# USAID'S Iraq Procurement Contracts: Insider's View

*By Jeffrey Marburg-Goodman*

The U.S. Agency for International Development (USAID) is known as the world leader among development assistance and emergency relief agencies. Its far-reaching programs, creative methodologies, and strong accountability requirements distinguish it from other bilateral and multilateral development agencies. Among other things, USAID's programmatic partners (its private sector contract and grant recipients) are held accountable by tough regulations and the agency's historic on-the-ground field presence.

USAID's rapid response to the situation in Iraq, including award of the largest foreign assistance contracts since the Marshall Plan,[1] should be seen as firm validation of the U.S. government's expertise and commitment to reconstruction and development assistance. Instead, USAID has met an onslaught of criticism as to its methods in competing and awarding the large Iraq reconstruction portfolio of contracts. That criticism must not go uncontested.

Although the lack, thus far, of a single GAO or agency protest by losing bidders offers some consolation, the author, a career USAID procurement lawyer, remains disturbed by a continuing drumbeat of mistaken information disseminated by some in the media, Congress, and even procurement experts outside the government. The assaults on USAID's procurement policies can be grouped into three categories, all centering on the use—and alleged misuse—of the U.S. government procurement system. Let's set the record straight for each of these.

## Allegation Number One

*"USAID decided to not fully compete these contracts, contrary to law and regulation."*

The U.S. Federal Acquisition Regulation (FAR) constitutes the most complex, yet most transparent, government purchasing code in the world. Still, the success it ensures for fundamental fairness, transparency, and maximum competitive benefit is normally achieved at considerable costs in time and staffing effort. It takes a minimum of six months—the norm is eight or more[2]—to carry out a full and open competition for complex services or supplies, which includes time to draft the scope of work, advertise the agency's needs, collect and evaluate proposals, and award a contract based on a weighted combination of cost and technical considerations—all part of the FAR's "best value" decision.[3]

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There is a tremendous tension between this purposely deliberate and unhurried process and the occasional emergency needs of a government agency. Sudden famine and killer viruses won't wait six months for a government agency to procure the resources to halt the effects of these natural disasters; the ordinary procurement process could result in the loss of thousands of innocent lives. Similarly, a country's destitution after war or organizational looting—where the physical infrastructure has been destroyed and much of the population is suffering from contaminated water, lack of lighting, a health care system on the verge of collapse, and a port so muddied that even food aid cannot cross its borders—such a country cannot endure a six-month procurement process in order to receive relief. Iraq, at war's end, was such a country.

USAID, in cooperation with an interagency committee, began contingency planning for Iraq's reconstruction in late fall 2002. In January 2003, the central procurement process was set in motion. Because time was short, USAID relied on one of two urgency-based regulatory exceptions to "full and open" competition.[4] Although the vast majority of USAID's procurements employ fully competitive procedures, these "urgency" exceptions have been embedded in USAID regulations for almost two decades now. They have been used prudently in situations such as relief efforts in the aftermath of conflict in Bosnia and Afghanistan and in response to natural disasters such as Hurricane Mitch in Central America and Columbian earthquakes in South America. None of these exceptions merited significant criticism and no one raised an outcry as to the use of less than fully competitive procedures. Notably, neither in Bosnia nor in Afghanistan (nor in other similar international emergency efforts) were there the kinds of false allegations that USAID has endured this year.

On January 13, 2003, the USAID acting administrator exercised, inter alia, the authority explicitly granted by the AIDAR (the USAID supplement to the FAR) to waive normal contracting procedures, including formal advertising requirements, by making a written determination "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."[5] With the exception of one contract to generally provide USAID with immediately needed personnel support for its work in Iraq[6] (and another for agriculture-related services that is currently being contracted for on the basis of full and open competition[7]), multiple firms were placed on a "short list" and invited to bid on the contracts.

