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FROM THE AMERICAN PEOPLE

OFFICE OF INSPECTOR GENERAL
for the Millennium Challenge Corporation

**AUDIT OF THE MILLENNIUM
CHALLENGE
CORPORATION'S CONTRACT
AWARD PROCESS**

AUDIT REPORT NO. M-000-06-001-P
October 11, 2005

WASHINGTON, DC



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*Office of Inspector General
for the Millennium Challenge Corporation*

October 11, 2005

MEMORANDUM

TO: Acting Vice President for Administration and Finance, Jonathan O. Bloom

FROM: Assistant Inspector General for the Millennium Challenge Corporation,
John Phee /s/

SUBJECT: Audit of the Millennium Challenge Corporation's Contract Award Process
(Report No. M-000-06-001-P)

This memorandum transmits our final report on the subject audit. In finalizing this report, we considered your comments on our draft report and have included those comments in their entirety as Appendix II in this report.

This report contains nine procedural recommendations to help improve the Millennium Challenge Corporation's (MCC) contract award process. Based on your written comments and supporting documentation provided, we consider that final action has been taken on one of the nine recommendations. For the remaining eight recommendations, we consider that a management decision has been reached on each recommendation. Final action for these recommendations must be determined by MCC, and we ask that we be notified of MCC's actions.

I appreciate the cooperation and courtesy extended to my staff during the audit.

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SUMMARY OF RESULTS

The Assistant Inspector General for the Millennium Challenge Corporation (MCC) conducted this audit to determine if MCC complied with applicable laws and regulations in awarding its contracts. (See pages 2 and 3.)

The audit concluded that MCC has followed many of the requirements of procurement laws and regulations including parts or sections of the Federal Acquisition Regulation (FAR) and in its first eighteen months of operation has established a fully functioning procurement activity that has made the numerous awards expected for a new Federal entity. Initially, MCC officials believed that Federal procurement requirements did not apply to MCC and specifically claimed an exemption from following FAR Parts 4 and 19 that implement the Small Business Act and the Federal Procurement Data System. During our audit fieldwork, MCC officials stated that they had been following the FAR requirements regardless of their applicability. However, subsequent to the completion of our audit fieldwork, MCC advised us that there was misperception among some MCC staff that MCC was following the FAR voluntarily but was not legally required to do so. In response to our recommendation, MCC stated that it would issue a memorandum to its staff emphasizing that the FAR applies to all MCC domestic procurement activities as a matter of law and not by choice. Other problem areas as well as areas for suggested improvement involving the procurement function include:

- Justifications for several sole source procurements were inadequate, overstated, and insufficiently documented. (See pages 8 to 10.)
- Non-procurement personnel either did not follow procurement regulations or their actions created the appearance of partiality. (See pages 10 to 12.)
- Policies and procedures regarding the use of personal services contractors have not yet been established. (See pages 13 to 14.)
- A non-citizen was allowed to work in MCC headquarters without MCC ensuring the individual had eligibility to work in the U.S. (See pages 14 to 15.)

The report contains nine audit recommendations to address the problem areas and areas for suggested improvement. The recommendations for MCC include establishing a small business procurement preference program and annual procurement preference goals, establishing policies on preparing supporting documentation for sole source procurements, incorporating additional policies into training classes for non-procurement personnel, and establishing a policy on the use of personal services contractors.

BACKGROUND

The Millennium Challenge Corporation (MCC) was established in January 2004 to further global development by promoting economic growth, eliminating extreme poverty, and strengthening good governance, economic freedom, and investments in people.¹ Since its inception, the MCC has dedicated its resources to establishing its operations and has focused on developing the infrastructure it needed to conduct business.

In its first year of operations, MCC's procurement function was staffed primarily with a series of temporary contractor employees under the direction of a contracting officer. As of June 30, 2005, MCC's Acquisitions Office included four full-time direct hire contracting officers and specialists and one personal services contractor. In addition, until March 31, 2005, MCC had an agreement with the U.S. Department of Interior's National Business Center to provide assistance with award solicitations and other procurement activities.

MCC's Acquisitions Office has the responsibility for the procurement of all supplies and services for the various program offices of MCC. From MCC's inception until May 10, 2005, MCC made approximately 204 awards including contracts, purchase orders, agreements with other Federal agencies, and blanket purchase orders. Many of these awards were for smaller purchases as small as a \$30 newspaper subscription but also included awards exceeding \$1 million.

AUDIT OBJECTIVE

The Assistant Inspector General for the Millennium Challenge Corporation conducted this audit as a part of its fiscal year 2005 audit plan. The objective of this audit was to answer the following question:

- Has the Millennium Challenge Corporation complied with applicable laws and regulations in awarding its contracts?

Appendix I contains a discussion of the audit's scope and methodology.

¹ The Millennium Challenge Act of 2003 (Public Law 108-199, Part D, Title VI), established the Millennium Challenge Corporation in the Executive Branch as the corporation responsible for carrying out the Millennium Challenge Act of 2003. The Millennium Challenge Corporation was designated a government corporation as defined in section 103 of title 5, United States Code.

AUDIT FINDINGS

The Millennium Challenge Corporation (MCC) has complied with many of the requirements of procurement laws and regulations in awarding its contracts. However, during our audit fieldwork, MCC officials had stated that these requirements did not apply to MCC. Specifically, MCC was not following sections of the Federal Acquisition Regulation (FAR) including FAR Parts 4 and 19. These sections implement the Small Business Act and the Federal Procurement Data System. Subsequent to the completion of our audit fieldwork, MCC officials advised us that MCC is subject to the requirements of the FAR and that they will advise its staff accordingly.

