

memorandum

615-0187

18

DATE: October 17, 1980

REPLY TO
ATTN OF: AG, Herbert L. Beckington **HGB**SUBJECT: Memorandum Audit Report No. 81-5, Kenya: Non-Competitive Procurement
Waiver for Charles R. Drew Postgraduate Medical School

TO: A/AID, Mr. Douglas J. Bennet, Jr.

We have completed a review of the Charles R. Drew Postgraduate Medical School (Drew) contract as requested in your memorandum dated June 27, 1980. The purpose of the review was to report on the circumstances surrounding the approval of the contract to ascertain if Agency rules and regulations were followed and whether improprieties were involved. The review included an examination of documents in AID/Washington and USAID/Kenya as well as discussions with responsible Government of Kenya and AID officials.

Background

On June 20, 1980, the Assistant Administrator for Africa (AA/AFR) requested you to retroactively approve a waiver of AID's competitive procurement requirements. In requesting retroactive approval, the AA/AFR reported that adherence to the usual competitive contracting procedures at that particular time, after the Government of Kenya had entered into an understanding with Drew, would have impaired the objectives of the foreign assistance program in Kenya. The justification for this request revolved around AID's repeated efforts to involve the Ministry of Health in implementing a more substantive population program. Moreover, a strain in relations with the Ministry had resulted from AID's persistence in its population program efforts. AA/AFR hoped that by developing activities in the health sector that have a high priority with the Ministry (in this case, the Drew contract), it would pave the way for future attempts at involving the Ministry of Health in population programs. The AA/AFR reasoned that, because the population program was a key objective of AID's program in Kenya, any deterioration of this relation would result in the impairment of the objectives of the foreign assistance program in Kenya.

AID Procurement Regulations Not Followed

AID's procurement procedures requiring competition were not followed in the selection and award of the host-country contract between the Government of Kenya and Drew. Moreover, Agency procurement regulations do not provide an appropriate way to award a host-country contract to minority business or educational institutions other than through normal competition.

In our view, the controversy over Drew's sole-source procurement was caused in part by the lack of coordination between responsible Africa Bureau offices and the AID Mission in Kenya (USAID). This lack of coordination



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contributed to the need for your retroactive approval of a waiver of Agency regulations to allow AID to fund the contract entered into without competition. Examples of poor coordination between the USAID and Africa Bureau offices are illustrated by the following events that led up to the award of the contract.

On May 11, 1979, AID/Washington approved the USAID's plans for the Health Planning and Information Project No. 615-0187. Following AID's initial approval of the project, a project agreement was entered into on August 30, 1979 to assist the Government of Kenya meet the costs of carrying out the project. The estimated cost of the project is \$3.3 million, which is funded by an AID grant of \$2.5 million and a Government of Kenya contribution of \$0.8 million.

After making an assessment of the Government's ability to implement a host-country contract, the USAID determined that host-country contracting procedures, rather than a direct AID contract, should be used to provide long-term technical specialists for the project. Thus, in Project Implementation Letter Number 1, dated October 4, 1979, the USAID informed the Government of Kenya that host-country contracting, AID's normal preference, should be used. By early December 1979, with USAID consultation, the Minister of Health and the Minister of Planning had determined that the host-country contract was the best way to implement the project and approved of the competitive procurement practices required by AID.

The USAID was aware of a number of prospective contractors interested in the Kenya project and indicated to these contractors that the Request for Proposal would be available by February 1980. The USAID then started to develop a list of prospective contractors who were to receive the Requests for Proposals. In January 1980, the USAID sent a cable to AID/Washington listing three minority contractors and two universities which it considered were qualified and interested in submitting proposals for the project. (Drew was not one of the original five.) At the same time, USAID requested AID/Washington to advise if there were other qualified universities or business firms to whom the Request for Proposal should be sent.

