

NGO FINANCIAL NEWSLETTER

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In the January 2015 issue:

Due to the many epic changes occurring this week – passage of the FY 2015 spending bill, USAID/CDC/State promulgating their regs. implementing OMB’s Uniform Guidance, USAID issuing a massive revision to the AIDAR, passage of the 2015 NDAA with its numerous A&A changes, and change in USAID’s leadership, among others – the January 2015 edition of *NGO Financial Newsletter* is being published early.

Season greetings to you and yours!

FY 2015 APPROPRIATIONS

State/Foreign Operations Funding Up 14.8%, Foreign Aid Up 12.4% in Fiscal 2015 Spending Measure Approved By Congress
\$5.4 Billion to Fight Ebola Included in Fiscal 2015 Spending Package
USAID Says Fiscal Budget 2015 Complicates Getting Food Aid to Syrian Refugees

FUNDING OPPORTUNITIES

Cost Data for Fiscal Years 2014 and 2013 Shows Shifts in USAID’s Programming
\$1 Billion Annually in Aid Requested for Jordan
Congressional Testimony on Future USAID Programming for Afghanistan and Pakistan

IN THE NEWS

USAID Administrator Raj Shah to Step Down in Mid-February
Funding of “Power Africa” Made Up of Smoke and Mirrors
OFPP Administrator Rung Rolls Out 3-Pronged Acquisition Improvement Plan
Linking Small Biz Subcontractors to Prime Contracts Not Feasible Using Current Federal Systems, GAO Reports
Sen. McCaskill’s Plan to End Funding for Unsustainable Afghan Infrastructure Projects Included in 2015 NDAA

A&A POLICIES

Deputy IG Tells It Like It Is About the Difficulties With USAID’s Contracting
Could Solutions Used By USAID to Fight Ebola Be a Model for Procurement?

RULES AND REGULATIONS

USAID, CDC, State Promulgate Their Regulations Implementing OMB’s Uniform Guidance Effective December 26

USAID Massively Updates and Amends the AIDAR

OFCCP Issues Final Rule Barring Discrimination Based on Sexual Orientation or Gender Identity By Contractors and Subcontractors, to Become Effective April 8, 2015
FAR Revisions for Establishing the Minimum Wage and Extending the Prohibition on Contracting With Inverted Domestic Corporations
Proposed FPIIS Reporting By Contractors to Include Predecessors and Successors

FINANCIAL MANAGEMENT AND COST CONTROL

Franchise Agreement Reviews, Affiliation and Eligibility for an SBA Business Loan
Danger Pay for Yemen Goes to the Max

COMPLIANCE & ETHICS

2015: A Year of H.R. Challenges for Government Contractors

AUDIT AND AUDIT RESOLUTION

USAID IG Michael Carroll Retires in Wake of Whistleblower Claims, to be Replaced By Catherine Trujillo
USAID Working to Whittle Away the Backlog of Uncompleted Contractor Audits, Down By 25% in Fiscal 2014
The Grinch at Christmas: the NSF IG
DCAA Audit Reports Material Noncompliance for NSF Nonprofit Not Separating Its F&A Rates and Questions Use of Management Fee
Differences in Indirect Cost Caps and Definitions Making Comparing Program Administrative Costs Difficult
DoD Incorporates DCAA's Contractor Forward Pricing Rate Adequacy Checklist in Its Regs

CASES AND DECISIONS

Former Louis Berger Chairman & CEO Admits to 20-Year Conspiracy to Defraud USAID of Millions in Overhead Charges, Faces Up to 10 Years in Jail
Former IRD Worker Indicted for Soliciting Bribes for Afghan Work
Filing of a Writ of *Certiorari* at the U.S. Supreme Court in *U.S. v. CMS* Extended to Jan. 5, 2015
USAID Offeror Protests USAID's Corrective Action
2014 Was a Banner Year With 30 Protests Filed, 215 Will Probably See More

U.S. TAXES

Protecting a Not-For-Profit Affiliated With a For-Profit Parent From IRS Challenge
Standard IRS Mileage Rates Up for 2015

LEGISLATION

Fiscal 2015 National Defense Authorization Act Passes With Many Contract and Grant Reforms

Provision Increasing Shipment of Food Aid Stricken from Senate-Passed Reauthorization
Four Foreign Aid Bills Not Passed by End of 113rd Congress

NEWS BRIEFS

Ann Mei Chang Joins USAID as Global Development Lab Executive Director

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STATE/FOREIGN OPS FUNDING UP 14.8%, FOREIGN AID UP 12.4% IN FISCAL 2015 IN SPENDING MEASURE APPROVED BY CONGRESS

Congress passed the Consolidated and Further Continuing Appropriations Act for fiscal 2015 and President Obama signed the measure into law on December 16th. With its share of Overseas Contingency Operations and Ebola funding, together they bumped up total funding to \$49.0 billion for fiscal 2015 State, Foreign Operations and Related Programs Appropriations, or a 14.8% increase over fiscal 2014's enacted level, the biggest increase any Federal agency is receiving this year.

For programs that traditionally have financed foreign aid, mostly administered by USAID, the total comes in at \$25.736 billion, or an increase of 12.4% over 2014's level, broken down as follows:

<u>Title/Program</u>	<u>FY 2015 Enacted</u>	<u>FY 2015 Requested</u>	<u>FY 2014 Enacted</u>
Global Health:	\$8.765 billion	\$8.05 billion	\$8.439 billion
USAID	(3.095)	(2.680)	(2.769)
State Dept.	(5.670)	(5.370)	(5.670)
Development Assist.	2.507	2.619	2.507
Economic Supp. Fund	5.470	5.176	4.638
Int'l Disaster Asst.	3.331	1.390	1.800
Transition Initiatives	56 million	67 million	68 million
Democracy Fund	130	-	130
Complex Crises Fund	50	30	40
USAID OE & OIG	1.420 billion	1.568 billion	1.313 billion
Migrant & Refugee	3.108 billion	2.047 billion	3.058
Millennium Challenge	899 million	1.0	898 million
	\$25.736 billion	\$21.947 billion	\$22.891 billion

USAID's increasing share of Overseas Contingency Operations (OCO) funding is remarkable. Whereas overall OCO funding went down from \$91.9 billion in fiscal 2014 to \$64.0 billion in 2015, USAID's share is actually going up from \$3.0 billion in 2014 to \$3.9 billion in 2015.

Section 7080 of the Act establishes a Small Grant Program (SGP) to replace the existing Development Grants Program to provide small organizations (e.g., those that have received less than a total of \$5 million in direct USG support over the previous 5 years) access to USAID support for up to 5 years for unsolicited proposals and funding through open and competitive processes.

Not less than 3 Missions will be selected to run a multi-year SGP with each Mission being allocated the full, estimated amount of funds to carry out a multi-year award rather than having funds incrementally allocated on a yearly basis. This section also provides some intriguing and open-ended language for these agreements when it states: "SGP funding may not be allocated or attributed toward certain directives prior to making awards."

USAID is to use existing authority to fund the Global Development Lab and, in this connection, the USAID Administrator "shall regularly consult with, and ensure the participation of nongovernmental and governmental entities in developing countries at all stages of the Lab's activities."

Section 7006 provides for, in evaluating proposals for local guard contracts, the Secretary of State shall award contracts in accordance with section 136 of the Foreign Relations Authorization Act, fiscal years 1990 and 1991 (22 U.S.C. 4864), except that the Secretary may grant authorization to award such contracts on the basis of best value as determined by a cost-technical tradeoff analysis (as described in Federal Acquisition Regulation part 15.101), notwithstanding subsection (c)(3) of such section, for high risk, high threat posts provided, that the authority in this section shall apply to any options for renewal that may be exercised under such contracts that are awarded during the current fiscal year.

The spending bill requires "no level of acceptable fraud is assumed" by any implementing agency or ministry of a foreign government that receives direct government-to-government assistance. Section 7031(a)(1)(A)(iv).

Section 7034(s) directs the head of any nonfederal or quasi-Federal organization that is provided direct appropriations, namely, the National Endowment for Democracy (receiving \$135 million), U.S. Institute of Peace (\$35.3 million), the Asia Foundation (\$17 million), East-West Center ((\$16.7 million), among others, to report to the Committees of Appropriations on salary and compensation for such organization's executive level employees.

\$5.4 BILLION TO FIGHT EBOLA INCLUDED IN FISCAL 2015 SPENDING PACKAGE

The Ebola response and preparedness funding was awarded \$5.4 billion of a \$6 billion request in Title IX of the 2015 omnibus appropriations bill.

Of this amount, \$1.436 billion was appropriated for International Disaster Assistance, \$711 million for Economic Support Fund, \$312 million for Global Health, and nearly \$25 million for USAID Operating Expenses and its Office of Inspector General

That money would combat the epidemic in West Africa and speed up the development of vaccines and other therapies. The money also would be used to help vulnerable foreign countries detect and respond to the disease.

President Obama also wanted \$1.5 billion for a contingency fund to deal with any unanticipated developments such as a new flare-up in West Africa or a need to vaccinate U.S. health care workers. Sen. Graham said he wanted to make sure that the contingency fund doesn't amount to a "slush fund," but Obama's other requests were "in the ballpark."

USAID SAYS FISCAL BUDGET 2015 COMPLICATES GETTING FOOD AID TO SYRIAN REFUGEES

USAID says lack of budget raises aid problems as food for Syrian refugees runs low, per *CQ Executive Briefings*.

Money to Feed Syrian Refugees Running Low. USAID is concerned about the World Food Program's announcement that it is strapped for money and will suspend food aid for 1.7 million Syrian refugees.

Matt Herrick, a USAID spokesman, said his agency has provided nearly a third of the money that the World Food Program has spent for Syrian food aid and now has the combined challenge of historic levels of global crisis coupled with the lack of an approved fiscal 2015 budget.

"USAID has used all funding available to it for Syria as apportioned through the current continuing budget resolution," Herrick said in a written statement Monday night. "Once an FY 2015 appropriations bill or continuing resolution is passed by Congress, USAID looks forward to providing additional support to WFP for this response."

Appropriators and leaders in the House and Senate are trying to agree on a way to fund the federal government for the remainder of fiscal 2015 that can overcome political hurdles in both chambers.

COST DATA FOR FISCAL YEARS 2014 AND 2013 SHOWS SHIFTS IN USAID'S PROGRAMMING

Every year, USAID publishes its Agency Financial Report which contains its official cost accounting based upon actual costs incurred. It is more accurate than the more usual reporting of obligations, inasmuch as de-obligations and other changes in funding may have occurred.

It shows relative changes by program area over the short period of fiscal years 2014 and 2013. To this extent, it might have some predictive value to show where USAID's programming will be going in fiscal 2015.

Three objectives -- Economic Growth, Investing in People and Humanitarian Assistance -- represent the largest investments at 76% of the total net cost of operations. We have highlighted some glaring changes in programming.