MCC has made significant progress in its contract award process. In its first eighteen months of operation, MCC established a fully functioning procurement activity that has made the numerous awards expected for a new Federal entity though during many of these months MCC's procurement function was staffed primarily with a series of temporary contractor employees. MCC has provided contracting officer's technical representative (COTR) training to large numbers of its staff. This course includes extensive coverage of the procurement function. In addition, MCC has hired a consultant to assemble a manual of Procurement Operating Procedures to set forth MCC's official procurement policies. However, there are problem areas or areas for suggested improvement that should be addressed.

MCC has not always adequately documented or justified its use of sole source procurement procedures. Also, three instances were noted of unauthorized commitments or inappropriate actions taken by non-procurement officials that did not appear to have been properly ratified or mitigated by MCC contracting officials. Finally, MCC has not yet established a policy regarding the use of personal services contractors and needs to acknowledge responsibility for confirming the work status of non-citizen individuals it hires to work in the U.S.

Problem areas and areas for suggested improvement noted in the audit are further discussed below.

Applicability of Federal Procurement Regulations to MCC

Summary: Millennium Challenge Corporation (MCC) officials believed there was some degree of flexibility in the applicability of Federal procurement regulations to MCC as stated by an internal MCC legal memo. This position had been widely disseminated to MCC staff although no second outside opinion had ever been obtained to confirm a special status for MCC under procurement regulations. However, the Federal Acquisition Regulation (FAR) specifically states that wholly owned Government corporations are subject to its requirements. By exempting itself from the FAR and other procurement regulations, MCC created an internal control environment over its procurement activities that could have serious long term implications.

An internal MCC legal memo dated December 2004 asserted that MCC was not bound by the requirements of the Federal Acquisition Regulation (FAR), Competition in

Contracting Act (CICA), or the Small Business Act (SBA). This position had been presented to MCC staff as MCC policy. Later, MCC advised us that it had retracted this memo but still maintained the position that it may be justified in concluding that certain acquisition-related statutes did not apply to their procurements because of the flexibility in its authorizing legislation. Furthermore, an MCC procurement training manual—that was distributed and being used by MCC staff at the end of our audit fieldwork—asserted that MCC was “not legally bound by the vast number of procurement laws that govern executive agencies” but that “MCC has elected to follow the FAR where the FAR sets forth sound business practices.”

This issue of the applicability of the FAR to MCC was raised in an earlier Office of Inspector General (OIG) report² with a recommendation that MCC seek a second opinion from appropriate authorities on whether it is exempt from general statutory and regulatory provisions governing Federal procurement. MCC indicated it would take this recommendation “under advisement” but had not obtained an outside opinion. MCC officials state that they had been following FAR requirements regardless of their applicability though this was not the case in all instances. As discussed in the audit finding below, MCC was specifically not following sections of FAR Parts 4 and 19.

Subsequent to the completion of our audit fieldwork, MCC advised us that it had informed procurement staff shortly after the issuance our previous audit report that the FAR applies to MCC’s domestic procurement activities and that MCC should conform its domestic activities accordingly. Additionally, MCC advised us that subsequent to the end of our audit fieldwork that it had corrected its procurement training manual that previously contained a statement suggesting that complying with the FAR was not required by MCC.

To ensure that all MCC staff has been adequately informed of the applicability of the Federal Acquisition Regulations to MCC, we are making the following recommendation.

Recommendation No. 1: We recommend that the Millennium Challenge Corporation (MCC) prepare a memorandum acknowledging applicability of Federal procurement laws and regulations to MCC domestic operations and distribute the memorandum to all MCC staff.

MCC Not In Compliance with Small Business Act

Summary: The Millennium Challenge Corporation (MCC) did not comply with the Small Business Act and Federal Acquisition Regulation (FAR) Part 19 that prescribe preference programs to provide procurement opportunities for small and small disadvantaged businesses. Specifically, MCC had not reserved any acquisitions valued between \$2,500 to \$100,000 to small businesses nor had it reserved or set aside any acquisitions for small disadvantaged firms--8(a) contractors--or any other class of small businesses. MCC officials believed MCC was exempt from the

² Review of Millennium Challenge Corporation’s Progress In Achieving Its Planned Organizational Structure And Beginning Its Assistance Programs As Of February 28, 2005 (Report No. M-000-5-001-S issued March 31, 2005).

requirements of the Small Business Act and FAR Part 19. As a result, MCC had not afforded the maximum practicable opportunity for businesses in the small and small disadvantaged business communities to participate as contractors to provide goods and services.

The Small Business Act of 1953, as amended, authorizes small and small disadvantaged business preferential contracting programs to ensure that small business concerns receive a fair share of Government contracts. The Act applies to all "Federal agencies" as defined in Section 3(b) of the Act and this definition includes a wholly-owned government corporation such as the MCC. The Act also states "Notwithstanding the government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practical opportunity for small business concerns ..." The Small Business Administration works with each agency to establish goals that both provide small businesses the maximum opportunity to win contracts given that agency's procurement needs.

The requirements of acquisition-related sections of the Small Business Act are contained in FAR Part 19 entitled *Small Business Programs*. FAR 19 authorizes preference programs to provide federal procurement opportunities to the small and small disadvantaged business communities. FAR 19.201 states that heads of contracting activities are responsible for effectively implementing the small business programs within their activities and to take all reasonable action to increase participation in their activities' contracting processes by these businesses. FAR 19.502-2 states that acquisition of supplies or services valued between \$2,500 to \$100,000 are automatically reserved exclusively for small business and shall be set aside for small business unless there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. In addition, the contracting officer shall set aside any acquisition over \$100,000 for small business participation when there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns, and award will be made at fair market prices.

At the time of the completion of our audit fieldwork, MCC officials believed that MCC was not subject to the Small Business Act or FAR Part 19 *Small Business Programs*. An internal MCC legal opinion prepared in December 2004 (which MCC later retracted) stated that:

"The 'character and necessity' language of the (Millennium Challenge) Act permits the MCC to prescribe the manner in which it will procure goods and services. This means that the MCC is not obligated to follow the general statutory and regulatory provisions governing Federal procurement, such as the Competition in Contracting Act, Small Business Act, and the Federal Acquisition Regulation. However, the MCC is still required to engage in sound business practices when it procures goods and services ..."

