

Agency for International Development
Washington, D.C. 20523

Office of the
General Counsel

October 13, 1989

MEMORANDUM

TO: OFDA, Andrew S. Natsios
FROM: GC/CP, Renee R. Matalon *RRM*
SUBJECT: Disaster Assistance Authorities

This is in response to your request that GC develop new delegations of authority for the regional bureaus which would permit them to address certain emergencies, without OFDA involvement, using procurement procedures available to OFDA when it provides disaster assistance. To summarize our views, (1) OFDA's expedited procurement procedures are based on the use of disaster assistance funds; (2) there is no authority to delegate separately from those funds; (3) there are existing procurement waiver authorities available to regional bureaus that are adequate, when used properly, to address most emergency needs; and (4) although there are some bureaucratic obstacles to the effective use of existing emergency authorities by regional bureaus, most could be eliminated by better coordination.

1. Disaster Authorities. OFDA's procurement of goods and services for disaster assistance purposes without complying fully with source/origin and competition requirements is based on section 491(b) of the FAA under which assistance may be provided "notwithstanding any other provision of this or any other Act." This "notwithstanding clause" is available only in connection with funds appropriated for disaster assistance or "borrowed" pursuant to section 492(b) of the FAA. There is no special authority for emergencies that may be delegated to the regional bureaus separately from disaster assistance funds.

Since the expedited procurement procedures are based on the source of funds, new delegations of authority would not be needed to use these procurement procedures if the Administrator decided to allocate funds appropriated under section 491 or

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appropriations for specific disasters to the regional bureaus. If this were done, however, the bureau could not finance a typical development assistance project to address the disaster, but would be limited to "relief and rehabilitation" activities if section 491 funds were allocated, or to the kinds of support described in the appropriation for a specific disaster.

Under appropriate circumstances, the authority in section 492(b) of the FAA may be used to supplement the disaster assistance appropriation, and these additional amounts drawn from the functional accounts may be allocated to a regional bureau rather than OFDA. These resources could be used with the same procurement flexibility as the disaster appropriation, but again these funds would be limited to relief and rehabilitation activities, and may be used only after a disaster has been declared. The "borrowing" authority in section 492(b), moreover, may be exercised only when it appears that the amount of funds appropriated for disaster assistance is not adequate to cover the reasonably foreseeable costs of existing, imminent, or anticipated disasters. (Of course, a regional bureau may not simply transfer resources into OFDA's OYB and have them returned with the magical properties of disaster assistance funds authorized under section 491 of the FAA.) Funds from other appropriation sources must be used in accordance with all source/origin and competition requirements, unless other authority exists to waive those requirements.

2. Procurement Waiver Authority. The regional bureaus do have authority, however, to operate in an expedited manner when necessary to respond to emergencies that do not amount to disasters. As noted in the memorandum of July 27, 1989, from D/REG, Howard Sharlach to C/AID, Alexander R. Love, procurement waivers with respect to both source/origin and competition requirements are available for funds from any A.I.D. source when there are urgent or compelling circumstances as defined in the relevant guidelines.

Chapter 5 of A.I.D. Handbook 1, Supp. B, sets forth source, origin and nationality waiver criteria for each category of procurement. In all cases, the authorized list of eligible countries or geographic code may be waived when "there is an emergency requirement for which non-A.I.D. funds are not available, and the requirement can be met in time only from supplies in a country or area not included in the authorized geographic code." For transactions of \$5 million or less, this waiver authority has been delegated to Assistant Administrators for the regional and functional bureaus, and may be redelegated to mission directors.

Under the Federal Acquisition Regulation (FAR), which governs competition requirements in direct A.I.D. contracts, an agency is permitted to limit the number of sources from which it solicits bids or proposals "when the agency's need for the supplies or services is of such unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals." 41 CFR 1-6.302(a)(2). The FAR further requires that where circumstances would justify a waiver of full and open competition, agencies solicit offers from as many potential sources as is practical under those circumstances, which OFDA also does informally even in disaster transactions. Contracts awarded under this waiver authority must be supported by written justifications and approvals (which may be done after the contract award when prior approval would cause unreasonable delay). Waivers of competition under these circumstances must be certified by a contracting officer and approved (for contracts over \$25,000) in accordance with FAR Section 6.304.

