



OFFICE OF INSPECTOR GENERAL

AUDIT OF USAID/SOUTHERN AFRICA'S USE OF WAIVERS FROM FULL AND OPEN COMPETITION FOR HIV/AIDS PROGRAMS

AUDIT REPORT NO. 4-674-13-007-P
MARCH 20, 2013

PRETORIA, SOUTH AFRICA



Office of Inspector General

March 20, 2013

MEMORANDUM

TO: USAID/Southern Africa Mission Director, Jeff Borns

FROM: Regional Inspector General/Pretoria, Robert W. Mason /s/

SUBJECT: Audit of USAID/Southern Africa's Use of Waivers From Full and Open Competition for HIV/AIDS Programs (Report No. 4-674-13-007-P)

This memorandum transmits our final report on the subject audit. We have considered carefully your comments on the draft report and have included them in their entirety (without the attachment) in Appendix II.

The report includes one recommendation to strengthen USAID's use of waivers from full and open competition. We acknowledge that a management decision has been reached and final action has been taken on this recommendation. Therefore, this recommendation is closed upon report issuance.

I want to express my sincere appreciation for the cooperation and courtesy extended to my staff during the audit.

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SUMMARY OF RESULTS

Although USAID policies generally encourage the use of competition, the Agency has allowed limited or no competition in awarding HIV programs based on “the urgent need to meet . . . ambitious targets” for more than a decade. On December 19, 2000, the USAID Administrator signed a memorandum that, among other things, allowed for the use of other than full and open competition for grants, cooperative agreements, and contracts. This memorandum noted that the waivers to competition would “remain in force throughout the life of the [HIV/AIDS Strategy], estimated to be through the year 2007.”

On December 20, 2007, the Administrator signed a new memorandum that extended the waivers to competition until December 31, 2013. The waiver signed in 2000 anticipated the HIV program budget to be no more than about \$530 million annually, whereas the one signed in 2007 anticipated the budget would average \$6 billion per year from 2008 to 2013.

At the same time it was increasing spending on HIV programs, USAID was allocating a much higher proportion of funding to programs awarded by overseas missions. The Government Accountability Office reported, “[Acquisition and assistance] obligations overseas increased by 600 percent, from about \$1 billion in fiscal year 2002 to about \$6 billion in fiscal year 2008.”¹

The combination of these factors greatly increased the applicability of the HIV waiver at USAID/Southern Africa’s Regional Acquisition and Assistance Office (RAAO). As of December 2012, RAAO had eight contracting officers that supported missions in Angola, Malawi, Madagascar, Namibia, South Africa, and Zimbabwe, as well as Botswana, Lesotho, and Swaziland (where USAID operates programs but does not maintain a mission). USAID’s HIV programs in these countries help prevent HIV transmission, provide care and treatment to people with HIV, and strengthen health-care systems. In fiscal years 2011 and 2012, RAAO issued new awards or modifications to existing awards that included HIV components worth almost \$2.4 billion.

The HIV waiver is not the only exception to competition available. Agency policies allow contracting officers to waive competition for cooperative agreements, including awards to public international organizations,² follow-on awards and extensions, small grants (worth less than \$150,000), awards to the only organizations capable of doing the work, awards that meet critical foreign assistance objectives, and awards to small businesses.

The use of waivers—and RAAO activities overall—have been affected by implementation and procurement reform (IPR), which is part of a set of reforms known as USAID Forward, launched in August 2010. IPR has six objectives:

1. Strengthen partner country capacity by increasing use of reliable partner country systems.
2. Strengthen local civil society and private sector capacity.

¹ Government Accountability Office, *USAID Acquisition and Assistance: Challenges Remain in Developing and Implementing a Strategic Workforce Plan* (GAO-09-607T), April 2009.

² According to ADS 308.3.1.1, a public international organization is one that is composed principally of countries, such as the World Bank Group and the United Nations.

3. Increase competition and broaden USAID's partner base.
4. Use U.S. Government resources more efficiently and effectively.
5. Improve collaboration with bilateral donors and multilateral and international organizations.
6. Improve USAID's internal technical capacity.