Here is the comparative rundown of costs incurred by objective and program area for these two past fiscal years:

<u>Objective</u>	<u>Program Area</u>	<u>Fiscal 2014</u>	<u>Fiscal 2013</u>
Peace and Security			
	Counterterrorism	\$33 million	\$38 million
	Combating Weapons of Mass Dest.	30	28
	Stabilization Ops & Sec. Sector Ref.	11	34
	Counternarcotics	154	174
	Transnational Crime	10	10
	Conflict Mitigation & Reconcil.	<u>430</u>	<u>411</u>
Total		\$671 million	\$697 million
Governing Justly and Democratically			
	Rule of Law and Human Rights	\$202 million	\$279 million
	Good Governance	690	189
	Political Compet. & Consensus-Bldg.	233	153
	Civil society	<u>293</u>	<u>310</u>
Total		\$1.420 billion	\$932 million
Investing in People			
	Health	\$1.625 billion	\$1.505 billion
	Education	828 million	743 million
	Social & Economic Services and Protection of Vulnerable Pops.	<u>185</u>	<u>617 million</u>
Total		\$2.640 billion	\$2.866 billion
Economic Growth			
	Macroecon. Found. For Growth	\$1.133 billion	\$756 million
	Trade and Investment	117 million	160
	Financial Sector	47	128
	Infrastructure	623	775
	Agriculture	1.014 billion	889
	Private Sector Competitiveness	322 million	375
	Economic Opportunity	178	(347)
	Environment	<u>662</u>	<u>621</u>
Total		\$4.093 billion	\$3.359 billion
Humanitarian Assistance			

	Protection, Assist. & Solutions	\$1.883 billion	\$1.435 billion
	Disaster Readiness	237 million	173 million
	Migration Management	-	-
Total		\$2.121 billion	\$1.608 billion
Operating Unit Management			
	Crosscutting Mgt. and Staffing	\$2 million	\$3 million
	Program Design and Learning	184	173
	Administration and Oversight	532	718
Total		\$718 million	\$895 million
	Total Net Cost of Operations	\$11.671 billion	\$10.359 billion

Note: Differences in totals are due to rounding of numbers

This report also shed some light on the splits in costs incurred by each of the categories of recipients of USAID's money:

<u>Category</u>	<u>Fiscal 2014</u>		<u>Fiscal 2013</u>	
Education institutions	\$212 million	1.5%	\$167 million	1.4%
For-profits	2.50 billion	18.1	2.65 billion	21.7
Governments	3.90 billion	28.2	1.78 billion	14.6
Individuals	840 million	6.1	785 million	6.4
Non-profits	5.19 billion	37.5	4.60 billion	37.7
Others	<u>1.18 billion</u>	8.6	<u>2.21 billion</u>	18.1
Total	\$13.846 billion		\$12.214 billion	

\$1 BILLION ANNUALLY IN AID REQUESTED FOR JORDAN

President Barack Obama told King Abdullah II December 5th that he hopes to increase the United States' aid to Jordan to \$1 billion a year -- a significant increase -- as the small nation continues to struggle to cope with more than one million refugees pouring in from nearby Syria, according to an article published by the *McClatchy Washington Bureau*.

President Obama praised Jordan for working with the United States and its allies "in making slow but steady progress" to empower the moderate forces in Syria in an attempt to defeat the Islamic State terrorist group.

"Jordan is an important partner," President Obama said. "We had an extensive discussion about how to debilitate and destroy ISIL both in Iraq and Syria. Jordan has been working on this side-by-side with U.S. troops and other countries. We are making slow but steady progress, and we recognize that it is a long-term and extremely complex challenge."

President Obama will ask Congress to provide the money over three years, fiscal years 2015-2017. The current agreement, in effect between fiscal years 2010 and 2014, calls for \$660

million in foreign assistance annually to Jordan, a country with just over 6 million people, according to U.N. High Commissioner for Refugees.

President Obama announced the aid to help Jordan, a key Middle East player and a longtime U.S. ally, as it faces increasing challenges from regional unrest, a huge refugee presence and high energy costs due to expensive foreign energy imports, National Security Council spokeswoman Bernadette Meehan said. It “signifies the administration’s long-standing and ongoing commitment to Jordan’s economic and security development, and to working closely with Jordan to support continued progress in implementing needed reforms, she said.

The United States is the largest donor to Syrian refugees, including millions of dollars to Jordan, according to USAID.

CONGRESSIONAL TESTIMONY ON FUTURE USAID PROGRAMMING FOR AFGHANISTAN AND PAKISTAN

Donald Sampler, Assistant to the USAID Administrator, Office of Afghanistan and Pakistan Affairs, appeared at a December 10 hearing before the House Foreign Affairs Subcommittee on Asia and the Pacific and Middle East and North Africa. In part, here are his introductory comments.

Afghanistan and Pakistan Programming Moving Forward

In Afghanistan over the past three years, USAID has shifted the focus of its programs from a focus on stabilization and infrastructure to a focus on creating the basis for sustainable, long-term development. USAID's strategy in Afghanistan is threefold:

- . Maintaining and making durable the gains made in health, education, and for women;
- . Supporting continued economic growth and employment through a focus on the agriculture sector and private sector development, operations and maintenance of infrastructure investments, and responsibly developing the extractives industry, all key to ensuring future fiscal sustainability; and,
- . Fostering legitimate and effective Afghan governance, the rule of law, and a robust civil society.

Operationally, USAID has adjusted its implementation model to improve sustainability and meet the challenges presented by the transition.

- . Developing a multi-tiered monitoring strategy to address reduced mobility and decreased field staff that, along with other monitoring and evaluation efforts, will continue to ensure appropriate oversight of projects;
- . Transforming USAID's approach in Afghanistan to one of mutual accountability that incentivizes Afghan reforms by conditioning an increasing percentage of our assistance to the

government on progress on reforms and that continues to increase government involvement and ownership of development needs; and

. Focusing on long-term sustainability through implementing three key principles of: (1) increasing Afghan ownership and capacity; (2) contributing to community stability and public confidence in the Government of Afghanistan; and (3) implementing effective and cost-efficient programming.

In Pakistan, USAID will continue to pursue the five-sector strategy, but in 2015, USAID is preparing to increase its engagement in helping the Government of Pakistan address the civilian impacts of Pakistan's military operations in the North Waziristan Agency (NWA). More than five years of Pakistani military operations in the FATA and KP have displaced 1.9 million people. This includes the recent displacement of roughly 900,000 people from NWA as a result of the Zarb-e-Azb operation that began in June 2014. In addition, this past fall, government forces expanded the operations to include the neighboring Khyber Agency. As of December 3, 2014, over 500,000 individuals have been registered as internally displaced persons (IDPs) from Khyber Agency alone.

The following three-step engagement plan is being considered for NWA:

- Help Pakistan meet IDP needs by providing short-term humanitarian assistance, which includes support from USAID's Offices of Foreign Disaster Assistance and Food For Peace, continued Mission support to U.N. entities, and supporting host communities in KP
- Support Pakistani efforts to address impediments to IDP returns, including the following:
 - Small community-based projects for immediate income generating opportunities
 - Support family livelihood needs
 - Reconstruction/repair of damaged housing and public infrastructure
 - Support re-establishment of public administration, human, and institutional capacity
- Augment Government of Pakistan commitments to strengthen public administration in the FATA where security and governance can be maintained.

Central and South Asia Regional Integration Programming

USAID is also working in coordination with the Department of State to encourage regional integration and strengthen economic ties between Afghanistan, Pakistan and their regional neighbors in an effort to bring greater prosperity and stability to one of the least economically integrated regions in the world.

USAID is laying the groundwork for a more economically connected region by facilitating trade; providing technical assistance for regional energy projects such as the World Bank's Central and

South Asia (CASA)-1000 project, in which the Central Asian countries of Tajikistan and the Kyrgyz Republic will provide surplus summer hydropower to Afghanistan and Pakistan; promoting business-to-business networking; and helping countries address cross-border trade impediments, as well as countering trafficking in persons.

USAID's Afghanistan Trade and Revenue (ATAR) project provides technical assistance for Afghanistan's accession to the World Trade Organization. ATAR works to ease transit constraints, modernize the customs agency, and create international business opportunities. In November, USAID brought together 80 members of the public sector to meet with government officials in Kabul to discuss ways to improve the implementation of the Transport Internationalaux Routiers (TIR) convention of 1975. The convention simplifies cargo transport across international borders.

This project reaches beyond Afghanistan's borders with Afghanistan's Export Promotion Agency of Afghanistan (EPAA) to create commercial opportunities. For example, in late October and early November, 2014, USAID supported business exhibitions such as the Central Asian Trade Forum and the World Food Exhibit in Almaty, Kazakhstan, which were well attended by Afghan business people.

USAID is also strengthening regional integration through programming based in Pakistan. The Pakistan Regional Economic Integration Activity (PREIA) is a follow-on activity to the Trade Project that will focus on facilitating regional trade and will promote Pakistan's regional economic integration. This new program will continue its technical support to the Government of Pakistan, including the Federal Board of Revenue/Customs and the Ministry of Commerce.

By building the Government of Pakistan's capacity to implement pro-trade reforms, improve customs facilitation measures with regional and bilateral trading partners, and support business connectivity, PREIA will help increase Pakistan's trade and transit volumes with regional trading partners. Among other things, PREIA will provide technical assistance to help the government implement the South Asian Free Trade Agreement (SAFTA) tariff framework, and facilitate expansion of Pakistan's trade with India. PREIA, it is expected, will come online by late spring of 2015.

USAID is also drawing on its expertise and knowledge across the region by coordinating its Afghanistan, Pakistan, and Central Asian activities. These include a regional nutrition program to help decrease the prevalence of malnutrition in Afghanistan, Kyrgyzstan, Tajikistan, and Kazakhstan, as well as an energy linkages program that will help coordinate regional energy initiatives and provide technical support and management to a Regional Energy Secretariat supporting the CASA-1000 project.

Oversight and Accountability

USAID has learned important lessons over the course of its engagement in Afghanistan, and has drawn on experiences in other challenging environments -- including Iraq, Pakistan, Yemen, Sudan, and Colombia -- to put in place strong oversight of U.S. assistance funds.

In addition to standard USAID oversight measures implemented worldwide, in Afghanistan USAID has implemented the Accountable Assistance for Afghanistan (A3) initiative, designed to prevent funds from being diverted from the development purpose to malign actors. Some of the approaches USAID is employing under A3 include:

1. Award Mechanisms -- They are utilizing assistance awards that provide the most visibility on project costs, such as cost-reimbursable contracts and limiting layers of subcontracts to two.
2. Partner Vetting - The USAID Mission established a Vetting Support Unit in February 2011. The unit conducts checks on non-U.S. companies and non-U.S. key individuals for prime contractors, sub-contractors, grant recipients and sub-grantees to determine whether or not they are associated with known malign entities or individuals. They have kept approximately \$100 million from being awarded to those who did not meet their vetting requirements.
3. Financial Controls - They are enhancing controls on project funds, such as promoting electronic funds transfers in lieu of cash payments, using independent financial monitors to verify appropriate usage of funds, ensuring close review of recipients' claims prior to payment, and performing audits of locally incurred costs.