No action was taken in response to this cable request due to an administrative oversight in the Africa Bureau; that is, the cable was incorrectly routed to the Kenya Desk Officer for action. The proper offices were the Office of Small and Disadvantaged Business Utilization and the Special Assistant for Minority Affairs in the Africa Bureau. However, action was not transferred to those offices despite the fact that they were clearly stated in the cable. Consequently, because no response was received, this request was subsequently withdrawn by the USAID on March 12, 1980. This failure to provide the requested information, in our judgment, was one reason contributing to the USAID's actions in allowing the Ministry of Health

to negotiate a contract with Drew without competitive bidding.

Another reason for the non-competitive award, in our view, was receipt of the Deputy Assistant Administrator's letter of January 10, 1980, stating that:

"I am writing to you at this time to bring to your attention our personal concern and that of the Administrator regarding the maximum utilization of U.S. minority health institutions in our development activities in Africa...

"By assisting the aforementioned minority institutions to develop their own institutional capabilities A.I.D. embarking on another effort to bring health services to those most in need. I strongly urge you and your staff to take full advantage of these resources in developing assistance activities to the country in which you are serving. You might wish to communicate directly with the appropriate institution as listed in the enclosure."

No mention was made in the letter reconciling maximum utilization of minority firms with AID's competitive procurement procedures. The USAID consequently stated (see Attachment A) that:

"We took this letter, reasonably we believe, as being a significant reiteration of an important Agency and Bureau policy. The letter certainly encouraged us to be as supportive as possible (within AID regulations, of course...) of the MOH request that consideration be given to sole-source contracting with Drew."

The Africa Bureau letter, in our view, was remiss in not reminding the USAID that, while greater use should be made of minority health institutions, competitive procurement practices were still applicable. The USAID was also remiss, in our view, for not seeking an explanation from the Bureau regarding the compatibility of greater use with the Agency's procurement regulations. The non-competitive selection of Drew thus resulted from this lack of coordination between the USAID and the Africa Bureau.

This lack of coordination influenced the subsequent sequence of events that led to the selection of Drew. During January 1980, USAID and the Africa Bureau exchanged several cables concerning a visit by Drew staff to Kenya. It was, according to the Africa Bureau, their understanding that the purpose of the proposed visit was to initiate discussions about possible institutional linkages between Drew and the Ministry of Health in conjunction with Drew's 122(d) grant, not to discuss the instant project. On January 12, 1980, AID/Washington requested USAID's approval for

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this visit. USAID concurred four days later. USAID officials reported that apparently the Minister of Health had a change of mind about competitive procurement after meeting with Drew officials in December 1979 and January 1980. After these meetings the Minister decided not to send Requests for Proposals to other interested contractors or institutions even though, as previously stated, the Minister initially preferred competitive procurement. USAID officials again informed the Ministry of Health that the Agency's normal competitive procurement rules should be followed, but after the January 1980 meeting, Ministry officials told the USAID they wanted only to review Drew's technical proposal. USAID officials reported that at this time they had no idea if the Ministry of Health would be satisfied with Drew's technical proposal. By March 12, '80, the Minister of Health formally requested Charles R. Drew Postgraduate Medical School to submit their proposal and travel to Kenya for negotiation of a contract.

Drew's proposal, dated April 23, 1980, was considered well prepared and highly responsive by the Ministry of Health and USAID officials. The USAID informed AA/AFR on May 14, 1980 of the Minister's decision to negotiate a contract with Drew, a U.S. minority institution, and requested a waiver of AID's normal competitive procedures be approved to allow funding for the Drew contract. In their proposal transmittal letter, Drew scheduled a trip to Kenya in May 1980 to begin contract negotiations. USAID participated in these negotiations, but instructed the Ministry of Health that formal contract approval could not be given until AID/Washington concurred in the non-competitive selection of Drew.

In responding to the results of our review, the USAID Director stated, "...that the Mission believed, reasonably, that at all stages of this procurement it was acting prudently and in accordance with stated Agency policy and procedures. We still believe this to be true, although experience has now taught us to treat any future such procurement differently, i.e., to involve AID/W at an earlier stage." At the Mission's request, we have attached their chronology and perspective of the situation to this report (see Attachment A).

