (criteria for use, documentation, and reporting) will be developed by M/OAA and GC no later than six months from the date of your approval.

In the context of these proposed waivers, it is important to recall that international disaster and famine assistance (IDFA) funds, Transition Initiative (TI) funds, and certain other types of funding appropriated to USAID have been made available to the Agency "notwithstanding any other provision of law." This means that these types of funds may be used to provide assistance, notwithstanding prohibitions against assistance to particular countries, activity level restrictions, and/or notwithstanding restrictions relating to competitive procedures or source/origin requirements. Disaster assistance requires special and expedited procedures; notwithstanding authority permits USAID to respond to the needs of disaster victims in a timely fashion, notwithstanding statutory requirements that otherwise might restrict our ability to respond in a timely fashion.

Notwithstanding authority is an extraordinary authority granted to USAID by Congress to use in special circumstances. As a matter of Agency policy to avoid any perception by Congress that USAID is abusing its notwithstanding authority, the clear preference is for USAID to use more conventional waiver authorities when practicable. Therefore, notwithstanding authority should be invoked only if other expedited acquisition and assistance procedures proposed in the memorandum are either unavailable or inappropriate for purposes for which notwithstanding authority is available. It is anticipated that, once USAID begins to transition away from tsunami-related emergency relief activities and into rehabilitation and reconstruction efforts, streamlining procurement and other project implementation requirements by invoking notwithstanding authority will be less appropriate. Because notwithstanding authority flows with the funds that carry notwithstanding authority, rather than being vested in any particular office, it is the Bureau, Office or Mission that will obligate the funds that will have the authority to determine whether to exercise notwithstanding authority. Bureaus, Offices and Missions should consult with the Office of General Counsel or their Regional Legal Advisor if they have any specific questions about using notwithstanding authority or more conventional waiver authorities.

In general, notwithstanding authority never should be used to eliminate from USAID agreements financial accountability provisions, such as those relating to vouchering, audits, reports, and similar matters. Notwithstanding authority should not be used to circumvent USAID policies with regard to responsibility determinations. Regulations on government ethics or employee conduct likewise cannot be disregarded through use of this authority.

Funds appropriated under notwithstanding authority must still be used for the purposes of the particular account or appropriation, i.e., the authority does not change the nature of the funds appropriated. Thus, notwithstanding authority cannot be used to charge an OE cost to a program account nor can this authority be used to provide economic assistance to the military or to fund abortions, among other prohibitions. All decisions to exercise notwithstanding authority should be documented and should be cleared by either GC or the appropriate Regional Legal Advisor.

In addition to possible use of the notwithstanding authorities, we recommend approval of the following waivers for the reasons discussed elsewhere in this memorandum.

RECOMMENDATIONS

**A. Approval of Obligations Not Covered by Existing Strategic Objectives (SOs).** USAID, working through the TRRTF, will respond to the urgent and unpredictable needs arising from the tsunami and its aftermath. In the current situation, there is no way that USAID is able to prepare a strategic plan for tsunami-related assistance to the affected region in advance of the obligations. In this regard, ADS 201.3.4.5 provides that "[c]ertain programs are exempted from the mandatory procedure described in [ADS 201] including (1) emergency disaster assistance . . . ." ADS 201.3.4.5 also provides that in special foreign policy situations where it is necessary to initiate activities prior to completion and approval of a strategic plan, a temporary one-year exemption may be issued. Taken together, the provisions of ADS 201.3.4.5 provide an exception for the emergency relief activities contemplated within the scope of this memo, and if approved, a one-year exemption for the reconstruction activities. As required by ADS 201.3.4.5, PPC and GC clear on the proposed one-year exemption. During this initial period, the Task Force, in particular its ANE and DCHA members, will take the steps to initiate development or modifications of strategic plans, where necessary, for Agency approval.