In addition, USAID is implementing a multi-tiered monitoring approach that allows it to use reporting data from multiple sources to make further programmatic decisions. Supporting this approach is the Implementation Support Team (IST) located in the mission. This team is charged with providing an additional layer of critical review and analysis, on a cross-sectoral basis, to ensure there are sufficient streams of monitoring information collected for providing USAID leadership and program managers with advice for addressing challenges in project implementation.

The levels of monitoring include: (1) direct hire personnel overseeing and meeting with implementing partners; (2) feedback from Afghan officials; (3) local civil society organizations; (4) monitoring and evaluation strategies employed by USAID implementing partners; and (5) the use of independent verifying agents in the field who can attend events, take photographs and report back to USAID officials when travel to a region is prohibitive.

Building on past monitoring and evaluation experience in Afghanistan, USAID is in the process of reviewing proposals for the new Monitoring Support Project. This request was issued following extensive consultations with international donors, Congress, and USAID implementing partners, as well as a comprehensive analysis of USAID's experience using independent monitoring around the world.

This project will utilize a variety of monitoring methods to verify project data, including site visits, GPS and time/date stamped photos, interviews, and crowd sourcing. Independent monitoring, however, is not the sole source of monitoring data. Moreover, it will not take the place of USAID staff as project managers. Instead, it is one tool that USAID can use to validate reporting data from other sources. Should USAID determine that its multi-tiered monitoring approach cannot provide adequate oversight over project activities, it will not hesitate to terminate or de-scope projects.

Read this original document at:

<http://docs.house.gov/meetings/FA/FA13/20141210/102792/HHRG-113-FA13-Wstate-SamplerD-20141210.pdf>

USAID ADMINISTRATOR RAJ SHAH TO STEP DOWN IN MID-FEBRUARY

According to a *New York Times* article, Rajiv Shah, the administrator of USAID, announced on Wednesday, December 17, that he would step down as head of the agency in mid-February 2015.

Mr. Shah took office in early 2010, just after a devastating earthquake in Haiti. He was widely credited with revitalizing an agency that had long been criticized for being overly bureaucratic and dependent on large outside contractors to do much of its work.

On Tuesday, Mr. Shah, 41, sought to downplay his role and credited President Obama for giving the agency a prominent role in foreign policy and national security decisions. "It's something that I have been honored to be a part of," he said in an interview.

Mr. Shah, who often accompanied Mr. Obama on his trips abroad, took over an agency that had been absorbed into the State Department during the Bush administration. He was the rare administration official who drew support from Democrats and Republicans on Capitol Hill.

As administrator, Mr. Shah sought to change the way America provided foreign aid. Rather than pouring billions of public dollars into programs to fight poverty, the agency used loan guarantees to get local banks and businesses to finance big projects, gave money directly to foreign development groups instead of to American contractors and helped push for changes in the way the U.S. ran its program for international food aid.

Mr. Shah is not without his detractors, however. The Professional Services Council said the decision to shift funding from larger aid groups to local (indigenous) nonprofits opened the agency's programs to potential waste and fraud, *The New York Times* reported. The agency faces persistent problems with waste and abuse with its programs in Afghanistan, it said, where it spends nearly \$1 billion a year.

Many colleagues think that he will someday run for Congress, although Mr. Shah said he had not decided what he wanted to do next. "Right now I'm very focused on having an effective transition that will happen sometime early next year," he said.

Meanwhile, Earl Gast joins Covington & Burling as a senior international advisor for Africa, based in Washington, DC. Prior to Covington, Mr. Gast served as assistant administrator for Africa at USAID. In this role, he oversaw a large and varied portfolio that provided \$6.4 billion in assistance to 49 African countries. Mr. Gast's previous work experience also includes serving as USAID's senior deputy assistant administrator for Africa.

FUNDING OF "POWER AFRICA" MADE UP OF SMOKE AND MIRRORS

President Obama last year told a cheering crowd in Cape Town that a \$7 billion plan to Power Africa would double electricity output on the world's poorest continent and bring light where currently there is darkness.

A year later, the President's flagship project for Africa has already achieved 25 percent of its goal to deliver 10,000 megawatts of electricity and bring light to 20 million households and businesses, according to its annual report. But the five-year plan has not yet delivered the power.

Power Africa has not measured its progress by counting actual megawatts added to the grid, but promises of additional power made in deals it says it helped negotiate, according to sources inside the project and documents seen by *Reuters*.

Some projects facilitated by Power Africa -- a program operated by USAID -- were under way years before the scheme's inception, others are still in the planning stage.

It is unclear how much of the \$7 billion President Obama pledged has actually been spent or if a further \$20 billion in private sector investment commitments will materialize.

Saying you've met targets on projects that might never happen or taking the credit for projects that have been worked on for years makes me uncomfortable, a source working on Power Africa told *Reuters*. It's misleading.

President Obama's pledge to double power generation in Africa within five years looked highly ambitious from the start. Per capita electricity output in Sub-Saharan Africa has been flat for three decades because most promised power plants never get built.

We're dealing with megawatts on paper, rather than on the grid, a second source working on the project said.

Is that really what President Obama promised?

The 48 countries of Sub-Saharan Africa, with a combined population of 800 million, produce roughly the same amount of power as Spain, a country of just 46 million. This constrains Africa's growth and keeps hundreds of millions in poverty.

Power Africa coordinator Andrew Herscowitz told *Reuters* there had been some confusion about the role of the program. He said it was always intended to expedite transactions, facilitating private investment rather than handing out aid.

Herscowitz said Power Africa was there to help the private sector deliver electricity and it had already negotiated commitments from companies worth \$20 billion, although he did not know how much of this money had been spent.

We're like a pharmacist, where people come to us, we reach out to people and figure out what is needed, he said. In some projects we may have a lot of involvement and in some we have very little involvement.

Foreign companies sign billions of dollars of agreements with African governments to build infrastructure every year, although a large number never get built.

In April 2011, the Millennium Challenge Corporation, involved in Power Africa, signed a \$350 million deal to revitalize Malawi's power sector. More than three years on, 1.7 percent of that money has been spent, according to the program's website, which gives no detail on progress on the ground.

Memoranda of Understanding Power Africa signed this year with its six focus countries -- Tanzania , Nigeria , Kenya , Ethiopia , Liberia and Ghana -- contain less than \$100 million of financial commitments targeted at specific countries, most of which is for consultants.

Tetra Tech won a \$64 million contract and former British Prime Minister Tony Blair's Africa Governance Initiative was given a \$3 million deal.

As with many African aid projects, rights groups have criticized Power Africa as being mostly a vehicle to subsidize U.S. companies.

Documents show \$5 billion out of the \$7 billion pledged is for loans for U.S. exports from the government's Export-Import Bank (EXIM) and Overseas Private Investment Corp. (OPIC).

It's absolutely not true. Power Africa is an opportunity to turn on the lights for millions of Africans by taking investment from all over the world, Herscowitz said.

Herscowitz rejected suggestions Power Africa merely tapped into existing projects, highlighting a 5 megawatt NextGen solar project in Tanzania and a 30 megawatt biomass scheme in Kenya which he said didn't exist before Power Africa.

The NextGen project website, however, says a power purchase agreement for the solar project was signed in January 2013, six months before Power Africa was launched.

It is by no means guaranteed that the Power Africa program, which has an initial five-year mandate, will continue or be seen as a priority when Obama's final term ends in two years, U.S. government sources told Reuters.

In addition, the investment banks EXIM and OPIC are fighting for their survival in Congress, where the Democratic Party was severely weakened in mid-term elections this month.

In a change of tack, the U.S. government said this month it wants to partner with China on improving power in Africa.

Meanwhile, corruption in the countries that Power Africa operates in remains a problem.

Nigeria's state oil company was accused last year by the then central bank governor of withholding \$20 billion in oil funds due to the government, while Tanzania's parliament is currently reviewing a report on graft in its energy sector.

OFPP ADMINISTRATOR RUNG ROLLS OUT 3-PRONGED ACQUISITION IMPROVEMENT PLAN

Three months into her tenure as Office of Federal Procurement Policy Administrator, Anne Rung has detailed her vision for major changes to the federal acquisition process, said Jason Miller on *Federal Drive*.

Rung released a memo on December 4th giving agencies marching orders for how to use data to make better procurement decisions. This roadmap builds on existing efforts and takes on targeted new initiatives -- all with the end goal of creating an improved, data-driven procurement system.

"We have a great opportunity to create a new model for federal contracting to drive greater innovation and performance, and generate savings," Rung said in an exclusive interview with Federal News Radio. "These actions were shaped, in part, by feedback from our first national online dialogue with industry. The overwhelming feedback from industry and others key stakeholders was that the sheer complexity of the federal marketplace is hindering our ability to deliver the most innovative, high performing and cost effective solutions."

Rung's plans center on three broad concepts:

- Category management
- Acquisition workforce talent development
- Stronger vendor relationships

Each of these focus areas are interrelated as much as they are standalone concepts.

Under category management, Rung said OFPP wants to take what the General Services Administration has been working on internally over the last year and expand it government-wide. GSA stood up three categories earlier this year and is expected to open more category hallways in the coming months.

She said the Strategic Sourcing Leadership Council (SSLC) will lead the initiative to set up categories across 10 commonly purchased goods and services.

OFPP estimates agencies spend about \$277 billion a year across these 10 areas, which include IT (\$47.4 billion), professional services (\$64.6 billion), facilities and construction (\$72.1 billion) and medical (\$33.2 billion).

"These categories may be a little bit fluid over time as we dig into the data and really understand what's in these categories, but it serves as an organizing principle to think where we are going to

stand up teams, gather data and start to share information," Rung said. "It really is a fundamental shift in how we think about what represents over \$200 billion in spending every year."

Experts to lead category efforts:

The memo states that category management includes strategic sourcing, but also strategies to "drive performance, like developing common standards in practices and contracts, driving greater transparency in acquisition performance, improving data analysis, and more frequently using private sector (as well as government) best practices."

Rung said the SSLC will rely on GSA's efforts, especially the Common Acquisition Platform, to run the category management initiative, but different agencies from across the government will lead the actual category management effort.

She said OFPP and the SSLC will ensure there are specialized teams running each category.

"The notion here is that each category will be led by a senior government official, recruited from government or industry who is a true expert in that category so they will understand the buying trends, what drives costs, new innovations on the horizon and emerging companies that they could bring into the federal marketplace," Rung said. "Eventually over time, we will build teams around these categories."

In the memo, Rung said OFPP will also update its business case guidance for new interagency and agency-wide contract vehicles as part of its coordination with the SSLC.

"The revised guidance will include a requirement for category managers to review new agency business cases and advise SSLC of potential duplication or opportunities for new or expanded strategic sourcing initiatives," the memo stated.

A second piece of this roadmap is developing agency acquisition workers' skills.

Over the last two years, OFPP has been updating the workforce certification program, but too many times Rung said their skillsets are a mile wide and an inch deep.

Rung said OFPP wants to create teams of acquisition experts, starting with IT.