Subsequent to the end of our audit fieldwork, MCC has stated that it believes that it is not exempt from the requirements of the Small Business Act and FAR Part 19.

Although MCC previously believed that it was exempt from the Act, MCC officials pointed out that it made several awards to small businesses including 8(a) contractors. In a May 2005 letter to a member of Congress, MCC reported that it had made awards in excess of the overall Federal Government goal in each category of small business.

Although MCC has made awards to small and small disadvantaged businesses it is incorrect to compare this with Federal Government procurement goals for these businesses. These goals are for the entire Federal Government and many agencies have much higher goals because of the nature of the goods and services they buy. Without any MCC-specific goals, one cannot assess the adequacy of MCC's awards to small businesses. More importantly, these federal goals are based on contracts or actual purchases whereas MCC's data includes the full amount of several blanket purchase agreements (BPAs)³—regardless of how much MCC had actually ordered under the agreements. For instance, a BPA awarded to an 8(a) firm for \$900,000 only resulted in actual purchases of approximately \$110,000. The bulk of the \$1.1 million in awards to 8(a) firms cited by MCC in its data was represented by this BPA.

In our opinion, MCC is subject to the Small Business Act and has not afforded the maximum practicable opportunity for businesses in the small and small disadvantaged business communities to participate as contractors to provide goods and services. The presence of "character and necessity" language in MCC's enabling legislation has no effect on the applicability of the Small Business Act on MCC. Regarding this, GAO's Principles of Federal Appropriations Law states: "The applicability of procurement laws and regulation to government corporations is fairly simple. They apply, for the most part, to wholly owned government corporations." In addition, we have contacted staff in the Office of Federal Procurement Policy, the Small Business Administration, and the Federal Procurement Data Center and have found no support for MCC's position that it is not obligated to follow the requirements of the Small Business Act and FAR Part 19.

By not complying with the Small Business Act and FAR 19, MCC has not always given small businesses the contract award opportunities reserved for small businesses. A commitment by MCC to apply and follow the Act and FAR 19 when awarding future contracts—and establishment of MCC-specific goals for small business procurement—would result in greater participation in Federal contracts by these businesses.

The U.S. Department of Interior's National Business Center—contracted by MCC to provide procurement assistance during MCC's first year of operation—prepared a program for MCC's use in implementing a small business acquisition policy but MCC declined to use it. Establishing annual procurement goals with the Small Business Administration and implementing a small business acquisition policy would demonstrate a commitment by MCC to complying with the U.S. Government's promotion of the use of small businesses.

Recommendation No. 2: We recommend that the Millennium Challenge Corporation prepare and implement a business and economic development program for its domestic procurements that provides consistent guidance and

³ A blanket purchase agreement is a simplified method of filling anticipated repetitive needs for supplies and services by establishing "charge accounts" with qualified sources of supply. It does not state or imply any agreement to place future contracts or orders with the contractor.

establishes internal guidelines for its contracting and program personnel to implement the laws and regulations concerning procurement preference programs.

Recommendation No. 3: We recommend that the Millennium Challenge Corporation, through negotiation with the Small Business Administration, establish annual procurement preference goals.

Non-Compliance with Federal Procurement Data System

Summary: The Millennium Challenge Corporation (MCC) has not reported information on its acquisitions to the Federal Procurement Data System (FPDS) and has neither requested nor received dispensation to exclude itself from FPDS coverage. As a relatively new organization, MCC has not yet focused its attention on implementing this requirement. Without inclusion in the FPDS, the extent to which the various classes of small businesses are sharing in MCC's acquisition activity cannot be accurately assessed. Also, information on MCC's use of other than competitive procedures is not readily available for outside review.

Federal Acquisition Regulation (FAR) Subpart 4.6 prescribes uniform reporting requirements for the FPDS. FAR 4.601 requires each executive agency to establish and maintain a computer file containing unclassified records of all procurements exceeding \$25,000. General information required includes (1) date of the contract award, (2) the contractor, (3) the property or services obtained, and (4) the cost of the procurement. In addition, information on the reason for the use of other than competitive procedures (such as sole source procurements) in these awards is required. Also, agencies shall be able to access information on such items as awards to small disadvantaged businesses and awards to businesses owned and controlled by women. All of this information is transmitted to the FPDS which provides a comprehensive mechanism for assembling, organizing, and presenting contract placement data for the Federal Government.

MCC has been in existence for approximately 18 months and has not yet developed a system for reporting the required FPDS information. Currently, MCC has no plan or timeline for implementing a system for reporting information on its acquisitions to the FPDS. Until MCC's acquisition activities are included in the Federal Procurement Data System, MCC is not in compliance with FAR Subpart 4.6. Among the functions or uses of the FPDS is the tracking or monitoring by the Small Business Administration of an agency's contracting with small businesses and set-asides and the use of other than competitive procedures. As discussed in an earlier audit finding, MCC should be taking steps to implement the Small Business Act and establish contracting goals for small businesses and set asides.

Recommendation No. 4: We recommend that the Millennium Challenge Corporation establish a plan, including implementation dates, for installing a contract information reporting system to provide information to the Federal Procurement Data System.

Inadequate Justifications for Sole Source Procurements

Summary: In several instances, the Millennium Challenge Corporation (MCC) used sole source awards to obtain goods and services. The justifications prepared for these sole source procurements were inadequate and overstated and the contract files were insufficiently documented as required by the Federal Acquisition Regulation to support the absence of competition. MCC officials believed the sole source awards were justified during MCC's first months as a new organization. Inadequate and poorly documented justifications for sole source awards can undermine public confidence in MCC's procurement system and can raise questions of its commitment to competition.