USAID career employees decided which firms were on the short list based on past performance and an estimate

of the capacity of the firms to perform. Six companies competed aggressively for the large infrastructure contract ultimately awarded to Bechtel, a competitive range was set, and the agency conducted vigorous and prolonged negotiations with the two finalists. This was in no way a "rigged" or predetermined outcome, and the American taxpayer reaped substantial savings from a process in which the bidder with the highest technical rating also bid the lowest cost.[8]

## Allegation Number Two

*"USAID went shopping in secret. It failed to advertise on the Web and selected a handful of contractors to bid on its Iraq procurements; clearly, politics played a role in the selections."*

In the first place, it is worth noting that the U.S. procurement process itself provides for a good deal of silence as, by law, it is supposed to be conducted in substantial secrecy. This secrecy is mandated to preserve the integrity of the process. For example, the deliberations of the career professionals who evaluate bidders' technical proposals are conducted in private, in order to avoid any undue influence over them. Meanwhile, the same procurement laws that call for a good deal of secrecy *during* the process already require substantial *after*-award publication—publication that was mandated by laws and regulations that appeared in the post-Watergate wave of "sunshine legislation." These public disclosures include the contract itself (minus certain contractor proprietary information), a debriefing process for losing bidders, and release, when required, of the contracting officer's negotiation memorandum chronicling the complete evaluation process.[9] USAID stands ready, as do all U.S. government agencies, to release its documents regarding decisions, as well as to open its processes even more fully to any appropriate review.

Therefore, in accordance with law and regulation, the Iraqi reconstruction procurement process was commenced quietly. This was purposeful and policy-oriented: Given the fact the Bush administration was publicly stating that war could be avoided if Saddam Hussein took certain steps, it would have been inadvisable to advertise these reconstruction contracts in the usual manner. Accordingly, we set up a process designed to elicit robust competition, value for money, and timely aid in an environment that required silence as to these plans. Still, nothing in this process would allow the agency to avoid its post-award obligations to disclose its evaluation methodology; the rated strengths, deficiencies, and weaknesses of the competing contractors; and the resulting contract itself.

A few additional facts can be shared here. First, more than 20 contractors with prior USAID experience were chosen based on merit and capacity. Secondly, many of these contractors were chosen because they currently hold contracts to do work for USAID—contracts awarded under full and open competition. As to the other contractors that were solicited to bid on the Iraq procurements, all were chosen based on objective indicia of merit devised by *nonpolitical* career professionals only.

Lastly, there is an unwritten but well-understood "firewall" at USAID and other U.S. government agencies that separates career workers who participate in procurement evaluation decisions from political appointees, who, almost without exception, do not serve on technical panels or make contracting officer cost decisions, and have no say in that process whatsoever.

The author can categorically state that this firewall was in place for all Iraq contract procurements. For example, the evaluation panel for the large infrastructure contract that was won by Bechtel consisted of five career professionals: two engineers, one physical scientist, one regional planner, and a contracting officer. If career USAID public servants had smelled even a whiff of "undue influence" by *an*y outsider to the process or thought that the integrity of our procurement procedures were compromised in any way, we would have loudly protested—alerting our agency administrator, our inspector general, and, perhaps, even the press. But that did not happen. And because the integrity of the process at USAID is fundamentally sound, it almost never does.

## Allegation Number Three

*"USAID improperly excluded non-American firms from the list of contractors it invited to bid on the Iraq contracts."*

USAID's purchases of goods and services for our country's foreign assistance program are strongly tied to American sources. The Foreign Assistance Act mandates that, as a rule, we not use contractors based in other advanced countries to carry out the U.S. foreign aid program, and Congress has on many occasions announced its strong preference that only American sources be used when taxpayer dollars are at stake.[10] Of course, this rule can result in inferior or more expensive goods or services being procured than would be the case if worldwide sources were solicited. Indeed, this policy directly contradicts the efforts by the Bush administration—and subscribed to by most of Congress—to free up trade barriers, including a concerted effort currently being undertaken by the U.S. trade representative to lessen national preferences when central governments, including ours, make their procurement purchases.[11]