"In a few months we will be bringing on our first class of recruits from the agencies as detailees within the existing Digital Services team so we are partnered up with [director] Mikey [Dickerson] and his team on this initiative," she said. "We will put them through a soon-to-be-developed digital IT acquisition training and send half of the graduating class back to the agencies, while using the remaining graduates as part of a SWAT team in digital services. It's important to note that these actions are not designed to substitute for an agency's existing workforce. We recognize that many contracting officers may need expert assistance or hands-on training to deal with complex IT and other specialized requirements. This team would be one such resource for them to use."

Rung said OFPP still is working out the details of this training program, including how many student in the first class and how long the program will last.

A "Yelp" for agency contracting shops:

In the memo, OFPP will develop that plan within 180 days to create this program. At the same time, the Defense Department and GSA will develop training and tools for the federal workforce to build its capability to use agile approaches to technology acquisitions that facilitate continual customer testing of creative contractor ideas, and develop a joint plan to "use new and innovative approaches to workforce development training, including cross-functional training, rotational development and assignments, and effective training and education used by the private sector."

Rung said industry and other expert feedback highlighted the need for specialized cadres of acquisition workers as well as the need for new approaches to training.

The third part of the roadmap focuses on vendor and agency relationships.

Within 90 days, OFPP will work with agencies and vendors to develop guidance for how successful and unsuccessful bidders will assess agency acquisition efforts.

Rung said GSA launched this effort on a specific procurement earlier this year, and DoD will kick-off a second pilot in 2015.

"By targeting the feedback on specific acquisitions we can be much more focused on the acquisition outcomes, and in particular how we drive greater innovations in our acquisitions," she said. "The idea is really to do this across all categories of acquisitions and launch this enterprise-wide. GSA's was, I believe, on a professional services contract, and the key here is we would use standard questions for each of these surveys so over time we can start to identify where we may have weaknesses or where our strengths are so we can share best practices. By asking these standard questions, you can really start to see the trends and areas you may want to focus in on."

At the same time, OFPP will launch a pilot to test out the concept of appointing an enterprise-wide vendor manager.

Rung said her office still is working out the details, but the goal is to manage the relationships across a small number of similar vendors from a government-wide perspective.

"We will think about a couple of different models that we will have to work through whether it's targeted at a few companies or targeted at a specific sub- category, but we think there is great potential in really managing these relationships across the enterprise. Think how frustrating it is for industry who may have several hundred or several thousand contracts across government, trying to manage that relationship across all of those units. It's incredibly frustrating to them," she said. "Similarly for the federal government, if we really want to drive change we've got to drive change across an enterprise so we have to have our eyes across all of these units. We think there is great promise to this. It's been used in the United Kingdom."

The memo states OFPP will develop a plan within 90 days to recruit that vendor manager for top IT commercial contractors.

Shrinking the FAR:

OFPP is committing to holding at least one national dialogue a year for the next two years and reviewing and eliminating outdated or burdensome regulations.

The memo states within 180 days, the Federal Acquisition Regulatory Council will identify and begin the process to remove or revise any outdated regulations.

"During this same period, agencies shall review their respective supplements to the Federal Acquisition Regulation and take steps to eliminate any outdated, ineffective, or unnecessarily burdensome requirements," the memo states. "Agencies shall review their internal policy guidance, if any, addressing minimum corporate experience requirements and take appropriate steps to update such guidance, as necessary, to ensure they do not prevent responsible sources that otherwise have the capacity and capability to accomplish a given requirement from performing work for the government."

Rung said a lot of this work is already underway so there is momentum in the acquisition community.

"We are piloting these ideas and really trying to test the marketplace, and tweak it, and re-tweak it and build on it over time as we develop and are more thoughtful about these great ideas," she said.

LINKING SMALL BIZ SUBCONTRACTORS TO PRIME CONTRACTS NOT FEASIBLE USING CURRENT FEDERAL SYSTEMS, GAO REPORTS

In fiscal year 2013 the federal government awarded about \$460 billion on contracts, many of which involve subcontracts. Federal regulations require prime contractors to report on their subcontracting with small businesses.

The contract reporting systems GAO reviewed contain relevant information in subcontracting plans, subcontracts, and subcontractors, but no single system was designed to link small business subcontractors to prime contracts. Linking small business subcontractors to prime contracts when there is a subcontracting plan that pertains to multiple contracts is especially difficult because these plans do not specify the particular contracts to which they apply. Despite the limited data, GAO was able to link a few small business subcontractors to prime contracts, but multiple steps were required.

GAO queried subcontract reporting systems regarding 199 contracts and found that 37 reported subcontract data, including contracts with a subcontracting plan that pertain to multiple contracts. GAO selected a non-generalizable sample of 12 of these 37 contracts and was able to identify a number of small business subcontractors.

There are multiple actions currently under way, or called for by legislation, that may result in a single system that can link small business subcontractors to prime contracts. The General Services Administration is currently involved in an effort to consolidate the functions and information of several existing contract reporting systems, and the Department of the Treasury was recently given responsibility to operate and maintain USASpending.gov and plans to make changes to improve the search function of that website, which could help facilitate linking subcontractors to prime contracts.

In addition to the actions under way to improve the retrieval or presentation of data, the Digital Accountability and Transparency Act (DATA), enacted May 2014, requires that agencies disclose additional data relevant to subcontracting; improve the consistency and reporting of these data; and periodically review their completeness, timeliness, quality and accuracy.

SEN. MCCASKILL'S PLAN TO END FUNDING FOR UNSUSTAINABLE AFGHAN INFRASTRUCTURE PROJECTS INCLUDED IN 2015 NDAA

This year's defense authorization bill includes provisions by Sen. Claire McCaskill to prohibit taxpayer funding from use by the Afghanistan Infrastructure Fund, and to prohibit unsustainable projects that cannot be overseen by American personnel.

The provisions come after sustained pressure from McCaskill on the Obama Administration to prevent waste and abuse of taxpayer dollars on unsustainable infrastructure projects in Afghanistan. The legislation prohibits funding for construction projects in Afghanistan greater than \$1 million that cannot be audited and physically inspected by U.S. government personnel or designated representatives, and necessitates a determination that the project has been coordinated with the government of Afghanistan and that adequate arrangements have been made for project sustainment.

McCaskill this summer penned a letter to USAID demanding answers on the cost and sustainability of the Tarakhil power plant, which has cost the U.S. more than \$300 million, and generated less than 3% of the power it was built to produce. McCaskill also quizzed General Joseph Dunford, Jr., Commander of the International Security Assistance Force in Afghanistan, on concerns raised by the Special Inspector General for Afghanistan Reconstruction regarding the dwindling oversight of taxpayer-funded projects in the country as the U.S. drawdown of troops continues.

Earlier this year, McCaskill called for action from the State Department to implement safeguards over contracts to stop the waste of tax money. The Inspector General's report came nearly one year after McCaskill had formally requested that the office review the contracts.

Last year, McCaskill introduced a Senate budget resolution to end funding for the projects and redirect those resources for use in construction of roads in the United States.

DEPUTY IG TELLS IT LIKE IT IS ABOUT THE DIFFICULTIES WITH USAID'S CONTRACTING

On page 144 of the fiscal 2015 Agency Financial Report, Deputy IG Michael Carroll described the state of contracting at USAID, when he wrote:

“Complex procurement processes and requirements limit USAID’s ability to program or implement activities in a timely manner, with some projects taking up to 2 years to design and fund. USAID staff requested more flexible procurement mechanisms. For example, centrally managed awards have strict deadlines for processing task orders that many missions cannot meet because they do not yet know what their budgets will be. USAID staff also said the Agency’s efforts to reform procurement by advancing local solutions have not streamlined the process, but made it more inefficient.”

“USAID also has a shortage of contracting staff able to design and administer awards effectively and efficiently, recommend appropriate mechanisms, apply consistent language and provisions in contracts and agreements, and provide technical support. Staff said they are overwhelmed with the number of awards they manage, leading to long delays in designing programs and approving new awards. In addition, contracting staff receive pressure from missions to bend procurement rules and requirements to approve awards quickly, leading to errors, weak terms and conditions, and poorly drafted statements of work, program descriptions, and evaluation criteria that require additional time later to amend or resolve.”

“The Agency’s efforts to work more with local partners further complicate procurement, especially given current staff levels and resources. Contracting staff cannot ensure under current conditions that organizations new to U.S. procurement requirements and processes use funds properly, heightening the risk of fraud, waste, and abuse.”

COULD SOLUTIONS USED BY USAID TO FIGHT EBOLA BE A NEW MODEL FOR PROCUREMENT?

Recently, USAID and the White House's Office of Science and Technology Policy created the “Ebola Grand Challenge,” an effort to expedite this process and draw out solutions from the public in a streamlined, collaborative way.

Through the online idea-sharing platform, “OpenIdea,” physicists, mathematicians, inventors, doctors and everyday “Joes” submitted ideas and research to assist aid workers battling this deadly virus. Research and ideas were presented, evaluated, dissected, and often times, combined in an amazing show of collaboration.

Could this be the future of federal acquisitions?

Unencumbered by the typical restrictions, competition and award protests, people and companies from all over the world have flocked to the forum to bring thoughts together to solve problems. Even companies that would seemingly have competing products for the grants can be seen collaborating on ideas about how to combine technologies to better solve major issues hampering the treatment of Ebola patients.

While this platform has allowed participants to present ideas meant to solve this particular issue, government organizations and contractors should peek in for solutions to some of their current challenges, as many routinely are faced with austere conditions and are unprepared or uneducated about what they will face while on location. With additional non-combat deployments into these harsh climates happening every day, this kind of idea repository can result in expedited vetting and evaluation of the solution space.

The scope and range of the suggestions and the new applications of these ideas is what has made this forum so appealing.

Companies are applying their products and ideas in a way previously not considered. One company, Qore Performance, a Fairfax, Va.-based company, submitted its new-to-market athletic apparel with arterial cooling pockets. Originally designed for athletes and law enforcement personnel for in-game or on-duty use, HAZMAT suit cooling and patient care was not the original design for the products, but this platform has put it on the radar for a number of government and private-sector organizations whose workers wear protective gear daily.

With no experience in providing solutions to the federal government, companies would have previously depended on third-party relationship managers to bring their products into the federal government and navigate the complexities of the General Services Administration's schedule contracts. Most are "flying blind," lacking the resources or connections to present their solutions in front of the proper set of eyes.

Open Innovation forums such as OpenIdeo may change this.

Federal acquisitions could greatly benefit from a place where questions can be posed to the general public, and solutions can be discussed, adapted, vetted and ultimately presented for implementation with less overhead and process-driven requirements. With the vetting that has already organically occurred on this open platform, you might see quite a few of the ideas from this OpenIdeo forum and the USAID Grand Ebola Challenge in government organizations much sooner than expected.