Various sections of the Federal Acquisition Regulation (FAR) incorporate the requirements of the Competition in Contracting Act (41 U.S.C. 253). FAR 13.104 states that the contracting officer must promote competition to the maximum extent practicable to obtain supplies and services from the source whose offer is the most advantageous to the Government, considering the administrative cost of the purchase. Also, the contracting officer must not solicit offers based on personal preference and should consider using solicitation of at least three sources to promote competition to the maximum extent practicable. FAR 13.106-1(b)(1) states that for purchases not exceeding the simplified acquisition threshold, contracting officers may solicit from one source if the contracting officer determines that the circumstances of the contract action deem only one source reasonably available (e.g., urgency). FAR 13.106-3 discusses file documentation and retention requirements for simplified acquisition purchases including explaining the absence of competition if only one source is solicited. FAR Part 10 prescribes policies and procedures for conducting market research to arrive at the most suitable approach to acquiring supplies and services.

It is Federal Government policy to promote full and open competition in the acquisition process as the use of competitive procedures lends itself to lower prices and conducting Government business with integrity, fairness, and openness. In the majority of its contract awards, MCC has followed FAR requirements for competition in selecting its contractors and vendors for goods and services. In the first few months after its inception, MCC made some purchases using other than full and open competition as it was forced to quickly establish day-to-day operations with only a handful of staff and no organizational infrastructure. However, we identified several instances in subsequent months where MCC used sole source awards to obtain goods and services when it should be significantly reducing this practice. The justifications for these sole source procurements were inadequate or overstated and there was a lack of documentation to support the absence of competition. These procurements included the following:

- A large consulting firm was awarded a \$300,000 blanket purchase agreement (BPA) in January 2005 to provide employee compensation and benefits consulting services. After identifying seven potential firms, MCC officials held meetings with three interested firms to discuss their capabilities and determined that the awardee was the only viable source willing and capable of completing a compensation study within the required time frame. A sole source procurement was justified under the simplified acquisition procedures of FAR Part 13 and the justification states that

"delay in contract award for this requirement would cause serious, irreparable injury in that MCC would be unable to competently perform its foreign assistance mission".

MCC's contracting officer explained that this procurement made use of market research as contained in FAR Part 10 to determine which sources were capable and available to perform the work in MCC's limited time frame. However, the limited contract file documentation does not support the conclusion that the other firms (a minority-owned firm and a small firm) under consideration were either incapable or unable to complete a study within MCC's time frame. We contacted one of these firms who indicated they were available and believed their firm was capable of performing the work. In our opinion, the intention of market research under FAR Part 10 is to identify potential market sources for an agency's requirements and not to narrow the number of sources and competition. In this case, market research was used to actually select a firm in lieu of a formal open solicitation.

Other examples which show MCC's use of sole source awards with inadequate or overstated justifications or a lack of documentation to support the absence of competition included the following:

- A policy research organization was hired at a cost of \$10,000 in February 2005 to provide consulting and writing services to assist in the design of briefing materials targeted to MCC's Board of Directors. The contract was justified as a sole source procurement because of "urgency" under the simplified acquisition procedures of FAR Part 13. The justification states that only one source was deemed reasonably available for the assignment which was to begin immediately and that "delay in contract award for this requirement would cause serious, irreparable injury in that MCC would be unable to competently perform its foreign assistance mission".
- A small firm was hired at a cost of \$14,850 in December 2004 to provide assistance in producing and printing MCC's 2004 annual report. The contract was justified as a sole source procurement because of "urgency" under the simplified acquisition procedures of FAR Part 13.
- A meeting facilitator was hired at a cost of \$10,000 in late December 2004 for a meeting to be held on January 4, 2005. The contract was justified as a sole source procurement because of "urgency" under the simplified acquisition procedures of FAR Part 13.
- A large architecture firm was hired at a cost of \$18,403 in March 2005 to assist with designing and choosing signage and artwork for MCC's new headquarters in Washington, D.C. The same firm had executed the interior layout and design of the building. The contract was justified as a sole source procurement because of "urgency" under the simplified acquisition procedures of FAR Part 13. The justification stated that a delay in contract award would "cause serious, irreparable injury in that MCC would not be able to represent itself to the national and international communities in a way that is crucial to creating public acceptance and support ..."
- A Canadian citizen was hired at a cost of \$12,000 (with an option for another \$24,000) in a sole source procurement in February 2005. This contract to provide

consulting services was justified as a sole source procurement because of "urgency" under the simplified acquisition procedures of FAR Part 13. The justification states that only one source was deemed reasonably available for the assignment.

Although each of these five procurements claims "urgency" as a justification for using sole source, the "urgency" is due more to a lack of advance planning which the FAR indicates is not a valid justification and can easily be viewed as an attempt to circumvent the Government's preference for competition. Claims of serious injury to MCC's ability to perform its mission if procurements are delayed—such as designing signs and choosing artwork—are overstated. In addition, no documentation was provided to demonstrate whether attempts were made to identify other sources or that the price paid was actually competitive and no explanation was provided to show that the selection did not represent a personal preference or how the particular contractor was identified and selected.

Use of competitive procedures is a benchmark of Federal acquisition policy and any acquisition where limitations are placed on full and open competitive procedures should be fully explained, justified, and documented. Frequent and poorly documented use of limited competition procedures—particularly the use of sole source procurements—can raise questions concerning an organization's commitment to competition. MCC officials should take steps to significantly reduce the use of sole source awards and to ensure thorough documentation when sole source procedures are used.

Recommendation No. 5: We recommend that the Millennium Challenge Corporation establish procurement policies and procedures that contain specific requirements for the use of sole source acquisitions including what elements must be contained in the sole source justification and in contract file documentation such as: (1) specific identification of how the contractor was chosen, (2) what attempts were made to find other sources and what other sources were contacted, and (3) identifying pricing information obtained from similar sources.