In addition, A.I.D. acquisition regulations provide that: "Full and open competition need not be obtained when it would impair or otherwise have an adverse effect on programs conducted for the purposes of foreign aid, relief and rehabilitation." 48 CFR 706.302-70(a)(2). This exception to competition requirements is available only for: (1) personal services contracts under section 636(a)(3) of the FAA; (2) awards of \$100,000 or less by an "overseas contracting activity"; (3) awards for which the Administrator of A.I.D., or the Assistant Administrator responsible for the project or program concerned, makes a formal written determination, with supporting findings, that "compliance with full and open competition procedures would impair foreign assistance objectives, and would be inconsistent with the fulfillment of the foreign assistance program"; and (4) awards under Title XII selection procedures. 48 CFR 706.302-70(b). These determinations need not be certified by a contracting officer and are not subject to approvals under FAR section 6.304, although it is necessary for the bureau to consult with the Agency's competition advocate before a waiver under AIDAR 706.302-70(b)(3) is approved. Even where such a waiver of competition is applicable, offers must be solicited from as many offerors as is practicable under the circumstances.

Similarly, for A.I.D.-financed host country contracts, competition for goods and services may be waived if the borrower/grantee can demonstrate the existence of an emergency situation in which the requirement for competition would result in unacceptable project delay. Competition may be waived for

construction services if adherence to competitive procedures would result in the impairment of the objectives of the United States foreign assistance program or would not be in the best interest of the United States. Handbook 1, Supp. B, 12C4a.2. Assistant Administrators, in consultation with M/AAA/SER, and mission directors where so delegated, are authorized to waive competition where the value of the procurement does not exceed \$1 million. If the procurement exceeds \$1 million, only the Administrator is authorized to waive competition.

3. Bureaucratic Obstacles To Dealing With Emergencies. To a large extent, a framework of authorities is in place which, theoretically at least, would permit regional bureaus to respond effectively to "emergencies" that do not amount to disasters for which OFDA would have responsibility and resources. Goods and services needed for emergency assistance activities may be procured on a timely basis if regional bureaus understand the waiver authorities that are now available and the bureaucratic procedures which must be followed to exercise these authorities. In emergency circumstances, for example, regional bureaus may approve source/origin waivers up to \$5 million per transaction with clearance by M/SER/OP and GC; they may approve waivers of competition in host country contracts valued at \$1 million; after consultation with the competition advocate, regional bureaus may approve waivers in direct A.I.D. contracts if competition will impair achievement of foreign assistance objectives; and regional bureaus may request M/SER/OP to waive competition in direct A.I.D. contracts when there is an unusual and compelling urgency to procure goods or services.

The bureaucratic procedures involved in these actions often appear formidable, but all that is really involved is a supportable justification that an emergency exists and an understanding of how to move the paper work effectively to the appropriate authority with the required clearances. There seem to be two related practical obstacles to the efficient use of these authorities. First, these procedures are not used frequently enough for the regional bureaus and the other offices involved, like GC and M/SER/OP, to become accustomed to them. (OFDA must use M/SER/OP to execute most disaster-related contracts without competition, but working relationships are in place because OFDA and M/SER/OP do this on a regular basis.) Second, emergency requirements may be identified and processed by a variety of offices and officers in a regional bureau, and it is necessary, therefore, for a large number of people to understand how to use these procedures effectively.