USAID, CDC, STATE PROMULGATE THEIR REGULATIONS IMPLEMENTING OMB'S UNIFORM GUIDANCE EFFECTIVE DECEMBER 26

Final guidance was issued by the Office of Management and Budget at 78 Fed. Reg. 78590-78691 on December 26, 2013, and will be implemented by all 26 Federal awarding agency with regulations issued effective December 26, 2014. Major elements of the government-wide reform include:

1. Integrating and streamlining eight overlapping OMB circulars into one set of guidance in Title 2 of the CFR
2. Providing a set of uniform definitions for federal assistance
3. Requiring pre-award consideration of merit and financial risk
4. Strengthening internal controls while providing administrative flexibility

5. Provisions for exceptions to support new innovative programs that improve cost effectiveness while achieving outcomes
6. Streamlining and clarifying guidance on subrecipient monitoring
7. Providing consistency on negotiated indirect cost rates by creating a minimum rate for recipients and requiring agency-head approval for deviations from negotiated rates
8. Simplifying reporting requirements for time and effort while strengthening the requirement for effective internal controls
9. Targeting audit resources based on risk by raising the single audit threshold from \$500,000 to \$750,000 and focusing audits on material weaknesses
10. Strengthening audit follow-up by requiring greater accountability and monitoring results more closely.

An interim final rule implementing the Uniform Guidance by all federal awarding agencies, including USAID, State, HHS/CDC, USDA, among others, is now available for public inspection at <http://www.ofr.gov/inspection.aspx> and will be officially published in tomorrow's (December 19) Federal Register, becoming effective for new awards or substantially modified existing awards on or after December 26, 2014.

On pages 669-687 of this 1140 page document, USAID has replaced 22 CFR 226 with OMB's Uniform Requirements at 2 CFR 700 with a number of unique provisions of its own:

1. §700.1 Definitions. USAID added definitions for "Agreement Officer," "Apparently successful applicant(s)," "Award," "Branding strategy," "Commodities," "Date of completion," "Marking plan," "program," "Public communications," "Suspension," "Unrecovered indirect cost," "USAID," and "USAID Identity." These definitions should be familiar with USAID recipient
2. §700.2 Adoption of 2 CFR part 200. USAID has adopted OMB's guidance Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards to Non-Federal Entities as supplemented by this part
3. §700.3 Applicability. The uniform administrative requirements and cost principles (Subparts A through E of 2 CFR part 200 as supplemented by this part) apply to for-profit entities
4. §700.4 Exceptions. Exceptions on a case-by-case basis may be authorized by USAID's Senior Deputy Assistant Administrator, Bureau of Management
5. §700.5 Supersession. This part supersedes 22 CFR 226
6. §700.6 Metric system of measurement
7. §700.7 Advance payment. Advance payment mechanisms include, but not limited to, Letter of Credit, Treasury check and electronic funds transfer and should comply with applicable guidance in 31 CFR 208
8. §700.8 Payment. Sets requirement that other funds should be used before requesting advance funds and, while not requiring separate depository accounts for funds, does require the non-Federal entity to account for receipt, obligation and expenditure of funds
9. §700.9 Property standards. Cites the standards in 2 CFR 200.311 & .313
10. §700.10 Cost sharing or matching. Adds indirect costs on cost-sharing or match to unrecovered indirect costs. (This may signal USAID's Overhead Branch requiring that indirect costs be also allocated and calculated on cost share or match)

11. §700.11 Contracting with small and minority businesses, women’s business enterprises and labor surplus area firms. Reaffirms the current requirement to provide OSDBU with advance notice of placing any order or contract above \$150,000
12. §700.12 Contract provisions. Specifies that all negotiated contracts, with the exception of those below \$150,000, must have a provision giving access to records to USAID, GAO or any duly authorized representatives
13. §700.13 Additional Provisions for Awards. Prohibits profit to any non-Federal entity that is a commercial organization. Retains the language presently found at 22 CFR 226.81
14. §700.14 Termination. Retains the present National Interest termination authority.
15. §700.15 Disputes. The USAID Senior Deputy Assistant Administrator, Bureau of Management shall receive appeals of Agreement Officers’ decisions and shall make the decision in such appeals
16. §700.16 Marking. Maintains USAID’s present marking plan and branding strategy.

The State Department’s regulations are to be found at 2 CFR 600, Department of Health and Human Services, also covering the Centers for Disease Control and Prevention, at 2 CFR 300 and the Department of Agriculture’s at 2 CFR 400 in this document.

USAID’s Office of Acquisition and Assistance is also expecting to have revisions to ADS 303 finalized and issued by December 26. It should contain USAID’s policies regarding how it intends to implement the changes under the Uniform Guidance and whether non-U.S. NGOs can avail themselves of the new 10% de minimis indirect cost rate. As soon as ADS 303 is released, NGO Financial Newsletter will issue a Flash issue summarizing its changes. Stay tuned!

USAID MASSIVELY UPDATES AND AMENDS THE AIDAR

On December 16 at 79 Fed. Reg. 74986-75003 and at 74681, USAID published a massive change to its Agency for International Development Acquisition Regulation (AIDAR) at Title 48 Code of Federal Regulations Part 7, comprising 17 compressed Federal Register pages. It is the largest change in the AIDAR that we have been reporting on for the past 16 years -- and it is happening all at once in a final rule.

The announced purpose of the change is to maintain consistency with the Federal Acquisition Regulation (FAR), incorporate long-standing USAID internal policy into the regulation, remove obsolete titles, and make editorial amendments.

Much of the revision consists of title changes to various USAID officials, such as CTO to COR, and offices, for example, “SDB” for the Office of Small and Disadvantaged Business Utilization with “SDBU,” among many others, but aside from editorial changes such as these, there are many substantive changes in the revision to the AIDAR, namely:

1. Increase in the contracting authority of Mission Directors to sign personal services contracts not to exceed \$1 million and other contracts up to \$150,000
2. Incorporates a new Definitions Section at AIDAR 702.170 including definitions of a Third Country National (TCN) and a United States National (USN)

3. Removal of the totally out-of-date “Gray Amendment” AIDAR Clause at 752.226-2, Subcontracting with disadvantaged enterprises, which had required 10% of the dollar value of the contract to be subcontracted to disadvantaged enterprises
4. Inclusion of information on ADS 300, which covers Agency policies, required procedures, and internal guidance on planning of USAID direct acquisition is awarded to AIDAR subpart 707.1
5. Elevating the responsibilities of the Debarment Official and Suspending Official in USAID to the Senior Deputy Assistant Administrator, Bureau of Management
6. Revision to AIDAR subpart 715.6 on unsolicited contract proposals for clarity and conformity with the requirements in FAR 15.406
7. Adaptation of Section 52.219-8, Utilization of Small Business Concerns with necessary prescriptive language in the appropriate section of the AIDAR. See the revised, stronger language at AIDAR 719.708 for “USAID to give U.S. Small Businesses an opportunity to provide supplies and services for foreign assistance projects.”
8. Designation of the Civilian Board of Contract Appeals to hear and determine appeals under USAID appeals
9. Incorporate new AIDAR contract clause entitled “Access to USAID Facilities and USAID’s Information Systems,” replacing the previous clause “Personal Identity Verification of Contractor Personnel”
10. Revised AIDAR clause 752.216-70, Award fee, to remove reference to the disputes clause for award fee determinations to conform with FAR 16.405-2(a)
11. Required flow down to subcontracts of AIDAR clause 752.231-70 covering salary supplements to host government officials
12. Approval of local currency advances to for-profit organizations requires the concurrence of, not the consultation with, the Mission Controller and letters of credit must also be approved by the Procurement Executive. See AIDAR 732.402(e) and 732.406-71(c)
13. Incorporates new AIDAR clauses entitled “Patent Reporting Procedures,” requiring contractors to report all inventions to NIH, and “Standards for Accessibility for the Disabled in USAID Construction Contracts,” requiring access to people with disabilities for construction or renovations
14. Revisions to AIDAR sections 731-205-46 and 752.7032 allowing the Contracting Officer to delegate to the COR international travel approvals for all travel directly and identifiably funded by USAID under the contract
15. Incorporates new AIDAR clause entitled “USAID Disability Policy” barring contractor discrimination against people with disabilities.

Unfortunately, USAID didn’t go far enough in this major rewrite of the AIDAR. It would have been nice to have seen that USAID increased the threshold for the definition of non-expendable property from \$500 to, say, \$5,000 in AIDAR clause 752.245-70 Government property – USAID reporting requirements. USAID could have allowed TCN employees to be paid in other than the local currency without the Mission Director’s approval, notwithstanding the current language at AIDAR 722.170(b).

The language in AIDAR 752.7028(a) barring the payment of post diff. and danger pay on overtime premium pay has cause confusion to more than a few sophisticated contractors, resulting in them paying huge amounts back; this language should have been clarified. Do we

really need Big Brother to tell us in AIDAR clause 752.7033, Physical fitness, to require contractor staff to have a physical fitness exam before being posted overseas?

The requirement to obtain the Mission Director's approval is mentioned no less than 46 different places in the body of the AIDAR. Many of these approvals are over purely, minor administrative matters. Why couldn't many of these approvals be delegated instead to the Contracting Officer in the AIDAR?

The final straw showing how out-of-date this contract regulation is the continued requirement to have all contractor employee international travel approved whether by the Contracting Officer or the COR. On December 26, international air travel will no longer be required to be approved for new or substantially modified grants or cooperative agreements awarded on or after then.

In the same edition of the Federal Register, USAID curiously is advising those affected by this final rule that they could comment on it, provided they submit their comments to Marcelle Wijesinghe, OAA's Policy Division Head, by January 15, 2015.

Because of its potential effect and the huge number of changes, this revision requires careful study and for this reason a copy should be downloaded from Tuesday's Federal Register.

OFCCP ISSUES FINAL RULE BARRING DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY BY CONTRACTORS AND SUBCONTRACTORS, TO BECOME EFFECTIVE APRIL 8, 2015

At 79 Fed. Reg. 72985-72995 (Dec. 9, 2014), the Office of Federal Contract Compliance Programs (OFCCP) is revising the regulations implementing Executive Order (EO) 11246, as amended, in accordance with Executive Order (EO) 13672, "Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity," which was signed by President Barack Obama on July 21, 2014.

More specifically, EO 13672 amended section 202 and section 203 of EO 11246, by substituting the phrase "sex, sexual orientation, gender identity, or national origin" for "sex or national origin." This final rule implements EO 13672 by making the same substitution wherever the phrase "sex or national origin" appears in the regulations implementing EO 11246.

This rule, when it becomes effective, will apply to those recruited in the United States to work overseas. When a particular foreign country refuses to issue a visa to such covered persons, a contractor or contractor would be required to notify the Department of State and DOL's Deputy Assistant Secretary. Not covered will be those who are recruited overseas for work outside the United States.

Effective date: these regulations are effective April 8, 2015. Applicability date: these regulations will apply to Federal contractors who hold contracts entered into or modified on or after April 8, 2015.

Pertinent changes to OFCCP's regulations are next.

“Sec. 41 CFR 60-1.4 Equal opportunity clause.

(a) Government contracts. Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.”

“Sec. 41 CFR 60-1.10 Foreign government practices.