Inappropriate Actions By Non-Procurement Officials

Summary: In three instances, the Millennium Challenge Corporation's (MCC's) non-procurement personnel either did not follow procurement regulations or their actions created the appearance of partiality. These personnel were unfamiliar with restrictions in the procurement process, particularly before a contract is awarded by a contracting officer. These situations were not adequately addressed or mitigated as required by the Federal Acquisition Regulation (FAR). Questions of fairness or propriety by any employee in the awarding of contracts can compromise the public's trust in MCC's procurement activities.

FAR 3.101-1 states that "Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none ... The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships." FAR 15.201(f) states "After release of the solicitation, the contracting officer must be the focal point of any exchange with potential offerors. When

specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage." FAR 9.505 states that "The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it."

FAR 1.602-3 describes an unauthorized commitment as an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government. Such commitments need to be ratified—or approved—by an official who has the authority to do so. Agencies are to take positive action to preclude, to the maximum extent possible, the need for ratification actions. FAR 1.602-3(c) states that the ratification should be exercised only when "The contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable."

The FAR describes personnel in the technical, supply and procurement fields as all being participants in the acquisition process. MCC's non-procurement personnel have been actively involved in various facets of the procurement process in order to expedite the purchase of goods and services. Federal procurement regulations, however, reserve certain functions for warranted contracting officers. Also, inexperience in Federal procurement by non-procurement personnel can easily result in questions of fairness in the procurement process. We identified the following instances involving non-procurement personnel where procurement regulations were either not followed or their actions created the appearance of partiality:

- MCC issued an open solicitation for recruiting/staffing services with the intention of issuing multiple blanket purchase agreements (BPAs) for these services. During the solicitation period, a senior MCC official contacted a senior official of a potential contractor to suggest that the firm submit a bid and later met with officials of the firm reportedly to discuss general topics relating to MCC. Although the firm may not have received any specific information to afford it an advantage in preparing its bid, there is a clear appearance of possible partiality that, in our opinion, required mitigation. Instead, the same senior MCC official also participated as a member of the selection panel evaluating the proposals MCC received. The firm ultimately received one of the three BPAs awarded by MCC (\$1 million ceiling for the first year and \$500,000 each for four option years). In our opinion, the appearance of possible preferential treatment taints this competition and the option years for this BPA should not be exercised. MCC's contracting officer made a judgment call that the official's intervention during the solicitation process did not preclude his participation on the selection panel. The OIG strongly disagrees.
- An MCC senior official hired a consultant to help prepare and facilitate a management meeting to be held on January 4, 2005. The official reported the hiring to the contracting officer in an e-mail the evening before the consultant was to arrive in Washington and stated that a fee of \$10,000 had already been agreed upon and requested help in how to "... document this contract." Although the need to hire a facilitator may have been discussed with the contracting officer in the weeks preceding the contract, only the contracting officer has the authority to enter into such an agreement and negotiate and establish the price. This unauthorized

commitment was never ratified as required by FAR 1.602-3. As discussed earlier in the report, there is no further documentation in the contract file to support any market research, explain how the facilitator was selected, or describe attempts to obtain price quotes from other facilitators. The contracting officer did not believe this constituted an unauthorized commitment because the need for the consultant had been discussed with procurement officials earlier and the contract was executed by the contracting officer in a timely manner. However, prior discussion has no bearing on whether or not this was an unauthorized commitment and a contract had already been formed before the Acquisitions Office took any action on it.

- An MCC staff member created an unauthorized commitment by leasing a vehicle for the use of MCC's new CEO in May 2004 although the individual lacked the authority to enter into an agreement on behalf of the Government. Although market research was reportedly performed to get the best price, none of this research was documented. Three months later in August 2004, MCC procurement personnel obtained two additional price quotes in conjunction with ratifying this unauthorized commitment and one quote was 20 percent less than the lease price MCC had already paid. In spite of this, the lease was ratified. The contract file states that the lower price quotation could be ignored and the unauthorized commitment ratified because the leasing company could not deliver the vehicle on a timely basis. In our discussion with the leasing company officials, they stated they could have delivered any existing vehicle within 48 hours. More importantly, the price quote was obtained simply for purposes of ratifying the unauthorized commitment—three months after the vehicle was actually leased. An inability to promptly deliver at that time has no bearing on the validity of the price quotation.

In our opinion, the procurement problems cited above involving non-procurement officials should be easier to prevent than addressed after-the-fact by procurement officials. MCC has provided training to a large number of its employees for performing the function of a contracting officer's technical representative (COTR). This course is a comprehensive course that covers many aspects of the procurement function but does not specifically address restrictions on procurement activities before a contract is awarded (such as unauthorized commitments) or during an open solicitation for contract proposals. These issues should be incorporated into this course or similar training for non-procurement personnel.

Recommendation No. 6: We recommend that the Millennium Challenge Corporation establish clear written policies—to be incorporated into existing in-house training courses—that delineate what pre-award and solicitation activities personnel can engage in and what specific actions they must avoid.

Recommendation No. 7: We recommend that the Millennium Challenge Corporation decline to exercise the option years for the staff recruitment blanket purchase agreement cited in the audit report.

MCC Needs a Policy on Personal Services Contractors

Summary: The Millennium Challenge Corporation (MCC) has no MCC-specific policy on the use of personal services contracts (PSCs) to obtain necessary services. Although there is no specific federal government requirement or criteria that mandates establishment of such a policy, authorization to award personal services contracts is the exception in the U.S. Government and a policy on how and when they will be used would be an indication that MCC has adequately considered the role of PSCs in MCC's operations. Without an MCC-specific policy concerning PSCs, PSC compensation packages could have an adverse or inflationary effect on MCC's overall compensation or recruitment policies. MCC is in the process of establishing its policies and procedures and should include among these a policy for the selection, hiring, and use of PSCs.

Federal Acquisition Regulation (FAR) 37.104 states that "Agencies shall not award personal services contracts unless specifically authorized by statute to do so." Section 614 of the MCA Act gives MCC authority to "contract with individuals for personal services."