Still, the USAID administrator has the power to waive these "buy American" requirements, especially when there is insufficient capacity or competition to be had from American sources alone.[12] In the January 13 waiver referenced above, he did just that, waiving the U.S. source-only requirement to allow USAID's procurement office, on a discretionary basis, to compete the Iraq contracts more broadly. Because it was determined that both ample capacity and competition existed in the American marketplace for the Iraq contract requirements, as well as to ensure the diplomatic necessity of proceeding quietly in this sensitive area, the decision was made to compete the initial prime awards only among American firms.

Meanwhile, the subcontracting process, to take place at a later, less sensitive time, could be opened up to worldwide sources, and the agency did just that.

## Conclusion

The procurement decisions made regarding the Iraq contracts were managed by USAID career professionals and, in hindsight, there is probably not a single internal policy decision we would have made differently. If some technical errors were made under the time and staffing pressures of this extraordinary effort, they were relatively inconsequential and entirely honest ones, committed in the exercise of the exuberant and humanitarian ideals that have guided USAID since its inception. PL

## Endnotes

1. The $680 million contract awarded to Bechtel National, Inc., in April 2003 was the largest single direct contract awarded by USAID in its 42-year history and is thought to be the largest single nonmilitary foreign aid contract to be awarded since the Marshall Plan that rebuilt Europe after World War II. Collectively, the initial Iraq contracts, now approaching $2 billion in value, comprise the largest single country foreign aid program since the Marshall Plan. At publication time, USAID was using full and open competition to procure follow-on infrastructure services for Iraq valued at $1.5 billion.

2. According to the "Customer Service Standards" of USAID's Office of Procurement, 240 days—or eight months—is the stated target for awarding complex competitive contracts.

3. Federal Acquisition Regulation [hereinafter "FAR"], 48 C.F.R. § 15.101 (2003).

4. These are the FAR's "unusual and compelling urgency" exception to full and open competition (FAR 6.302–2) and the much less well-known exception, unique to USAID and codified in the agency's supplemental acquisition regulation: "Full and open competition need not be obtained when it would impair or otherwise have an adverse effect on programs conducted for the purposes of foreign aid, relief and rehabilitation." Acquisition Regulation [herinafter "AIDAR"], 48 C.F.R. § 706.302–70(a)(2) (2003). Additional provisions limit application to narrower, specified circumstances.

5. AIDAR, 48 C.F.R. § 706.302–70(b)(3)(ii) (2003).

6. This first Iraq contract, initially valued at about $7 million, was awarded on a sole source basis to International Resources Group in February 2003. The only sole source contract awarded by USAID in this series, it is worth less than one-half of 1 percent of all USAID Iraq contracts that will be awarded this year.

7. The Iraq Agriculture contract is valued at $120 million.

8. USAID's inspector general performed an exhaustive audit of this procurement and in July 2003 found only minor flaws in the process; these findings were themselves contested by the agency. *See* the IG's report, *available at* http://www.usaid.gov/oig/iraq_reports.html.

9. FAR, 48 C.F.R. § 15.506 (2003); FAR, 48 C.F.R. §§ 5.401–.402 (2003); Bid Protest Regulations, 4 C.F.R. § 21.3(d) (2003).

10. Foreign Assistance Act, 22 U.S.C. § 2354(a)(1) (2003).

11. *See*, *e.g.*, "FTAA-Free Trade Area of the Americas: Draft Agreement," ch. 3, art. III (Nov. 1, 2002), *available at* http://www.ustr.gov/regions/whemisphere/ftaa2002/tnc-w-133-05of12-eng.pdf.

12. Foreign Assistance Act of 1961, 22 U.S.C. § 2354(a)(1)(B) (2003).