We also found that a close relationship did exist between Charles R. Drew and the Government of Kenya's Ministry of Health officials. The Dean of Charles R. Drew Postgraduate Medical School and the key person designated to implement the contract had worked as consultants for USAID in 1977 under an AID-financed contract. In their final report in 1977, they critiqued the Government of Kenya's Rural Health Program and recommended several areas needing development assistance. According to USAID and Ministry officials, their work was highly professional. Moreover, because of the quality of their work and the past professional relationship developed, Ministry officials claimed to have had Drew's staff in mind to implement the project.

Conclusion and Recommendation

AID's procurement procedures requiring competition were not followed in the selection and award of the Drew contract. The procedures were not followed due in part to the Africa Bureau's non-responsiveness to the USAID's cable request for information on minority firms and a letter received about that time strongly urging the USAID to maximize its use of minority firms. This letter was ambiguous in the sense that it did not relate how maximum use of minority firms should be handled in the context of AID procurement procedures. This, according to the USAID, was the rationale used to justify the sole-source procurement. In our view, the Africa Bureau was remiss in not spelling out how maximum utilization of minority firms was to be effected in the context of existing competitive procurement procedures. Also, in our view, the USAID was remiss in not obtaining clarification before it acted.

The Agency is responsible to assure that all procurement is awarded in accordance with established procurement regulations. A decision needs to be made regarding an Africa Bureau policy which encourages "...maximum utilization of U.S. minority health institutions in our development activities in Africa." The Africa Bureau stated that their desire to promote such utilization in no way presupposed or intended a by-passing by the Mission of the applicable contracting regulations. As you have already instructed the General Counsel to develop procedures for increasing utilization of minority organizations in host-country contracting, we have not made a recommendation in this report concerning that matter. However, until such time that a procedure is established, AA/AFR should instruct all USAIDs to encourage competition in all procurement activities in accordance with Agency competitive procurement procedures. Accordingly, we have made the following recommendation:

Recommendation No. 1

The Assistant Administrator, Bureau for Africa, take the necessary steps to assure that USAIDs comply with current Agency competitive procurement regulations under host-country and direct AID contracts.

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FOR CHARLES R. DREW POSTGRADUATE MEDICAL SCHOOL

Allison B. Herrick, Director, USAID/Kenya

Chronology and Perspective - September 18, 1980

It may help to recapitulate the available record, and our discussions with AAG, as to how we saw the situation as it unfolded. We understand from our discussion with you on September 18 that you have no factual disagreement with the following chronology.

First, we would like to stress that the Mission did plan a competitive bidding process for this project initially. In preliminary discussions with the Ministry of Health in November 1979, we explored the possible solicitation of proposals from minority contractors; such exploration of possible use of minority contractors is based on Agency policy and Africa Bureau guidance, frequently reiterated as, for example, at the October 1979 Design Work op. We were told, however, that MOH preferred advertisement. Later, in early January of this year, MOH stated that, on reflection, it saw advantages in limiting the competitive procurement to minority contractors. We cabled AID/W with this news and asked for a complete list of such contractors (Nairobi 536 of 1/9/80). This cable was never answered by AID/W, despite follow-ups. Had it been, the contract could have been bid competitively among qualified minority contractors and, presumably, no problem would have arisen.

Second, it seems worth quoting from the DAA/AFR letter of 1/10/80, an important document in our view. This letter states the Bureau leadership's "personal concern and that of the Administrator regarding the maximum utilization of U.S. minority health institutions in our development activities in Africa." The letter goes on to "strongly urge" Missions to "take full advantage of these resources" (i.e., the institutions receiving Section 122 c grants) and suggests that Missions "might wish to communicate directly" with such minority institutions. The attachment to the letter identifies several such institutions, of which Drew, according to the description in that attachment, is the only one qualified in the health planning and information category. We took this letter, reasonably we believe, as being a significant reiteration of an important Agency and Bureau policy. The letter certainly encouraged us to be as supportive as possible (within AID regulations, of course -- see below) of the MOH request that consideration be given to sole-source contracting with Drew.