Related to the first objective, on August 16, 2011, USAID issued ADS 220, "Use of Reliable Partner Country Systems for Direct Management and Implementation of Assistance." This guidance notes, "Competition is not required prior to entering into bilateral agreements for the use of partner country systems."

The Regional Inspector General/Pretoria (RIG/Pretoria) conducted this audit with the following objectives:

- Did USAID/Southern Africa appropriately use waivers from full and open competition in its acquisition and assistance process for HIV/AIDS programs?
- How could the Agency's IPR affect the use of waivers from full and open competition in USAID/Southern Africa's acquisition and assistance process for HIV/AIDS programs?

Overall, the audit found that USAID/Southern Africa was using waivers appropriately and that RAAO generally complied with the requirements stated in the HIV waiver. However, the requirements only dictated what RAAO needed to do when the waiver was used, not how to determine whether it should be used. Additionally, while the audit focused on the HIV waiver—the most commonly used exception to competition—RAAO used other exceptions. The audit found that RAAO complied with the various rules and regulations for these exceptions as well.

Regarding the second objective, IPR's most significant impact on the use of waivers is the increased use of local organizations. Many of the new awards issued for HIV programs in South Africa were limited to local organizations, including 11 in the audit sample. Although the competition was technically limited, the number of capable civil society organizations in that country led to robust competition. USAID/Southern Africa negotiated 14 awards worth more than \$530 million in August and September 2012, and some of these received as many as 45 applications. Although limiting awards to local organizations in other countries could limit competition significantly, even limited competition would increase competition compared with issuing sole-source awards based on an exception.

The other area of IPR that could affect the use of waivers is the increased use of host-government systems. USAID missions in South Africa and Malawi determined that they could implement programs through their respective host-country governments, although neither had arranged the details of the programs. However, giving more funds to host-country governments could eventually reduce the use of both the HIV waiver and competition by having less funding available for programs implemented by nongovernmental organizations, for-profit companies, and public international organizations.

Although waivers generally were used in accordance with rules and regulations, we found the following problem.

- Reporting to the agency competition advocate³ about the use of waivers was not complete (page 5). The advocate collects information annually from missions about the use of waivers from competition to prepare a report for Congress. The information that USAID/Southern Africa submitted was neither complete nor accurate because RAAO used inadequate procedures to prepare the report. As a result, Congress did not have comprehensive, correct information about the Agency's use of waivers to competition.

To improve the reporting, we recommend that USAID/Southern Africa:

1. Review its procedures for reporting exceptions to competition to the agency competition advocate and implement a documented plan to improve the relevance, reliability, and timeliness of these reports (page 6).

The detailed finding appears in the following section, and the scope and methodology appear in Appendix I. Management comments are in Appendix II, and our evaluation of them is on page 7.

³ The agency competition advocate is a position required by Federal Acquisition Regulation 6.501. Among other things, the advocate is responsible for promoting full and open competition, including identifying new initiatives to increase it.

AUDIT FINDINGS

USAID Complied With Requirements for Use of Exceptions to Competition

Waivers from competition for the main types of awards issued by USAID—grants, cooperative agreements, and contracts—are authorized by several federal statutes. For grants and cooperative agreements, the USAID Office of General Counsel stated that the USAID Administrator has the authority to waive competition requirements because the Federal Grant and Cooperative Agreements Act of 1977 encourages, but does not require, competition for these awards. For contracts, the Office of General Counsel said the Administrator could waive competition requirements because they do not apply to foreign aid, relief, and rehabilitation programs.⁴ Despite the possibility of waivers under these statutes, USAID has made the policy choice that it will require competition unless there is a documented exception. Because this is merely a USAID policy choice, the possibility remains that the Administrator could eliminate this competition requirement, as was done with the HIV waiver.

Use of the HIV waiver required RAAO to:

1. Notify the agency competition advocate when competition was waived for contract actions⁵ worth more than \$100,000 (this does not apply to cooperative agreements or grants).
2. Limit extensions for cooperative agreements and grants to no more than 2 years.
3. Justify its use in writing.

Notably, the only requirement for electing to use the HIV waiver was that the agreement had a HIV component.