Contractors shall not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin when hiring or making employee assignments for work to be performed in the United States or abroad. Contractors are exempted from this obligation only when hiring persons outside the United States for work to be performed outside the United States (see 41 CFR 60-1.5(a)(3)).

Therefore, a contractor hiring workers in the United States for either Federal or non-federally connected work shall be in violation of Executive Order 11246, as amended, by refusing to employ or assign any person because of race, color, religion, sex, sexual orientation, gender identity, or national origin regardless of the policies of the country where the work is to be performed or for whom the work will be performed.

Should any contractor be unable to acquire a visa of entry for any employee or potential employee to a country in which or with which it is doing business, and which refusal it believes is due to the race, color, religion, sex, sexual orientation, gender identity, or national origin of the employee or potential employee, the contractor must immediately notify the Department of State and the Deputy Assistant Secretary of such refusal.”

The final rule requires that in all solicitations or advertisements for employees, contractors must “state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, *sexual orientation, gender identity*, or national origin.” This requirement may be satisfied by either listing all protected classes or simply by stating that the contractor is an “Equal Opportunity Employer (EOE).”

Although not explicitly spelled out in the final rule, contractors impacted by the new rule should review discrimination, anti-harassment, and any other affected policies to ensure that sexual orientation and gender identity are specifically listed with other classes protected from harassment and discrimination, if the contractor has not already done so.

Contractors with contracts entered into or modified on or after the April 8, 2015 effective date will also want to include sexual orientation and gender identity in any training on discrimination and harassment prevention.

On the other hand, the final rule does not alter the existing religious exemption in EO 11246 (60-1.5(a)(5)) in any way. So, religiously affiliated contractors (religious corporations, associations, educational institutions, or societies) may continue to favor individuals of a particular religion when the individual is to perform work connected with the carrying on of its activities.

Much to the relief of contractors, the final rule does not require contractors ask applicants and employees to voluntarily self-identify their sexual orientation or gender identity or to invite such voluntary disclosure if they choose to do so. The final rule does not require a number of things that are required under the requirements for women, minorities, protected veterans, and individuals with disabilities, namely:

- Does not require outreach or goals
- Does not change affirmative action plans (except for EO clauses, taglines and posters included as supporting documents)
- Does not require invitations to self-identify sexual orientation and/or gender identity
- Does not require other affirmative action activities, such as contractors are required to conduct on behalf of women and minorities.

FAR REVISIONS FOR ESTABLISHING THE MINIMUM WAGE AND EXTENDING THE PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC COPORATIONS

On December 15, the Federal Acquisition Regulation (FAR) was revised by two rule changes.

Establishing a Minimum Wage for Contractors:

At Fed. Reg. 74544-74553, DoD, GSA, and NASA are issuing an interim rule amending the FAR to implement Executive Order (E.O.) 13658 and a Department of Labor (DOL) final rule issued on October 7, 2014, both entitled Establishing a Minimum Wage for Contractors.

The interim rule establishes a new minimum wage for covered service and construction contracts of \$10.10 per hour, which will be adjusted annually, by the DOL. Contracting Officers will

include a clause in covered contracts and, if requested by the contractor and if appropriate, will adjust contract prices for the annual adjustments in the E.O. minimum wage. Contractors shall consider any subcontractor request, including requests by small business subcontractors, for a subcontract price adjustment due to the annual adjustment in the E.O. minimum wage.

This requirement only applies to contracts with the Federal Government requiring performance in whole or in part within the United States (the 50 states and the District of Columbia) (29 CFR 10.2 and 10.3) (FAR 22.1903, 22.1906 and 52.222-55 (a), (b)(1), and (k)). This provision becomes effective February 13, 2015.

Prohibition on Contracting With Inverted Domestic Corporations:

At 79 Fed. Reg. 74554-74557, this interim rule amends the provisions of the FAR that address the continuing Government-wide statutory prohibition (in effect since fiscal 2008) on the award of contracts using appropriated funds to any foreign incorporated entity that is an inverted domestic corporation (under section 835 of the Homeland Security Act of 2002, codified at 6 U.S.C. 395) or to any subsidiary of such entity.

In particular, this rule amends FAR 9.108 to revise the FAR coverage, including the language of solicitation provisions and contract clauses, so that it more clearly reflects the ongoing, continuing nature of the statutory prohibition on contracting with inverted domestic corporations and their subsidiaries.

PROPOSED FPIIS REPORTING BY CONTRACTORS TO INCLUDE PREDECESSORS OR SUCCESSORS

At 79 Fed. Reg. 71975-71979 (Dec. 4, 2014), DoD, GSA, and NASA are proposing to amend the FAR to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 to include in the Federal Awardee Performance and Integrity Information System (FAPIIS), to the extent practicable, identification of any immediate owner or subsidiary, and all predecessors of an offeror that held a Federal contract or grant within the last three years.

The objective is to provide a more comprehensive understanding of the performance and integrity of the corporation before awarding a Federal contract.

Also notable, however, is what the proposed rule does *not* require. Specifically, the rule would not mandate the inclusion of data related to affiliated entities other than direct owners or subsidiaries. The decision not to require information in FAPIIS about indirect corporate affiliates was driven by two considerations. First, in the judgment of the Defense Acquisition Regulation Council and Civilian Agency Acquisition Council, “the further the distance between the entities, the less relevant the information is likely to be for establishing responsibility of the offeror.” Second, the two Councils concluded that the substantial “cost and complexity” of monitoring all direct and indirect subsidiaries would outweigh the benefits of such a system.

Unlike data on indirect affiliates, data on the immediate owner and direct subsidiaries of an offeror will be readily available, as that information is now required in response to FAR

provision 52.204-17, which became effective November 1, 2014. And in order to ensure that information about predecessor entities will be readily obtainable, the Councils have proposed a new FAR provision 52.204–WW, entitled “Predecessor of Offeror,” which would require an offeror to state whether it “is or is not a successor to a predecessor that held a Federal contract or grant within the last three years.”

In addition to serving as a resource for acquisition officials, the proposed rule may also constitute a valuable source of information for the wider contracting community, as information in FAPIIS regarding immediate owner, subsidiaries, and predecessors would be publicly available, as mandated by Section 3010 of the 2010 Supplemental Appropriations Act. It is not difficult to see that this new information may prove significant in a number of settings, including with due diligence and bid protests efforts. At the same time, however, the proposal of new reporting requirements further underscores the importance of developing and implementing company policies that maintain full compliance with the evolving FAPIIS standards.

The proposed regulatory language:

As prescribed in 4.1804(d), insert the following provision:

Predecessor of Offeror (Date)

(a) *Definitions.* As used in this provision—

Commercial and Government Entity (CAGE) code means—

(1) An identifier assigned to entities located in the United States and its outlying areas by the Defense Logistics Agency (DLA) Logistics Information Service to identify a commercial or government entity, or

(2) An identifier assigned by a member of the North Atlantic Treaty Organization (NATO) or by NATO's Maintenance and Supply Agency (NAMSA) to entities located outside the United States and its outlying areas that DLA Logistics Information Service records and maintains in the CAGE master file. This type of code is known as an NCAGE code.

Predecessor means an entity that is replaced by a successor and includes any predecessors of the predecessor.

Successor means an entity that has replaced a predecessor by acquiring the assets and carrying out the affairs of the predecessor under a new name (often through acquisition or merger). The term “successor” does not include new offices/divisions of the same company or a company that only changes its name. The extent of the responsibility of the successor for the liabilities of the predecessor may vary, depending on State law and specific circumstances.

(b) The offeror represents that it is or is not a successor to a predecessor that held a Federal contract or grant within the last three years.

(c) If the offeror has indicated “is” in paragraph (b) of this provision, enter the following information for all predecessors of the offeror that held a Federal contract or grant within the last three years (If more than one predecessor list in reverse chronological order):

Predecessor CAGE code: ____ (or mark “Unknown”).

Predecessor legal name: ____.

FRANCHISE AGREEMENT REVIEWS, AFFILIATION AND ELIGIBILITY FOR AN SBA BUSINESS LOAN

The Small Business Administration (SBA) has requested for comment its re-examining the factors the agency considers relevant to the determination of “affiliation” between entities involved in a franchise or other similar business relationship (such as license, dealer, and jobber relationships), as well as the current processes for making such determinations in connection with SBA's business loan programs. See 79 Fed. Reg. 72748-72753 (Dec. 8, 2014) for this Notice.

SBA also intends to evaluate issues related to the use of SBA's Franchise Findings List and to the use of external resources (such as the Franchise Registry) that are available to assist with the determination of affiliation based on a franchise or similar business relationship. Such issues include the responsibility for choosing, approving and/or maintaining these resources and the process by which affiliation determinations are made available to the public. SBA is issuing this notice to solicit feedback from the public on these issues and related matters.

In general, SBA's programs, including its business loan programs, are available only to independent small businesses as defined by the Small Business Act and Part 121 of Title 13 of the Code of Federal Regulations (CFR). One key step in determining whether an applicant for a business loan is independent and small is to determine whether the applicant is affiliated with any other parties. SBA's regulations at 13 CFR 121.103 set forth the general principles on affiliation, including affiliation resulting from a franchise agreement.

Currently, when a small business loan applicant has or will have a franchise, license, dealer, jobber or similar relationship and such relationship (or product, service or trademark covered by such relationship) is critical to the applicant's business operation, affiliation is, in part, determined by reviewing the agreement and any related documents governing the relationship (or product, service or trademark) and identifying any areas of control that could cause the applicant to not be considered independent.

Restraints imposed on a franchisee or licensee related to standardized quality, advertising, accounting format and other similar provisions generally are not considered in determining whether affiliation exists if the applicant has the right to profit from its efforts and bears the risk of loss commensurate with ownership. However, common ownership, common management or excessive restrictions upon the sale of the franchise interest may be means by which affiliation is determined to arise. 13 CFR 121.103(i).

SBA has issued procedures for review of such agreements in connection with its business loan programs in SBA's Standard Operating Procedure (SOP) 50 10 5(G), Subpart B, Chapter 2, Paragraph III.B.9 and Subpart C, Chapter 2, Paragraph III.B. 5 (which may be revised periodically). If the franchise review leads to a determination that the parties are affiliated, then the size (e.g., revenues, employees, net worth or net income) of the applicant and the franchisor/licensor/etc. will be combined to determine whether the applicant is small for purposes of SBA's business loan programs.

Under SBA's current processes, this review is conducted by SBA for certain loan applications and by participating lenders or certified development companies (CDCs) for other loan applications. SBA conducts the review for applications submitted under "non-delegated" processing by lenders participating in SBA's 7(a) business loan program (7(a) lenders and by CDCs in SBA's development company program (also known as the 504 loan program). For 7(a) loan applications processed under a 7(a) lender's delegated authority, the 7(a) lender is responsible for conducting the review. However, SBA also provides these lenders the option of submitting the relevant documents to SBA for review and a determination as to whether the parties to the agreement are affiliated.