Selected agencies of the U.S. Government--including USAID, the Department of State, and the Overseas Private Investment Corporation (OPIC) in the international arena--have the authority to award PSCs. Each of these agencies have established agency-specific policies to govern and regulate their use of PSCs. Although MCC is clearly not subject to the PSC policies of other agencies, it is instructive to note what types of limitations these older agencies have put in place to control and regulate the use of PSCs. These policies include the following:

- Limiting the role and responsibility of PSCs by not allowing them to supervise direct-hire employees, make final decisions on personnel selection, serve as contracting officers or sign obligating documents, or make decisions involving planning, budget, programming and personnel selection;
- Negotiating PSC salaries to consider both the market value of the position as well as the individual's salary history;
- Limiting, with some exceptions, PSC salaries to the Civil Service's Executive Service 6 (ES-6) level;
- Requiring a security clearance or a preliminary clearance for all PSCs;
- Providing a specified variety of benefits to PSCs such as annual and sick leave and pay supplements to serve as a retirement benefit; and
- Specifying how to select the individuals to be awarded a PSC.

MCC has hired several PSCs in both a full-time and an intermittent status during its first eighteen months of operation. Without a policy on PSCs, MCC has hired PSCs with wages and benefits negotiated on an inconsistent basis with no restriction on the duties they can perform and no limitation on how much they can be paid. A review of these

contracts disclosed the following items that could be addressed in a MCC-specific PSC policy:

- MCC's full-time PSC staff includes one managing director with a subordinate staff member that is a direct-hire employee;
- Intermittent or temporary PSCs are not required to have security clearances;
- Full-time PSCs are paid on an hourly basis though many intermittent or temporary PSCs are paid on a daily basis. In addition, full-time PSC contracts contain provisions and funding to allow compensation for all hours worked though direct hire employees receive only a straight salary.
- The salaries of some intermittent PSCs were negotiated to include a large increase over their salary history to compensate for the omission of various personnel benefits while other intermittent PSCs did not receive the increase.
- The salary of some intermittent PSCs exceeded the ES-6 level and in one case involving a short-term consultancy, the PSC's salary was established at a rate approximately three times that rate.
- Contract files for PSCs do not consistently show how the contractor was chosen or what type of competitive process was used.

MCC has not yet established all of the policies and procedures it will eventually have although it has recently hired a consultant to compile a procurement procedures manual for use by MCC's acquisitions and non-acquisitions staff. With over a year's experience in contracting for personal services and as it finalizes its staffing and compensation policies for its employees, MCC is in a position to establish a policy for the selection, hiring, and use of PSCs. Without an MCC-specific policy concerning PSCs, PSC compensation packages could have an adverse or inflationary effect on MCC's overall compensation or recruitment policies.

Recommendation No. 8: We recommend that the Millennium Challenge Corporation establish a policy covering contracting for personal services contracts (PSCs) that identifies any limitations on a PSC's duties, salaries (including negotiation and computation) and benefits.

No Assurance Non-Citizens Eligible to Work In the U.S.

Summary: The Millennium Challenge Corporation (MCC) hired a non-resident Canadian citizen as a consultant to work in Washington without ensuring the individual had legal status to work in the U.S. MCC legal and contracting officials stated it was their opinion that Canadians are eligible to receive U.S. Government contract awards and that they had no obligation to ensure proper entry status because the individual was hired as a consultant and not as a personal services contractor. However, without documentation of the visa status or entry classification of any non-resident, non-citizen it hires to work in the U.S., MCC has no assurance that it is in compliance

with U.S. law and requirements to determine contractor eligibility to receive a contract.

Federal Acquisition Regulation (FAR) Part 9 prescribes policies, standards, and procedures pertaining to prospective contractors' responsibility and FAR Subpart 9.100 applies to all proposed contracts with any prospective contractor that is located (1) in the U.S., its possessions, or Puerto Rico; or (2) elsewhere, unless application of the subpart would be inconsistent with the laws or customs where the contractor is located. FAR 9.103 states (a) purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only, and (b) no purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. FAR 9.104-1 (g) states that to be determined responsible, a prospective contractor must be otherwise qualified and eligible to receive an award under applicable laws and regulations. U.S. law requires non-resident, non-U.S. citizens to obtain specific work visas or entry classifications before being able to work in the U.S. The North American Free Trade Agreement (NAFTA) requires certain Canadian professionals to obtain a specific entry classification before commencing work in the U.S.

Although MCC provided a consultant with a letter to be used in obtaining the required entry classification for a Canadian professional to work in the U.S., MCC's contract file and other records were not documented to show that MCC officials ever ascertained that the consultant actually obtained the required status upon entering the U.S. MCC officials asserted that this was not MCC's responsibility as the contract was not a personal services contract.

In our opinion, the type of contract an individual is hired under has no bearing on the obligation U.S. employers (particularly entities of the U.S. Government) have to ensure the proper work status of non-citizens they employ. Although institutional contractors may be relied on to check the status of their employees, MCC itself must ensure each individual it hires to work in the U.S. has the proper work visa or entry classification before commencing work. MCC has no policy or procedures to require documentation of the work status of non-resident, non-U.S. citizens it employs to work in the U.S.

Recommendation No. 9: We recommend that the Millennium Challenge Corporation (MCC) develop policy and procedures to require documentation of the work status of non-citizen individuals to perform work for MCC in the United States.

EVALUATION OF MANAGEMENT COMMENTS

In response to our draft report, MCC management provided written comments that are included in their entirety as Appendix II. In addition, we incorporated certain minor clarifications into the report that were suggested by MCC. Overall, MCC management concurred with all nine recommendations included in the report and are planning to take corrective action to address those recommendations. MCC also provided evidence showing that final action has been taken to address one of the nine recommendations. As a result, a management decision has been reached for eight of the nine recommendations and final action has been taken on one recommendation.