Approve: Frederick G. Schieck

Disapprove: _____

Date: February 4, 2005

**B. Authorization for Other Than Fully Competitive Procedures for both Grants and Cooperative Agreements.** For grants and cooperative agreements to non-governmental organizations (NGOs) or other eligible organizations, the competition requirements are considered to be met when an announcement is published and recommendation for award is made after an impartial review and evaluation of all applications. In accordance with USAID's need to expedite programs in the affected region, it is imperative that USAID select its grant-financed partners and get them in operation in the shortest time possible. It will not always be possible to compete grant

applications in the manner required under ADS 303. To facilitate quick implementation of programs to be delivered by grants, we recommend the following:

(1) Authorizing non-competitive amendments to existing grants and cooperative agreements for additional work similar to that performed under the initial agreement. These extensions would be limited to a two-year period in order to provide the time to obtain subsequent support on a more competitive basis and would count against the ten-year overall limit for noncompetitive extensions (ADS 303.5.5d); and

(2) Authorizing awards of new grants and cooperative agreements using less than fully competitive procedures. While formal advertising would not be required, applications would be solicited from as many sources as practicable under the circumstances. While our preference will be to solicit from a number of sources, there may be circumstances in which sole source awards are necessary.

Pursuant to ADS 303.5.5(d)(1)(e), competition is not required for assistance awards when justified by circumstances which are determined to be critical to the objectives of the foreign assistance program. The crisis caused by the tsunami calls for immediate action, and USAID's programs in support of relief and reconstruction in the region, which are critical to U.S. foreign policy objectives, must be expedited if it is to be successful. If slowed by the standard competitive process, an opportunity to move quickly on vital relief and reconstruction efforts would be squandered. We recommend that, by approving below, you make the "critical objectives" finding described above and authorize the use of other than fully competitive procedures in making awards under assistance agreements.

Approve: Frederick W. Schieck

Disapprove: _____

Date: February 4, 2005

**C. Authorization for Other Than Full and Open Competition for Contracts.** We recommend that flexible and expedited procurements procedures be approved for USAID direct contracting for the delivery of goods and services for tsunami-related activities in the affected region. Specifically, we recommend that such procurement be undertaken through limited competitive procedures that are quicker as well as less labor intensive than the FAR full and open competitive procedures. As in (B) above, this would apply to all follow-on extensions of existing contractual efforts (again, with the two-year limit as described above), as well as to new procurements.

Under the USAID Acquisition Regulation (AIDAR), you may determine in writing, with supporting findings, that compliance with full and open competitive procedures would impair foreign assistance objectives and be inconsistent with the fulfillment of the foreign assistance program. AIDAR 706.302-70(b)(3)(ii). You have the authority to make such a determination with respect to the entire program, such as the programs and activities which will be developed, coordinated, or implemented by the ANE and DCHA Bureaus and other Agency elements through the TRRTF, as further defined by the formal written determination attached at TAB A. In essence, the programs and activities would be those undertaken in direct response to the tsunami relief and reconstruction effort. The expedited procedures would be utilized for quick reaction activities where the impact of U.S. assistance will be needed quickly. Your approval below would also serve as approval of the formal written determination with supporting findings at TAB A. The Agency Competition Advocate has reviewed the determination. While formal advertising would not be necessary, solicitation would be made from as many sources as practicable under the circumstances. While our preference would be to solicit from a number of sources, there may be circumstances in which sole source awards are necessary. In those circumstances, your approval of less than full and open competition would constitute a sole source justification as required by FAR 603.2-1 and ADS 302.5.8.

Approve: Frederick W. Schieck

Disapprove: _____

Date: February 4, 2005

**D. Source, Origin, and Nationality Waiver.** USAID source, origin, and nationality regulations generally require that goods and services acquired under direct USAID contracts be procured from Geographic Code 000 (United States) or Geographic Code 941 (U.S. and developing countries). See ADS 260.3.3. We recommend that Geographic Code 935 (which includes all countries except foreign policy restricted countries) be established as the applicable authorized source/origin/nationality code for any goods and services procured in direct support of the USAID relief and reconstruction program with respect to the tsunami, with a preference for the procurement of U.S. source, origin, and nationality to the extent practicable. The preference for U.S. procurement would be subject to the terms of any promulgated, published policy of USAID effective at the time of the procurement.