To assist in the review of franchise and other similar relationships for the SBA business loan programs, SBA makes available a listing that identifies franchise and other similar agreements that have been approved by SBA regarding affiliation and control issues only, and therefore do not require additional review of the franchise agreement for those issues (i.e., these agreements do not demonstrate a level of control, referred to in this notice as "excessive control" such that the parties are considered to be affiliated). SBA posts the listing of agreements approved for those issues on SBA's Web site at www.sba.gov/for-lenders. This information is also currently available to the public at no cost at www.franchiseregistry.com (the Registry).

A franchise system need not be on SBA's Web site or the Registry in order to be considered acceptable for affiliation purposes, but franchise agreements on SBA's Web site or the Registry have already undergone a review and been found acceptable on those issues only. The listing of an agreement does not mean that the loan applicant meets all SBA size, eligibility, underwriting and other loan program requirements. Also, further review may be necessary if there is an amendment to the agreement or there is a formal size protest.

SBA also has developed the Franchise Findings List (the List), available on SBA's Web site at <http://www.sba.gov/content/franchise-findings>, which contains a list of franchise eligibility issues that SBA has identified over the years and contains the names of those franchises and other systems that have requirements in their franchise or other agreement that could cause a franchised business to be affiliated. The List is made available for use by 7(a) lenders and CDCs, as well as by SBA staff, in evaluating the size eligibility of a business that would operate under a franchise or similar agreement. The List is only a guide and is not a substitute for a full review of the agreement and related documents.

DANGER PAY FOR YEMEN GOES TO THE MAX

DANGER PAY

	FROM	TO
YEMEN		
OTHER	30	35
SANAA	30	35

2015: A YEAR OF H.R. CHALLENGES FOR GOVERNMENT CONTRACTORS

In an article written by Blake Bertagna which appeared December 9th in *Law360*, he wrote: The New Year is approaching. This is a time of reflection upon the year prior and a time of anticipation for the year ahead.

The White House gave federal government contractors much to reflect upon in 2014 and to anticipate as 2015 begins. In his State of the Union address in January, President Obama declared that it would be a “year of action.” If lawmakers would not act, the president promised he would: “[W]herever I can act on my own, without Congress, by using my pen to take executive actions, or picking up the phone and rallying folks around a common cause, that’s what I’m going to do.”

And a year of action it was. President Obama issued five significant orders or directives that could have widespread ramifications for federal government contractors for years to come. Looking ahead, federal government contractors will have their own year of reaction as they strive to bring themselves into compliance with new obligations flowing from President Obama’s active pen.

A. Executive Order 13658: The Minimum Wage Order

On Feb. 12, 2014, President Obama signed Executive Order 13658, establishing a minimum wage for federal contractors and subcontractors. On Oct. 7, 2014, the U.S. Department of Labor issued a final rule implementing Executive Order 13658.

New Minimum Wage

The minimum wage to be paid to workers performing on or in connection with a “covered contract” governed by the final rule must be at least:

\$10.10 per hour, beginning Jan. 1, 2015; and beginning Jan. 1, 2016, and each following year, an amount determined by the secretary pursuant to the executive order.

Covered Contracts

The minimum wage order applies only to new contracts, and replacements for expiring contracts, with contracting agencies resulting from solicitations issued on or after Jan. 1, 2015 (or to contracts that are awarded outside the solicitation process on or after Jan. 1, 2015) that fall within one of four categories of contracts:

- Construction contracts covered by the Davis-Bacon Act
- Service contracts covered by the Service Contract Act

- Concessions contracts and
- Contracts in connection with federal property or lands and related to offering services for federal employees, their dependents or the general public.

Covered Workers

Workers whose wages are governed by the above-listed laws are generally entitled to receive the mandated minimum wage in two scenarios: (1) workers performing “on” covered contracts (i.e., directly performing the specific services under the contract); and (2) workers performing “in connection with” covered contracts (i.e., workers performing other duties necessary to the performance of the contract), unless less than 20 percent of their hours in a given workweek are related to the covered contracts.

New Obligations

The final rule results in three new requirements for covered contractors. Contractors and subcontractors must pay all covered workers the new minimum wage for all hours worked. They must flow down the executive order contract clause to covered lower-tier subcontracts. They must notify subject workers of the applicable minimum wage rate by posting a notice in a prominent and accessible place at the worksite, or by posting a notice on its website.

B. Executive Order 13665: The Pay Transparency Order

President Obama claims that the “wage gap” between men and women is driven in part by employer policies prohibiting the disclosure or discussion of employee compensation. To that end, on April 8, 2014, President Obama signed Executive Order 13665 to encourage pay transparency. On Sept. 17, 2014, the DOL issued a notice of proposed rulemaking. The Office of Federal Contract Compliance Programs recently indicated it plans to release a final rule implementing Executive Order 13665 in September 2015.

Prohibiting Discrimination: Disclosure of Compensation

If the proposed rule becomes final, it will provide that contractors “will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.”

There are some exceptions to the general rule. Employers may generally take adverse action against employees who disclose or discuss compensation information they have access to as part of their work duties (e.g., a human resources employee). In addition contractors may take adverse action in accordance with a legitimate workplace rule that is consistently and uniformly applied (e.g., prohibiting disruptive behavior at work).

New Obligations

The proposed rule, if passed, will require contractors to assume three new obligations.

Contractors must abide by the new nondiscrimination obligation (i.e., not discriminating for employee/applicant inquiries, discussions and disclosures related to compensation). Contractors must include the amended equal employment opportunity clause in their subcontracts and purchase orders.

They must publish the OFCCP-required nondiscrimination provision by: (1) inserting it in their employee manuals or handbooks, and (2) disseminating it to employees and job applicants, which may be done by circulating electronically or by posting a physical copy in conspicuous places available to employees and applicants.

C. Presidential Memorandum: The Pay Data Collection Order

On the same day President Obama issued Executive Order 13665, he signed a presidential memorandum, directing the Secretary of Labor to promulgate a rule requiring federal contractors and subcontractors to submit “summary data on the compensation paid their employees.” On Aug. 6, 2014, the OFCCP published a proposed rule requiring the annual filing of an equal pay report (“EPR”). The OFCCP intends to issue rules finalizing the EPR in August 2015.

Who Must File the EPR?

The EPR would be an annual obligation for most federal contractors and subcontractors, who meet three requirements.

- They are a prime contractor or first-tier contractor required to file EEO-1 reports
- They have more than 100 employees and
- They have a contract, subcontract or purchase order that: (1) exceeds \$50,000 in value and (2) covers a period of at least 30 days, including modifications.

What Must be Included in the EPR?

Contractors will submit “summary data” for the prior calendar year that will include: the total number of workers within each EEO-1 job category by race/ethnicity and sex; the total W-2 wages for all workers in each EEO-1 job category broken down by race/ethnicity and gender; and the total hours worked for all employees in each EEO-1 category by race/ethnicity and gender.

When Must the EPR Be Filed?

The EPR must be filed between Jan. 1 and March 31. The EPR will report the summary compensation data from the prior calendar year (Jan. 1 to Dec. 31) as to those employees who appeared in the contractor’s most recent EEO-1 report.

How Must the EPR Be Filed?

The OFCCP states it will “treat information contained in the Equal Pay Report as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of

Information Act, 5 U.S.C. § 552.” The OFCCP, however, also would require contractors to submit the EPR electronically through a web-based filing system. If the proposed rule becomes final, contractors will need to be thoughtful about presenting their summary data in a manner that maximizes confidentiality.

D. Executive Order 13672: The LGBT Order

Prohibiting Discrimination: Sexual Orientation and Gender Identity

President Obama consistently has expressed his commitment to equality of rights for the lesbian, gay, bisexual and transgender community. Despite the Senate’s passage of the Employment Non-Discrimination Act, which would make it illegal to discriminate in employment on the basis of sexual orientation or gender identity, it has not become law. The lack of congressional action did not deter President Obama’s “year of action.”

In July 2014, he signed Executive Order 13672, amending Executive Order 11246, which prohibits employment discrimination by contractors on the bases of race, color, religion, sex and national origin. On Dec. 3, 2014, the OFCCP announced a final rule implementing Executive Order 13672, which amends the implementing regulations of Executive Order 11246 by replacing the words “sex, or national origin” with the words “sex, sexual orientation, gender identity, or national origin.”

New Obligations

The final rule, which will be effective 120 days after publication in the Federal Register, results in three obligations for covered contractors.

- Contractors must update the flow down language in new or modified subcontracts and purchase orders
- Contractors must ensure that applicants and employees are treated without regard to their sexual orientation and gender identity and
- Contractors must update the “tag line” used in their job solicitations and postings to include these two new protected classes.

The final rule settles the speculation that the OFCCP might require contractors to collect or analyze data on the bases of sexual orientation or gender identity or set placement goals on either ground. Contractors will satisfy their affirmative action obligations by simply complying with the three obligations noted above.

E. Executive Order 13673: The Fair Pay and Safe Workplaces Order

The four executive orders or directives discussed above are consistent with two key pieces of President Obama’s agenda since he entered the White House: pay and LGBT equality. The final executive order sweeps much broader and is likely equal in significance to the EPR.

Labor Violation Disclosures

In connection with seeking an award of a new federal procurement contract valued at more than \$500,000, bidding contractors must disclose to the contracting agency whether they have incurred any: (1) adverse administrative merits determination, (2) arbitral award or (3) civil judgment within the preceding three years for one or more 14 covered federal statutes and equivalent state laws, covering wage and hour, safety and health, collective bargaining, family and medical leave and civil rights protections. For a contractor with operations in all 50 states this means tracking over 700 separate employment laws or regulations.

If a bidding contractor has one or more violations to report, it will provide additional disclosures about their corrective measures to address the violations. The contractor agency will review and evaluate that information provided to determine whether the bidding company is “a responsible source that has a satisfactory record of integrity and business ethics.”

In addition, every six months the contractor must update its preaward disclosures. If a contractor discloses new information within the scope of the rule, the contracting agency will re-evaluate the contractor’s status and determine whether action is necessary in response to the new information.

Contractors will have to flow this duty down to their subcontractors.

Pay Transparency

The typical employee is used to receiving a regular paycheck that provides information related to the employee’s pay and hours. Executive Order 13673 requires employers to make additional disclosures to their employees and independent contractors regarding their employment status, hours, and pay. Contractors must similarly obligate their covered subcontractors.

Predispute Arbitration Agreements

For federal contracts of \$1 million or more, contractors cannot require their employees to enter into arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment -- unless the employer secures the voluntary consent of the employee or independent contractor to arbitration after such disputes arise.

There are two exceptions. The prohibition on pre-dispute arbitration agreements does not apply to: (1) employees covered by collective bargaining agreements; or (2) employees who enter into an otherwise valid arbitration agreement before a contractor bids on a covered contract, unless the agreement between the employee and contractor is subject to unilateral change or is renegotiated or replaced.

Contractors must also flow this obligation down to their covered subcontractors.