In response to Recommendation No. 1, MCC agreed to issue a memorandum to its staff emphasizing that the Federal Acquisition Regulation applies to all of MCC domestic procurement activities as a matter of law, not by choice. A management decision has been reached for this recommendation and MCC anticipates corrective action will be completed by October 2005.

In response to Recommendation No. 2, MCC agreed to prepare and implement a business and economic development program for its domestic procurements that meets Small Business Administration requirements and implements laws and regulations concerning procurement preference programs. A management decision has been reached for this recommendation and MCC anticipates corrective action will be completed by January 2006.

In response to Recommendation No. 3, MCC agreed to contact the Small Business Administration (SBA) to determine the applicability of annual procurement preference goals for MCC and will establish appropriate goals based on feedback from the SBA. A management decision has been reached for this recommendation and MCC anticipates corrective action will be completed by November 2005.

In response to Recommendation No. 4, MCC pointed out that it does have a system for compiling the type of information required by the FPDS but has not yet reported the information to the FPDS because of limited personnel resources. MCC agreed to begin transmission of procurement data to the Federal Procurement Data System (FPDS) beginning in October 2005. A management decision has been reached for this recommendation.

In response to Recommendation No. 5, MCC agreed with the recommendation and stated that it supports the notion that advance procurement planning should be completed and that a formal advance procurement planning program was initiated in June 2005. MCC also stated that it had already established the recommended procurement policies and procedures that contain specific requirements for the use of sole source acquisitions including what elements must be contained in the justification and in contract file documentation. Additionally, MCC noted that the six cited procurements are relatively small and were awarded using the simplified acquisition procedures of FAR Part 13 and had been in operation for approximately one year before

these awards were made. A management decision has been reached for this recommendation.

In response to Recommendation No. 6, MCC agreed with the recommendation and stated that it is taking steps to develop the policies and procedures to continue to teach and train non-procurement personnel issues on pre-award and solicitation issues. MCC also amended its contracting officer's technical representative (COTR) handbook to include discussion of restrictions on contacts with prospective contractors and making unauthorized commitments. Based on the supporting documentation provided, we consider that MCC has taken final action on this recommendation.

In response to Recommendation No. 7, MCC agreed with the recommendation and stated that it will not renew the blanket purchase agreement with the firm in question. A management decision has been reached for this recommendation.

In response to Recommendation No. 8, MCC agreed to establish a policy on contracting for personal services contracts. A management decision has been reached for this recommendation and MCC anticipates corrective action will be completed by November 2005.

In response to Recommendation No. 9, MCC agreed to develop policy and procedures to require documentation of the work status of non-citizen individuals to work for MCC in the U.S. A management decision has been reached for this recommendation and MCC anticipates corrective action will be completed by November 2005.

SCOPE AND METHODOLOGY

Scope

The Assistant Inspector General for the Millennium Challenge Corporation audited MCC's contract award process in accordance with generally accepted government auditing standards to determine whether the Millennium Challenge Corporation complied with applicable laws and regulations in awarding its contracts. In particular, the audit focused on whether MCC met federal requirements for competition, properly selected the sources of its supplies and services, and adequately documented its contract awards.

A judgmental sample of 72 contracts were reviewed out of approximately 204 contracts that had been awarded from MCC's inception in January 2004 until May 10, 2005. Contracts chosen for review included a cross section of the different types of contract awards made by MCC with an emphasis on sole source procurements and contracts awarded in the latter half of MCC's existence. Audit coverage included contracts awarded in the U.S. as part of MCC's due diligence efforts to support development of MCC's compacts (agreements) with foreign governments. Audit coverage did not extend to MCC's compacts or to purchases made overseas to implement and support MCC's overseas assistance activities.

The audit included tests and review of selected internal controls integral to the contract function including (1) proper authorizations and approval, (2) adequate obligation of funding for contracts, (3) documentation of key elements of the contract process, and (4) controls over the use of government purchase cards.

Audit fieldwork was performed at MCC's former headquarters in Arlington, Virginia and current headquarters in Washington, D.C. from April 20, 2005 through July 14, 2005.

Methodology

To answer the audit objective, we reviewed documentation in MCC's contract files and reviewed federal procurement regulations including the Federal Acquisition Regulation, the Competition in Contracting Act, and the Small Business Act. In addition to conducting interviews with MCC officials, we also interviewed officials or staff of the National Business Center, the Small Business Administration, the Office of Federal Procurement Policy, and the Federal Procurement Data Center. We also contacted and interviewed staff from a small number of MCC's contractors or prospective contractors and interviewed officials of the American Council of Engineering Companies. Selected procurement-related policies and procedures used by USAID and other federal entities were also reviewed.

MANAGEMENT COMMENTS



Millennium Challenge Corporation

Reducing Poverty Through Growth

October 4, 2005

John Phee
 Assistant Inspector General
 U.S. Agency for International Development
 AIG/MCC-Room 8.09.63, RRB
 1300 Pennsylvania Avenue, NW
 Washington, DC 20523

Re: Audit of the Millennium Challenge Corporation's Contract Award Process
 (Report No. M-000-05-003-P)

Dear Mr. Phee:

Please find herewith the Millennium Challenge Corporation's (MCC) comments on each of the recommendations identified in draft report No. M-000-05-003-P.

Recommendation No.1: We recommend that the Millennium. Challenge Corporation prepare a memorandum acknowledging applicability of Federal procurement laws and regulations to MCC domestic operations and distribute the memorandum to all MCC staff.