Services of local and regional contractors can be used in obtaining access to readily available equipment and materials in nearby countries, enabling implementation to get underway quickly. In addition, the ability to procure from Geographic Code 935 sources can enable USAID to "domesticate" certain aspects of the relief and reconstruction effort, by using all local supplies and subcontractors, ensuring that the maximum benefits of our efforts will go to people of the affected countries. Absent a blanket waiver, USAID would experience significant barriers in providing services in a timely manner and would have to expend significant time and resources to address source, origin, and nationality issues. While USAID is normally precluded from procurement of construction and engineering services from "advanced developing countries by Section 604(g) of the FAA (which, in this context, could arguably include Thailand, one of the most affected countries), this waiver would override that provision, according to the standards of 22 CFR 228, Subpart F.

Motor vehicles are included in the waiver, and your approval below constitutes the "special circumstances" finding required by Section 636(i) of the Foreign Assistance Act of 1961, as amended (FAA), for vehicles procured in direct support of the USAID relief and reconstruction program with respect to the tsunami crisis. However, the preference for U.S. source and origin vehicles is explicitly noted here in this finding, and procurement of motor vehicles from non-U.S. sources will be held to a minimum and carried out only when necessitated by required specifications, spare parts, and maintenance capabilities.

Pharmaceuticals are not included in the waiver; however, if necessary for program purposes, USAID will initiate a review of the technical feasibility of, and prepare a separate waiver for, some procurement of pharmaceuticals from non-U.S. sources, as may be required for timely program implementation, so long as the pharmaceuticals themselves are subject to regulation by a stringent regulatory authority.

22 CFR 228.51(a)(3) and 22 CFR 228.53(c) provide that a source, origin, and nationality waiver for goods or services may be authorized when it is found necessary to promote efficiency in the use of foreign assistance resources, including to avoid impairment of foreign assistance objectives. The regulation, as well as the underlying statute, FAA Section 604(a), provides that such waivers must be made on a case-by-case basis, and GC confirms that this proposed waiver meets this standard.

We recommend that you make the above finding and authorize the waiver of source, origin, and nationality requirements for goods and services purchased in direct support of the USAID relief and reconstruction program with respect to the tsunami, to permit procurement from Geographic Code 935 as the applicable source/origin/nationality code, with a preference for the procurement of U.S. source, origin, and nationality to the extent practicable as described above.

Approve: Frederick W. Schieck

Disapprove: _____

Date: February 4, 2005

In addition to the above, the TRRTF will consider other actions, in conjunction with M/OAA, to facilitate the speedy implementation of tsunami-related relief and reconstruction activities. These actions include:

(1) Ensuring maximum use of existing instruments designed to enable fast track assistance and acquisition processing, e.g., IQCs, grants under contract mechanisms, Leader/Associate assistance instruments if appropriate;

(2) Encouraging the use of Public International Organizations (PIOs) to the extent their programs and goals are similar to USAID's; and

(3) Encouraging Minority Serving Institutions and small and disadvantaged business utilization to the degree it can expedite the A&A process.

Attachment:

Tab A – Determination and Finding

TAB A

# DETERMINATION AND FINDING

The U.S. Agency for International Development (USAID) Administrator's Determination Regarding Expedited Procurement Procedures for Programs and Activities Related to Tsunami Relief and Reconstruction

Pursuant to the authority set forth in the USAID Acquisition Regulation, Section 706.302-70(b)(3)(ii), I have determined that it is necessary to use other than full and open competition for programs and activities related to relief and reconstruction following the tsunami of December 26, 2004 in order to avoid impairment of foreign assistance and U.S. foreign policy objectives. This determination is made in consideration of the supporting findings set forth below and will be effective from the date of this signature, subject to annual review, and will remain in force for the period of the programs and activities carried out by USAID with respect to tsunami-related relief and reconstruction.