Overall, we found that USAID/Southern Africa complied with the requirements for use of waivers from competition. This audit selected a random sample of 68 acquisition and assistance actions, worth more than \$1.7 billion, from a total of 121 actions worth almost \$2.4 billion that RAAO completed in fiscal years 2011 and 2012.

RAAO chose not to seek bids for 20 of the 50 actions in the sample that would have triggered competition, such as modifications of existing contracts that increased the cost ceiling, changed the scope of work, or extended the period of performance (except for one-time, no-cost extensions of 1 year or less). However, these 20 actions represented only 15 percent of the dollar value of the sample. Of these actions, the HIV waiver was cited eight times, making it the most commonly used exception to competition, as show in the table on the next page.

⁴ The Competition in Contracting Act of 1984 modified the Federal Property and Administrative Services Act of 1949, stating that, with a few exceptions, executive agencies shall use full and open competition to issue contracts. However, there is an exception to the Federal Property and Administrative Services Act, including the section modified by the Competition in Contracting Act, for “foreign aid, relief or rehabilitation programs,” provided that the agency adheres to the act as much as possible.

⁵ The award and modification of grants, cooperative agreements, and contracts are referred to as actions.

Exceptions to Competition Cited by USAID/Southern Africa

Exception Cited	Instances	Value of Actions (\$)	Average Value (\$)
HIV waiver	8	63,190,758	7,898,845
Public international organization	4	8,179,633	2,044,908
Follow-on award or extension	3	10,550,823	3,516,941
Small grant	2	129,000	64,500
Exclusive capability	1	300,000	300,000
None cited*	1	1,984,520	1,984,520
U.S.-based small business	1	3,182,154	3,182,154
Total	20	87,516,888	4,375,844**

* The agreement officer said the documentation did not need to cite an exception because USAID had reduced the cost ceiling before the modification, and the modification did not increase the amount beyond the original ceiling. However, the documentation did not explain why this increase was needed.

** This is the average value of each action, not the sum of the average value column.

We found that the sample included actions that involved robust competition, actions in which waivers were used in the best interest of U.S. foreign policy, and actions in which the need for the HIV waiver was not clear. In one example of using a waiver in the best interest of U.S. foreign policy, RAAO waived competition when it increased an award's cost ceiling because USAID asked the program to support a South African Government initiative to increase the number of men getting circumcised in health-care facilities. Because of this initiative, the program was projected to exceed its cost ceiling before the end of the agreement. This exception was consistent with the HIV waiver, which allows noncompetition to “quickly respond to changing assistance priorities,” like male circumcision.

However, in an example of RAAO not documenting the need to waive competition, USAID/Southern Africa extended a program for 6 months and increased the cost ceiling by \$25 million, which was the same as the average program costs for a 6-month period under the original agreement. The justification for the exception did not list any changes or emergencies that necessitated the extension. In another example, an award was issued for a program in Namibia without competition for 1 year to allow RAAO to compete a subsequent award for the program. However, at the end of the year RAAO extended the award for 1 year and added \$3.18 million to the cost ceiling—again without competition.

Notwithstanding these isolated examples, in general the mission's use of waivers was generally in accordance with the relevant current criteria.

Mission Did Not Report Use of Waivers Completely or Accurately

A 1981 amendment to the Foreign Assistance Act of 1961 (22 U.S.C. 2394) instructed USAID to include in an annual report to Congress the dollar value of all contracts worth more than \$100,000 entered into without competition and the reason for doing so. According to the agency competition advocate, this amendment was clarified in the 2006 House Appropriations Committee Report for Public Law 109-152, which explained that Congress is interested in grants and cooperative agreements, as well as contracts.

To meet these requirements, the advocate asks RAAO for annual reports about the use of exceptions to full and open competition. Despite Congress's interest in waivers for awards worth more than \$100,000, the reports RAAO sent to the advocate were not complete or accurate. Of the five sample actions that RAAO should have reported to the advocate because they used the HIV waiver, the mission did not report two and reported another as almost \$6 million less than the actual amount.