Recommendation No. 1, MCC Response: MCC management will issue a memorandum to staff re-emphasizing that the Federal Acquisition Regulation (FAR) applies to all of MCC's domestic procurement activities as a matter of law, not by choice, in light of the apparent misperception among some MCC staff that MCC is following the FAR voluntarily but is not legally required to do so. MCC originally addressed this issue in response to a finding in the IG's Audit of MCC's Progress In Achieving Its Planned Organizational Structure and Beginning Its Assistance Programs, issued on March 31, 2005. In that report, the IG recommended that MCC seek a second opinion on an internal December 2004 memorandum issued by an MCC attorney which questioned the applicability of the FAR due to the "character and necessity" language contained in Section 614(a)(4) of the Millennium Challenge Act. MCC management indicated at that time that it would take this recommendation "under advisement" and indicated that, notwithstanding any potential argument to the contrary, it intended to continue following the requirements of the FAR, as it had in the past. The IG considered that response to be final action on that recommendation. Immediately after the IG issued the March 31 audit report – and prior to the beginning of the audit period covered by this Report -- MCC's Office of General Counsel advised MCC's Vice President for Administration and Finance (Acting) and the Director of Procurement that the FAR applied to all of MCC's domestic procurement activities (as a matter of law, not by choice), and that they should not rely on the December 2004 memo as justification to deviate from FAR procedures. Also, in early April 2004 (prior to the audit period of the current Report) the MCC attorney who authored the December 2004 memorandum regarding FAR applicability to MCC informed the Office of Management and Budget, the General Accountability Office and the IG that he withdrew the opinion and that he would inform them of any other opinion that questioned the applicability of any federal procurement regulations. No other opinions have been

issued on this matter and the position of MCC remains that it is subject to the FAR.

Recommendation No.2: We recommend that the Millennium Challenge Corporation prepare and implement a business and economic development program for its domestic procurements that provides consistent guidance and establishes internal guidelines for its contracting and program personnel to implement the laws and regulations concerning procurement preference programs.

Recommendation No.2, MCC Response: The MCC will prepare and implement a business and economic development program for its domestic procurements that meets SBA requirements and provides consistent guidance for its contracting and program personnel to implement the laws and regulations concerning procurement preference programs. Completion date: January 2006.

Recommendation No.3: We recommend that the Millennium Challenge Corporation, through negotiation with the Small Business Administration, establish annual procurement preference goals.

Recommendation No.3, MCC Response: The MCC will contact the SBA to determine the applicability of annual procurement preference goals for MCC. Based upon feedback from the SBA, appropriate procurement preference goals will be established. Completion date: November 2005.

Recommendation No.4: We recommend that the Millennium Challenge Corporation establish a plan, including implementation dates, for installing a contract information reporting system to provide information to the Federal Procurement Data System.

Recommendation No.4, MCC Response: The OIG report states "MCC has been in existence for approximately 18 months and has not yet developed a system for compiling and reporting the required FPDS information."

The MCC does not believe that the OIG's finding is totally accurate, the MCC implemented a system for compiling the type of information required by FPDS, and in fact, has compiled the information for all contract actions awarded from the beginning of MCC procurement operations. The MCC has not, however, coded the information onto FPDS forms and transmitted it to FPDS because of limited personnel resources. The MCC will begin transmission of data to FPDS beginning in October 2005.

Recommendation No.5: We recommend that the Millennium Challenge Corporation establish procurement policies and procedures that contain specific requirements for the use of sole source acquisitions including what elements must be contained in the sole source justification and in contract file documentation such as: (1) specific identification of how the contractor was chosen, (2) what attempts were made to find other sources and what other sources were contacted, and (3) identifying pricing information obtained from similar sources.

Recommendation No. 5, MCC Response: MCC agrees with the recommendation. MCC supports the notion that advance procurement planning should be completed; and, in fact, MCC initiated a formal advance procurement planning program in June 2005. In addition, MCC has established procurement policies and procedures that contain specific requirements for the use of sole source acquisitions including what elements must be contained in the sole source justification and in the contract file documentation, such as: (1) specific identification of how the contractor was chosen, (2) what attempts were made to find other sources and what other sources were contacted, and (3) a price reasonableness justification. The OIG report cited six (6) procurements that were awarded on the basis of what the OIG considers questionable "urgency" justifications. Each of the cited procurements was awarded using simplified acquisition procedures of FAR Part 13 during the period February 2004 and March 2005. The contract

award value of the cited procurement is:

- \$10K
- \$10K
- \$12K
- \$15K
- \$18K
- \$78K

It should be noted that MCC has been in operation as an Agency for approximately 1 year prior to the award of the small dollars procurements cited.

Recommendation No. 6: We recommend that the Millennium Challenge Corporation establish clear written policies-to be incorporated into existing in-house training courses-that delineate what pre-award and solicitation activities personnel can engage in and what specific actions they must avoid.

Recommendation No. 6, MCC Response: MCC agrees with the recommendation, and is taking steps to develop the policies and procedures to not only continue teaching the issues in its COTR training course, but also to train non-procurement personnel on these issues.

Recommendation No.7: We recommend that the Millennium Challenge Corporation decline to exercise the option years for the staff recruitment blanket purchase agreement cited in the audit report.

Recommendation No. 7, MCC Response: After further review of the facts surrounding this issue, MCC agrees with the recommendation and will not renew the Blanket Purchase Agreement with the firm in question.

Recommendation No.8: We recommend that the Millennium Challenge Corporation establish a policy covering contracting for personal services contracts (PSCs) that identifies any limitations on a PSC's duties, salaries (including negotiation and computation) and benefits.

Recommendation No.8, MCC Response: The MCC will establish a policy covering the unique MCC environment for contracting for personal services contracts (PSCs) that identifies any limitations on a PSC's duties, salaries (including negotiation and computation) and benefits. Completion date: November 2005.

Recommendation No.9: We recommend that the Millennium Challenge Corporation develop policy and procedures to require documentation of the work status of non-citizen individuals to perform work for MCC in the United States.

Recommendation No.9, MCC Response: The MCC will develop policy and procedures to require documentation of the work status of non-citizen individuals to perform work for MCC in the United States. Completion date: November 2005.

Sincerely,

/ s /

Charles O. Sethness

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