## Supporting Findings

It is imperative that USAID rapidly mobilize contractors and grantees for relief and reconstruction related to the tsunami of December 26, 2004. In particular, quick action is necessary to put into place programs and activities designed to save lives, deliver humanitarian relief, begin work on reconstruction projects, and begin strategic planning for USAID's work in the affected region. Maintenance of civil order, gaining public confidence in central governing authorities, and the promotion of U.S. foreign policy interests require that the flow of assistance take place immediately, without resort to the standard competitive procedures of USAID. The time frame required by fully competitive contracting procedures, if followed, will not enable USAID to act in a manner consonant with U.S. foreign policy in the affected region. The magnitude of the humanitarian crisis and the urgency of the need for immediate assistance call for expedited procurement procedures.

USAID, by seeking offers from as many sources as is practicable under the circumstances, should be able to achieve beneficial, healthy competition while ensuring that assistance is delivered as rapidly as possible.

Prior to using informal or expedited procedures for a particular procurement, as authorized by this determination, implementing offices will consider the feasibility of using full and open competitive procedures as described in the Federal Acquisition Regulation, as well as small business Section 8(a) procurement authorities and minority serving institutions.

All uses of this authority will be documented by the pertinent contracting activity and the pertinent contracting officer. The use of this waiver replaces the need for the justification for other than full and open competition otherwise required by FAR 6.303 when specific contracts are competed under it. USAID will review this waiver on an annual basis to determine the adequacy of the authorities; their continued necessity, if any; or any need for modification.

CLEARANCE PAGE FOR ACTION MEMORANDUM entitled "Expedited Acquisition and Assistance Procedures for Activities and Programs Related to Tsunami Relief and Reconstruction."

Clearances:

ES, Douglas J. Aller — 2/3
ANE/AA, James Kunder — for JK
DCHA/A/AA, William Garvelink — for WG
GC, John S. Gardner
DAA/PPC, Barbara N. Turner
M/OAA/OD, Michael Walsh — for MW
GC/OAA, John Niemeyer — for JN
LPA/AA, J. Edward Fox — for JEF

GC:JGardner:20900:1/16/05:GCPUB/gcpublic/docs/Tsunamiprocwaiv.doc

USAID
EXECUTIVE SECRETARIAT
2005 FEB -2 A 8:21

CLEARANCE PAGE FOR ACTION MEMORANDUM entitled "Expedited Acquisition and Assistance Procedures for Activities and Programs Related to Tsunami Relief and Reconstruction."

Clearances:

ES, Douglas J. Aller _____

ANE/AA, James Kunder _____
DCHA/A/AA, William Garvelink _____
GC, John S. Gardner _____
DAA/PPC, Barbara N. Turner _____
M/OAA/OD, Michael Walsh _____ 1/3/05
GC/OAA, John Niemeyer _____
LPA/AA, J. Edward Fox _____

~~GC/ANE:~~ ~~VReddy: 12/30/04~~
AC: JGardner 1/6/04

TAB A

# DETERMINATION AND FINDING

The U.S. Agency for International Development (USAID) Administrator's Determination Regarding Expedited Procurement Procedures for Programs and Activities Related to Tsunami Relief and Reconstruction

Pursuant to the authority set forth in the USAID Acquisition Regulation, Section 706.302-70(b)(3)(ii), I have determined that it is necessary to use other than full and open competition for programs and activities related to relief and reconstruction following the tsunami of December 26, 2004 in order to avoid impairment of foreign assistance and U.S. foreign policy objectives. This determination is made in consideration of the supporting findings set forth below and will be effective from the date of this signature, subject to annual review, and will remain in force for the period of the programs and activities carried out by USAID with respect to tsunami-related relief and reconstruction.