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We think the system could be more efficient if the regional bureaus would designate a single officer on whom everyone else in the bureau could rely when it is necessary to process emergency actions. This officer would be familiar with the authorities available; he or she could consult with OFDA and learn some of the practical aspects of expediting planning and procurement actions in emergency situations; and he or she could develop arrangements and relationships with GC and M/SER/OP to ensure prompt and effective consideration of emergency actions. (When necessary, M/SER/OP could be asked to designate an emergency contracts officer for the bureau.) Bureau emergency officers might even explore with GC and M/SER/OP the possibility of obtaining blanket waivers of source/origin and competition requirements for serious emergencies, under prescribed guidelines. Dealing with the bureaucracy is not so difficult when it is understood properly.

Although centralizing this function in one person for each bureau would eliminate many of the delays involved with emergency actions, we believe there is one institutional requirement that should be changed in order to permit timely regional bureau response. Unlike OFDA's activities, emergency activities funded by regional bureaus generally would be considered project assistance, and the requirements for the identification, design and approval of projects described in Handbook 3 were not developed to accommodate emergencies.

We understand that it generally takes from six to nine months to identify, design and approve a project under Handbook 3 procedures, and only then would the procurement of goods and services begin. (This would not be the case, of course, if the emergency fit within the scope of an existing regional bureau project.)

Obviously, emergency activities were not considered when the standard project design and approval procedures in Handbook 3 were developed. Moreover, Chapter 4, which treats Special Project Activities: Exceptions to the General Project System does not provide an exception for "emergency activities," although one is available for projects estimated to cost less than \$500,000. This exception may be used for some emergency activities, but it is likely that this funding limitation would be too restrictive for many emergencies. Paragraph 4 A.2 states that any proposal for an exception to the general project system requirements for an entire class of projects should be submitted by PPC, with appropriate clearances, to the Deputy Administrator for approval.

We suggest that you consult with the regional bureaus regarding whether it would be useful to seek such an exception. If it is, the process of developing and clearing such a proposal would provide the Agency an opportunity to define what it means by an "emergency" for this purpose, and to develop appropriate design and approval procedures for emergency activities.

Clearance:

GC/LP, RMLester (draft)

GC/CCM, KEFries (draft Gary Bisson for)

GC/CP, SRTisa (draft)

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AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20523

November 9, 1989

ACTION MEMORANDUM FOR THE ACTING ADMINISTRATOR

FROM : OFDA Director, Andrew S. Natsios¹

SUBJECT: Regional Bureau Authority to Manage Emergencies

Problem: Your action is necessary to facilitate regional bureau ability to respond to those emergency situations which do not require OFDA assistance.

Background: For many years OFDA has responded to emergencies which did not fully meet the requirements for disaster assistance as outlined in Handbook 8. This situation, in part, resulted from a perception that the regional bureaus did not have OFDA-like authority to respond. This situation persists to this day.

Discussion: An OFDA management assessment, which was prepared by senior A.I.D. and former A.I.D. officials in 1988, identified the need to enable regional bureaus within A.I.D. to handle some emergencies without having to rely always on OFDA. At a meeting chaired by the former Deputy Administrator, it was agreed that GC should prepare a paper on ways which would permit regional bureaus to act with the same speed and authority as OFDA. GC just completed the memorandum which outlines several mechanisms which would enable regional bureaus to handle emergencies which do not qualify for OFDA assistance. In general, it appears that regional bureaus have adequate authority to handle emergencies which do not require OFDA intervention, although some bureaucratic, but surmountable, obstacles do exist.

The memorandum should be distributed to all three regional bureaus and a small working group formed, with membership from OFDA, PPC, the three regional bureaus, S&T, M/SER/OP and GC, to put in place procedures which will permit rapid regional bureau response to emergencies. The working group could define what situations should be called emergencies and develop appropriate design and approval procedures for emergency activities. We recognize that there may be some cases in which as a result of legislative or other constraints, a regional bureau response to an emergency may be inappropriate.

Recommendation: That you circulate the attached GC memorandum to the regional bureaus and that you name a working group with representation from the offices listed above to develop procedures to facilitate regional bureau response to emergencies and to define them. A covering memorandum is also attached.