Problems with two of these actions stemmed from inadequate procedures that RAAO used to prepare the report. One was not reported because USAID's Global Acquisition and Assistance System generated acquisition and assistance action information by contracting officer instead of by mission. Therefore, the actions managed by a contracting officer who left the mission during the fiscal year did not show up in the system and were therefore not in RAAO's report. In the case of the second action, a RAAO official said the amount was underreported by almost \$6 million probably because the office incorrectly used a planning figure that was not updated.

In addition, RAAO excluded an action based on the advocate's instructions not to include any that increased the cost ceiling but obligated less than \$100,000. RAAO correctly excluded a fiscal year 2011 modification that increased the cost ceiling by \$8 million, but did not obligate any funds. The advocate explained that when she became responsible for this report, she was told that Congress was only interested in obligations.

Although RAAO complied with the advocate's guidance, excluding an action like this modification gives an incomplete picture of how USAID is using exceptions to competition. As of the end of fiscal year 2012, RAAO had obligated almost \$6 million of the \$8 million cost ceiling increase, but because mission officials did not increase the cost ceiling in the same modification, these obligations did not need to be reported to the advocate. Therefore, by basing the actions reported on a minimum obligated amount, USAID has inadvertently excluded information that would otherwise be applicable to this Congressional request.

Without relevant, reliable, and timely information about how USAID is using exceptions to competition, Congress cannot determine the impact the HIV waiver has on acquisition and assistance activities at USAID. Accordingly, this audit makes the following recommendation.

Recommendation 1. *We recommend that USAID/Southern Africa review its procedures for reporting exceptions to competition to the agency competition advocate and implement a documented plan to improve the relevance, reliability, and timeliness of these reports.*

EVALUATION OF MANAGEMENT COMMENTS

In its comments on the draft report, USAID/Southern Africa agreed with the recommendation to review its procedures for reporting exceptions to competition and to implement a documented plan to improve the reporting. The mission reviewed its procedures and issued a memorandum to all RAAO employees on March 11, 2013, explaining how the office will prepare these reports. Therefore, a management decision has been reached and final action has been taken.

SCOPE AND METHODOLOGY

Scope

RIG/Pretoria conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions in accordance with our audit objective. We believe that the evidence obtained provides that reasonable basis.

The objectives of this audit were to determine the following:

- Did USAID/Southern Africa appropriately use waivers from full and open competition in its acquisition and assistance process for HIV/AIDS programs?
- How could the Agency's IPR affect the use of waivers from full and open competition in USAID/Southern Africa's acquisition and assistance process for HIV/AIDS programs?

As of December 2012, RAAO provided contracting support for USAID missions in Angola, Malawi, Madagascar, Namibia, South Africa, and Zimbabwe, as well as support for Botswana, Lesotho, and Swaziland. In fiscal years 2011 and 2012, RAAO issued 121 new awards or modifications to existing awards that included HIV components worth almost \$2.4 billion. We randomly selected 68 of those that related to agreements worth more than \$1.7 billion for review. This sample size represents a 95 percent confidence level and 4 percent margin of error.

In planning and performing the audit, we reviewed the laws, regulations, and policies related to use of waivers from competition related to HIV/AIDS programs. This included extensive discussion with attorneys in the regional legal office in South Africa and Office of the General Counsel in Washington, D.C. We also assessed RAAO's significant internal controls, including controls related to the office's organizational structure, planning, monitoring, reporting, and the review the office conducted in compliance with the Federal Managers' Financial Integrity Act of 1982.⁶

Audit fieldwork was conducted from October 4 to December 6, 2012. The audit team met with the director of the regional HIV/AIDS program, the bilateral health team, the program office, the regional financial management office, regional legal office, and RAAO at USAID/Southern Africa. In addition, we conducted teleconferences with health officers from missions in Angola, Malawi, Namibia, and Zimbabwe.

Methodology

To answer the audit objectives, we conducted meetings with mission stakeholders, including RAAO, the regional financial management office, and HIV technical teams that worked with RAAO. These meetings included discussions on the use of waivers from competition, the role of RAAO, and how the acquisition and assistance process would change after the missions have

⁶ Public Law 97-255 codified in 31 U.S.C. 3512.

completed IPR. In addition, we reviewed the preliminary conclusions of the IPR review that RIG/Pretoria conducted for countries including Malawi and South Africa as part of a worldwide review conducted by OIG. That review is still in progress as of March 12, 2013.