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Third, in March of 1980, given the cumulative facts of (a) AID/W's non-responsiveness after many weeks to Nairobi 536, (b) receipt of the DAA/AFR letter of 1/10/80, and (c) the USAID/MOH desire to move toward procuring a contractor's services, we concluded it was proper to concur in the MOH request that USAID/MOH look at a proposal from Drew, but only on a non-committal basis. (See the terms of the RFP which make clear that the proposal is solicited without commitment.) As your memo indicates, we were "on record" with AID/W at this time, via cables, as to how MOH, with USAID concurrence, was proceeding with Drew; no AID/W note of caution was sounded. Further, the Regional Legal Advisor's impression notwithstanding, we were at this time aware of the need for AID/W approval of any sole-source selection and we did intend at the later and proper time to seek AID/W approval for the selection of Drew, which was as of March hypothetical. We believed it prudent first to see the proposal, on a non-committal basis, so that both we and MOH could either be satisfied with its quality or reject it. Once we were satisfied, yet before negotiations commenced, the Mission sought a waiver for the sole-source selection of Drew (Nairobi 8940 of 5/14/80) at which time counsel was sought from the RLA. At the same time, by letter of 5/16/80, we were on record to MOH and Drew of the need that we obtain AID/W approval of the sole-source selection of Drew; we advised these parties that any discussions must be informal and non-committal since we could not guarantee AID/W approval. It was and remains our view that the above-outlined sequential approach (a) responded to AID/W minority contracting policy as reinforced by the DAA/AFR letter, (b) was in keeping with Agency regulations relative to sole-source procurement, (c) was based on prompt and prudent action by the Mission at each stage, and (d) kept up momentum toward project implementation.

Fourth, the judgments contained in your memo notwithstanding, we believe we advanced sound justification in Nairobi 8948 for sole-source selection of Drew. Given Agency policy as reinforced by the DAA/AFR letter, it seemed to us then (and still does now) entirely defensible for USAID to support a GOK request to select a "predominantly qualified" contractor among minority contractors. We believe that for the Agency to have rejected such a request would not have been in "the best interest of the United States" as that phrase can be fairly interpreted. The Regional Legal Advisor did not question this conclusion and cleared Nairobi 8940 without qualification. Ambassador LeMelle also supported our conclusions in this regard; see Nairobi 10881 of 6/13/80 (paragraph four).

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Fifth, had AID/W responded promptly to Nairobi 8940 in a negative or even a cautionary vein, the informal Drew/MOH negotiations could have been discouraged. (USAID of course lacks the authority to compel a private U.S. contractor to discontinue informal or other negotiations with a sovereign government.) Instead, telephone reports from AID/W were all to encouraging effect, at least for the first few weeks following dispatch of Nairobi 8940. It was only in mid-June, after completion of informal MOH/Drew negotiations, that difficulties in the AID/W clearance/approval process were reported to us, again by telephone only. No interim guidance telegrams were received. State 173181 of 7/1/80 approving the Drew selection was AID's only formal communication to us.

We request that the chronology and perspective outlined above be incorporated into your report, as an attachment thereto if you prefer.

LIST OF REPORT RECIPIENTS

Deputy Administrator	1
Assistant Administrator/Africa	5
USAID/Kenya	5
REDSO/WA	1
Kenya Desk	1
AAA/AFR/PMR	1
AFR/EMS	1
SER/CM	1
Assistant Administrator/LEG	1
General Counsel	1
Controller, FM	1
IDCA's Legislative and Public Affairs Office	1
PPC/E	1
DS/DIU/DI	4
Auditor General	1
AAG/EA	1
AAG/EAFR	1
AAG/Egypt	1
AAG/LA	1
AAG/NESA	1
AG/PPP	1
AG/IIS	1
IIS/AFR	1