Approved

good idea
ml

Disapproved

Date

11/27

Attachments: a/s

ef
Drafted: AID/OFDA/LAC:BNHeyman:bnh:5026H:11/7/89:7X5870

UNITED STATES INTERNATIONAL DEVELOPMENT
AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20523



OFFICE OF
THE ADMINISTRATOR

January 19, 1990

MEMORANDUM

TO: See Distribution

FROM: A/AID, Frank Kenefick *Frank Kenefick* Special Asst. to the Counselor

SUBJECT: Regional Bureau Authority to Manage Emergencies

A meeting of designated Bureau/Office representatives is scheduled for 3 p.m., Tuesday, January 23, 1990 in Room 5895 NS.

We would like to discuss:

- GC's interpretation of budget and procurement authorities which Bureaus could use for "emergency" responses;
- Definitions/criteria for distinguishing between OFDA and Regional Bureau responsibilities for sudden/unexpected disasters, periods following sudden disasters, and expected/chronic "disasters"; and
- Procedural and or regulatory (Handbooks) changes, as appropriate, needed to implement recommended action responsibilities.

The meeting should last 1 - 1 1/2 hours. Your attendance and participation will be appreciated.

DISTRIBUTION:

- OFDA, Andrew Natsios
- GC, Renee Matalon
- PPC/PB, Harold Gray
- PPC/PDPR/SI, Tom Bebout
- S&T/PO, Doug Sheldon
- ANE/PD, Bob Nachtrieb
- AFR/TR, Judith Gilmore
- LAC/DR, Edward Markeset
- MS/OP, Catherine Cunningham

Agency for International Development
Washington, D.C. 20523

Office of
the Administrator

November 28, 1989

MEMORANDUM

TO : DISTRIBUTION

FROM : A-A/AID, Mark L. Edelman *MLE*

SUBJECT: Regional Bureau Authority to Manage Emergencies

For many years OFDA has responded to emergencies which did not fully meet the requirements for disaster assistance as outlined in Handbook 8. This situation, in part, resulted from a perception that the regional bureaus did not have OFDA-like authority to respond. This situation persists to this day and I would like to change it. OFDA resources are severely constrained and should be used as a last, rather than first, resort.

An OFDA management assessment, which was prepared by senior A.I.D. and former A.I.D. officials in 1988, identified the need to enable regional bureaus within A.I.D. to handle some emergencies without having to rely always on OFDA. At a meeting chaired by the former Deputy Administrator, it was agreed that GC should prepare a paper on ways which would permit regional bureaus to act with the same speed and authority as OFDA. GC just completed the memorandum which outlines several mechanisms which would enable regional bureaus to handle emergencies which do not qualify for OFDA assistance. In general, it appears that regional bureaus have adequate authority to handle emergencies which do not require OFDA intervention, although some bureaucratic, but surmountable, obstacles do exist.

I am appointing a working group to be chaired by Ray Love, with representation from each of the recipients of this memorandum. The working group is charged with reviewing the GC memorandum, assessing the adequacy of existing regional bureau authorities, devising strategies and procedures to remove those obstacles which preclude or interfere with regional bureau ability to respond to emergencies, and treating those situations which should be treated as emergencies. The working

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group should also specifically address the extent to which Handbook 3, Chapter 4, which deals with exceptions to the general project system, needs to be modified to accomodate emergency situations. The working group should submit its report to me by no later than January 15, 1990. I recognize that there may be legislative or other constraints which in some cases may preclude regional bureaus from handling emergencies and expect these exceptions to be dealt with in the report.

DISTRIBUTION:

○ OFDA/OD:Andrew S. Natsios	○ GC/CP:Steve Tisa
○ A-AA/LAC:Frederick Schieck	○ A-AA/S&T:Bradshaw Langmaid
○ AA/ANE:Carol Adelman	MS/OP:Terrence McMahon
○ A-AA/AFR:Walter Bollinger	○ AA/PPC:Reginald Brown

CC:
GC:Howard Fry
AA/MS:Michael Doyle

Attachment: a/s

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