To establish criteria for the audit, we considered the following documents, among others:

- Government Accountability Office, *Standards for Internal Control in the Federal Government*.
- The August 16, 2011, and March 26, 2012, versions of ADS 220.
- The April 10, 2009, November 18, 2011, and July 31, 2012, versions of ADS 302.
- The March 9, 2010, November 8, 2010, September 23, 2011, March 12, 2012, and July 3, 2012, versions of ADS 303.
- USAID Acquisition Regulation, Section 706.3.

We then collected information from USAID/Southern Africa to identify all acquisition and assistance actions in fiscal years 2011 and 2012 related to programs with HIV funding, the date of these awards, and their cost ceilings. We validated this information by comparing it with reports from the Global Acquisition and Assistance System and through discussions with USAID technical teams. Based on this information, we accumulated the population of acquisition and assistance actions related to HIV programs in fiscal years 2011 and 2012. We consulted OIG's statistician to select a statistical sample of 68 actions from this population. A statistical sample was chosen because the supporting documentation was maintained in one location, a uniquely identifiable population was available from which to select the sample, and noncompliance could be projected to the population. Although we opted not to use projections in the report because we did not identify instances of noncompliance in the sample, the results could be projected to the population based on our sampling methodology.

To review these acquisition and assistance actions, we first determined whether the award was made after a full and open competition. If so, we reviewed the technical evaluation committee memorandum and negotiation memorandum to determine whether the competition was limited and that these memorandums supported the award. If the award was not made after full and open competition, we reviewed the justification for exception to competition and the negotiation memorandum to determine which exception was cited, whether the documentation included all applicable clearances and/or approvals, and whether the justification supported the use of the exception. We also reviewed the sample actions that used the HIV waiver to determine whether RAAO included them in its response to the agency competition advocate's data call.

Finally, we discussed the legal authority for the HIV waiver with USAID regional legal advisors, OIG's associate counsel, and USAID's Office of General Counsel.

MANAGEMENT COMMENTS



UNITED STATES GOVERNMENT
M E M O R A N D U M

March 14, 2013

MEMORANDUM

TO: Regional Inspector General/Pretoria, Robert W. Mason

FROM: USAID/Southern Africa Mission Director, Jeff Borns /s/

SUBJECT: Revised Final: USAID/Southern Africa Response to Audit of USAID/Southern Africa's use of Waivers From Full and Open Competition for HIV/AIDS Programs (Report No. 4-674-13-00X-P)

This memo revises the Mission's March 11, 2013 response. In response to subject RIG audit, USAID/Southern Africa submits the following General Comment and response to the subject report. Note that this revision replaces the 3/11/13 Mission response.

General Comment: The Summary of Results, Pages 1-2 of the draft OIG report, does not reflect the complete statement of the USAID Office of General Counsel (GC) as communicated through emails from GC and the OIG on November 29, 2012, November 30, 2012 and December 13, 2012. GC's statements, taken in their totality, make it clear that in spite of the fact that USAID doesn't have statutory competition requirements, USAID has implemented regulations in the AIDAR, as well as policy in ADS 302 and 303, to ensure that USAID uses competition unless there is a documented exception. This point is not clearly communicated in the OIG's draft report. We ask that OIG re-review the November 29, 2012, November 30, 2012 and December 13, 2012 from GC to ensure that statements attributed to GC are accurate and complete in the final OIG report.

Recommendation 1. We recommend that USAID/Southern Africa review its procedures for reporting exceptions to competition to the agency competition advocate and implement a documented plan to improve the relevance, reliability, and timeliness of these reports.

Mission Response. The Mission agrees with this recommendation. The corrective action is for RAAO to put new reporting procedures in place, as per the attached memo signed by the RAAO Acting Officer Director. The date for the completion is March 11, 2013. No further action is necessary.

USAID/Southern Africa respectfully requests that RIG close this recommendation based on the supporting documentation.

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