



Office of Inspector General

MEMORANDUM

TO: [REDACTED]
Attorney Advisor
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FROM: [REDACTED]
Senior Counsel
USAID/OIG/GC

SUBJECT: Vulnerabilities to USAID Accountability Measures over Non-U.S.-based NGOs
OIG Case Number: AF-H1-17-0575-I

A recent decision by the United States Court of Appeals for the Second Circuit, affirming a lower court's decision, poses a significant challenge to the government's ability to hold non-U.S. based Non-Governmental Organizations (NGOs) accountable under the False Claims Act (FCA). This office has previously brought this issue to USAID's attention in a September 10, 2021 referral letter. Without action to remedy the situation, the agency's authority to hold foreign based government contractors and grantees accountable will be undermined.

On June 16, 2022, the Court of Appeals for the Second Circuit affirmed the judgement of the United States District Court for the Southern District of New York, dismissing a qui tam for lack of personal jurisdiction against UK-based NGO Christian Aid, a recurring recipient of USAID funding. The court concluded that the district court correctly determined that TZAC failed to make a prima facie showing of the court's personal jurisdiction over Christian Aid.

In a June 9, 2021 decision, the district court found that Plaintiff-Appellant The Zionist Advocacy Center ("TZAC") failed to establish personal jurisdiction over Christian Aid, an organization based in the United Kingdom. According to TZAC, Christian Aid fraudulently certified to USAID that it had not provided material support to terrorist groups despite the funding of a vocational training program taught by an arm of a foreign terrorist organization.

At the district court, TZAC provided three facts to establish personal jurisdiction over Christian Aid: (1) Christian Aid is a member of a large consortium of charitable organizations with an office in New York; (2) Christian Aid helped form a separate nonprofit organization in New York; and (3) executives from Christian aid traveled twice to New York between 2018 and 2019 to attend conferences. Additionally, TZAC noted language from the USAID certifications

stating that the United States has “the right to seek judicial enforcement of these assurances.”¹ The district court found that the contacts asserted by TZAC to support the exercise of personal jurisdiction over Christian Aid were not sufficient and that the clause included in the USAID certifications could not be construed as a forum selection clause demonstrating Christian Aid’s submission to the jurisdiction of a forum in the United States.

On appeal, TZAC argued that Christian Aid’s acts of applying for and contracting with the United States government to obtain USAID funding should be considered sufficient contacts to justify the exercise of personal jurisdiction. The Court of Appeals firmly rejected TZAC’s argument, finding that “the mere existence of a contract between parties in different jurisdictions does not constitute sufficient minimum contacts for the complaining party to assert personal jurisdiction over the other in the plaintiff’s home jurisdiction.”²

Notably, the court reiterates the district court’s assertion that a contract can establish personal jurisdiction if there is a forum selection clause included. However, the court finds that the “contract between USAID and Christian Aid is tellingly silent as to the governing law and forum for resolving disputes.”³

We present this information to the Agency for its consideration and awareness of a significant vulnerability, and a potential solution. Incorporating a forum selection clause as a standard award provision would ensure accountability and deterrence via the FCA against foreign based NGO’s accused of defrauding USAID programs. We appreciate your consideration of this memorandum and in advising OIG of any remedial actions taken in response.

If you have questions or need further assistance, please contact OIG Senior Counsel

██████████ at ██████████ or via email at ██████████.

¹ *United States ex rel. TZAC, Inc., v. Christian Aid*, No. 17-cv-4135, 2021 WL 2354985 (S.D.N.Y. June 9, 2021)

² *United States Ex Rel TZAC, Inc. v. Christian Aid*, No. 21-1542, 2022 WL 2165751, at *2 (2d Cir. 2022).

³ *Id.*