## Supporting Findings

It is imperative that USAID rapidly mobilize contractors and grantees for relief and reconstruction related to the tsunami of December 26, 2004. In particular, quick action is necessary to put into place programs and activities designed to save lives, deliver humanitarian relief, begin work on reconstruction projects, and begin strategic planning for USAID's work in the affected region. Maintenance of civil order, gaining public confidence in central governing authorities, and the promotion of U.S. foreign policy interests require that the flow of assistance take place immediately, without resort to the standard competitive procedures of USAID. The time frame required by fully competitive contracting procedures, if followed, will not enable USAID to act in a manner consonant with U.S. foreign policy in the affected region. The magnitude of the humanitarian crisis and the urgency of the need for immediate assistance call for expedited procurement procedures.

USAID, by seeking offers from as many sources as is practicable under the circumstances, should be able to achieve beneficial, healthy competition while ensuring that assistance is delivered as rapidly as possible.

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200501612

USAID

U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT

APR 26 2005

# ACTION MEMORANDUM

TO: The Administrator

FROM: AA/ANE, James Kunder

SUBJECT: Worldwide Competition for Tsunami-Related Contractual Activities

## ISSUE FOR DECISION

Whether to approve the mandatory opening to worldwide competition of infrastructure contracts competed for Tsunami-related activities.

## ESSENTIAL FACTORS

In an Action Memorandum dated February 1, 2005 covering expedited acquisition procedures for Tsunami relief and reconstruction activities (the "Tsunami waiver"), Frederick Schieck, Acting Administrator, approved the recommendation to establish Geographic Code 935 (which includes all countries except foreign policy restricted countries) as the applicable authorized source, origin, and nationality code for any goods and services procured in direct support of infrastructure, including design, construction, or construction-related activities under the USAID Tsunami relief and reconstruction program. The approved recommendation was conditioned by a "preference for the procurement of U.S. source, origin, and nationality to the extent practicable" and that this preference would be "subject to the terms of any promulgated, published policy of USAID effective at the time of the procurement."

The Development Assistance Committee (DAC) of the Organization for Economic Cooperation and Development defines "untied aid" as "Official Development Assistance for which the associated goods and services may be fully and freely procured in substantially all countries."

Along with twenty other donor nations, the United States in May of 2001 signed the DAC Recommendation which committed signatory nations to untie certain forms of aid to the least developed countries and encouraged them to untie aid for other activities receiving official development assistance. This authority to join in the DAC untying initiative is provided to you as Administrator in the Foreign Assistance Act (FAA). Section 604(a)(1)(B)(ii) of the FAA permits you, in a delegation from the President, to determine "on a case-by-case basis, that procurement in such other country is necessary ... (II) to promote efficiency in the use of United States foreign assistance resources, including to avoid impairment of foreign assistance objectives."

The goals of USAID in providing humanitarian assistance to Tsunami-stricken areas are closely linked with those of the DAC 2001 Recommendation on Untying. Therefore, untying USAID's development assistance in this circumstance to worldwide competition will help accomplish the following goals:

(1) Promote greater integration among participating developing countries into the global economy;
(2) Provide worldwide best value in the delivery of goods and services to host nations;
(3) Provide more rapid mobilization and delivery of humanitarian relief and quick commencement of reconstruction projects due to the availability of local and regional contractors;
(4) Build capacity of host nations by domesticating certain aspects of the relief and reconstruction effort by using local supplies, subcontractors, and labor, ensuring that maximum benefits of our efforts reach the people of the affected countries;
(5) Provide U.S. foreign assistance suppliers with an opportunity to gain additional exports through the reciprocal opening to U.S. participation of other donor countries' procurements;
(6) Strengthen the responsibility and ownership of participating countries in the development process;
(7) Generate cooperative and effective partnerships with host nations, as well as other donor nations;
(8) Increase the supply of potential sources amongst participating countries eligible to meet the development needs in the area; and
(9) Maintain the U.S.'s leadership position with regards to untying official development assistance around the world.