Conclusion

The DOL estimates that there are roughly 24,000 businesses with federal contracts, employing about 28 million workers. If all of President Obama's actions are implemented, they will have a widespread impact across these thousands of businesses. President Obama delivered his year of action in 2014. Federal contractors will need to be the ones taking action in 2015.

USAID IG MICHAEL CARROLL RETIRES IN WAKE OF WHISTLEBLOWER CLAIMS, TO BE REPLACED BY CATHERINE TRUJILLO

Michael Carroll, the deputy inspector general for USAID, will retire at the end of the year after allegations by whistleblowers that his office improperly altered and removed negative findings from audit reports before releasing them to the public, according to a December 8 *Washington Post* article.

He said Deputy Inspector General Catherine Trujillo will take over the day-to-day operations of the office until a permanent replacement is named which is unlikely until next year.

In October, The Washington Post reported that 8 current and former auditors and employees at the USAID inspector general's office complained that negative findings had been stricken from audit reports between 2011 and 2013. The Post also found that sharply critical passages had been removed from a dozen audits and that more than 400 negative comments about USAID and its mission offices had been deleted from final reports.

The Post also reported that Sen. Tom Coburn and investigators working for the Senate Homeland Security and Governmental Affairs Committee had been examining the allegations and interviewing whistleblowers.

Auditors and others in the inspector general's office said Carroll had increasingly become a defender of USAID and he did not want to create controversy while awaiting Senate confirmation to become the permanent inspector general. Carroll and his deputies have denied the accusations.

The inspector general's office said the alterations and deletions were based on editorial judgments and accounting principles. Deputies in the office said there was no effort to play down reports that cast USAID or any other federal agency in a negative light. The deputies also said that the office has changed its auditing policies and has become more transparent by posting once-confidential audit information on its Web site.

As The Post was preparing to publish its examination of the whistleblowers' allegations, Carroll on October 22 withdrew his nomination to become the permanent inspector general. He noted that he did not expect the Senate to approve his nomination in the near future but he said he planned to remain in the office as a deputy inspector general.

Carroll did not say why he changed his mind. In a brief e-mail exchange with The Post on Monday, he said that his e-mail to his staff "captures my sentiments completely, so I'm not certain there is anything more that needs to be said."

By way of introduction, Catherine Trujillo has occupied leadership and management roles in the USAID OIG since 2006. Before assuming her current position as Deputy IG, Ms. Trujillo served as Regional Inspector General in Cairo from 2012 through 2014. She previously managed OIG's country office in Iraq and regional offices covering Asia and Latin America and the Caribbean.

Prior to joining OIG in 2001, Ms. Trujillo served as a supervisory auditor with the Defense Contract Audit Agency (DCAA) where she worked for 14 years. While with DCAA, Ms. Trujillo developed expertise in contract management. She is a Certified Public Accountant.

Catherine has a reputation as a no-nonsense, by-the-book highly professional auditor who was known to read the contract before auditing it – with a warm, disarming smile.

USAID WORKING TO WHITTLE AWAY THE BACKLOG OF UNCOMPLETED CONTRACTOR AUDITS, DOWN BY 25% IN FISCAL 2014

According to the fiscal 2014 USAID Financial Report, audits of USAID's for-profit contractors traditionally are conducted by the Defense Contract Audit Agency (DCAA) under a reimbursable agreement with USAID. In the past, USAID has not made timely requests for many of these audits due to insufficient funds. DCAA has also been slow to respond to audit requests. As a result, as of September 30, 2014, USAID continues to have a backlog of about 157 incurred cost audits; in fiscal 2013, the backlog was about 210.

To clear the backlog, USAID has taken or plans to take the following actions. First, it provided increased funding for incurred cost audits and proposes a working capital fund to finance future audits, setting aside a small percentage of program funds each time a contract award is made. Second, USAID is using contracts with public accounting firms to augment DCAA's audit efforts.

Third, USAID has funded a liaison position at DCAA to monitor audits requested by USAID, facilitate resolution of problems with those audits (e.g., taking action on delayed audits). And see that USAID receives periodic status reports. Finally, DCAA has dedicated six virtual incurred cost teams at field offices to conduct USAID's incurred cost audits.

During fiscal 2014, USAID focused on completing incurred cost audits for contractors with the largest dollar awards. These efforts have resulted in the completion of 97 audits. USAID established and exceeded its goal during fiscal 2014 to fund 60 percent of complete audit submissions provided by contractors and accepted by the Office of Acquisition and Assistance. USAID actually funded all submissions submitted and accepted during fiscal 2014. USAID also established a goal of clearing the backlog of completed audits within the next 4 years.

THE GRINCH AT CHRISTMAS: THE NSF IG

\$25,000 for a Christmas party, \$11,000 for premium coffee services -- all this was billed to taxpayers by a federally funded science group, according to a scathing National Science Foundation (NSF) inspector general report.

The audit, conducted by the NSF OIG and the Defense Contract Audit Agency, detailed spending by the Colorado-based National Ecological Observatory Network (NEON). The nonprofit, designed to operate a network of ecological observatories across the continent, is solely funded by the National Science Foundation.

The report found that spending at the group has gotten out of control. "Given the present lack of controls, there is virtually no accountability over the contingency funds ... NSF does not have sufficient safeguards over the significant and unsupported contingency costs included in NEON's award budget," the report said.

The report, and the spending, was the subject of a December 3rd House science committee hearing.

Among the spending was a slew of items billed to the National Science Foundation between mid-September 2012 and mid-April 2013, under a so-called "management fee." They included the lavish Christmas party, the coffee services, \$3,000 for "alcohol-fueled" Board of Directors dinners, \$3,000 for T-shirts and more. It also included \$112,000 for lobbying, according to the report. According to a whistle-blower document, the Christmas and holiday party costs included more than \$12,000 for expenses at a Westin Hotel.

"Why did NSF allow this to happen?" Science Committee Chairman Lamar Smith said at the hearing. "The NSF needs to be held accountable for how they spend taxpayers' hard-earned dollars."

Though it wasn't in the IG report, Smith also alleged trips to a "high-end resort in France."

Asked for comment, an NSF spokeswoman said the agency has initiated a review of "management fee policies and controls."

"Consistent with government-wide regulations that govern audit resolution, NSF has policies and procedures for resolving and following up on and recommendations contained in audit reports issued by the Office of the Inspector General," the spokeswoman said, adding the agency will post its final decision online.

NEON Board Chairman James Collins also defended the organization. "NEON, Inc. has always spent all funding in strict compliance with our understanding both of the guidelines provided to the organization and the law," he said in a statement.

Defense Contract Audit Agency Director Anita Bales says, "Because these expenses were covered by a management fee, we did not question them as unallowable."

The committee says management fees awarded to the Network have been used in ways not appropriate for years and past audits have been ignored. This misspent money is coming from a \$434-million dollar construction project within the network. Thirty-six percent of that budget, which is more than \$150 million, is found to have an "unacceptable level of accounting." It's

money directly allocated for research.

DCAA AUDIT REPORTS MATERIAL NONCOMPLIANCE FOR NSF NONPROFIT NOT SEPARATING ITS F&A RATES AND QUESTIONS USE OF MANAGEMENT FEE

In greater detail, following up the above article, Anita Bales, Director, Defense Contract Audit Agency (DCAA) testified at the House Science, Space, and Technology Committee Hearing; "Review of the Results of Two Audits of the National Ecological Observatory Network."

She started off by reviewing DCAA's role in such civilian agency contracts. DCAA has performed contract audits for civilian agencies since its inception in 1965, a function that represents between 9 to 11 percent of our budget, or \$50 to \$64 million in funding. Both the type and scope of DCAA's efforts at civilian agencies are very similar to the audits we perform for the Department of Defense.

One of the contractors that NSF requested help with is the National Ecological Observatory Network (NEON), she mentioned. NEON is a non-profit organization and as a non-profit must follow the cost principles outlined in OMB Circular A-122 for determining costs of grants, contracts and other agreements. While not as comprehensive, OMB Circular A-122 is similar in principle and function to the Federal Acquisition Regulations (FAR). DCAA has performed two significant audits at NEON.

DCAA's audit disclosed two material noncompliances, Bales said. First, NEON failed to comply with the OMB Circular A-122 requirement that organizations receiving more than \$10 million in Federal funding of direct costs in a fiscal year must break out indirect costs into two broad categories: Facilities and Administration (F&A), before developing indirect rates. Prior to DCAA's audit, NEON had reported these indirect costs together. (This audit finding could have ramifications for USAID Overhead, Special Cost and Closeout Branch's heretofore practice of allowing its largest nonprofits to separately account for F&A rates, but to not require them to bid or bill two separate F&A rates for their awards.)

Second, DCAA's audit determined that NEON excluded unallowable costs from the G&A -- somewhat similar to, but not the same as, the widely-used modified total direct cost -- base. OMB Circular A-122 requires unallowable costs be included in the G&A allocation base so they absorb their share of an organization's indirect expenses.

DCAA also provided the NSF Inspector General with supplemental information related to NEON's use of the management fee it earns under the cooperative agreement. (USAID's 22 CFR 226.81, Prohibition Against Profit, has not allowed profit or a management fee to be reimbursed on its assistance awards.) Based on DCAA's observations during the accounting system review, NEON and NSF negotiated a "management fee" in the cooperative agreements that NEON uses to pay non-reimbursable costs incurred by NEON.

The NSF Proposal Award Policies and Procedures Guide and the NSF Grant Policy Manual address fee in general terms, making it clear that fee is permissible if approved by the grants/agreements officer, which it was. DCAA can find no regulation that prohibits the

payment of a management fee under a cooperative agreement to a non-profit entity. The management fee established for this cooperative agreement is 0.5 percent, which is at the low end of NEON's stated policy of assessing fees of 0.5-1.0 percent on NSF projects.

However, DCAA was unable to find any NSF Grant Policy determining when a fee should be awarded or how a negotiated fee should be used by a non-profit entity. DCAA also found expenses being incurred that would ordinarily be unallowable under OMB Circular A-122 if they had been paid for separately as costs (for example, \$56,000 for lobby costs and \$19,000 for a holiday party).

DCAA recommended that NSF consider strengthening their Grant Policy to specify requirements for determining and monitoring the award of fee. Specifically, NSF should benchmark with other federal agencies to determine how they use management fee and how other agencies allow the use of that fee.

DIFFERENCES IN INDIRECT COST CAPS AND DEFINITIONS LIMIT MAKING COMPARING PROGRAM ADMINISTRATIVE COSTS DIFFICULT

In GAO Report 15-118, dated December 12, GAO finds administrative costs reported to the federal government may understate the actual cost to administer a grant program. GAO found examples of grantees absorbing part of the costs to administer a grant. Some primary grant recipients stated that when such costs were not reimbursed by the federal grant, they would cover those expenses themselves. Another grantee said he relies on state appropriations to cover the majority of administrative costs.

GAO identified two factors that hinder the comparability of administrative cost data in the programs it reviewed. First, is the existence of cost caps. These caps limit the amount of the grant that may be charged as administrative costs, and thereby affect what is reported to the federal government as administrative costs. For the programs GAO reviewed caps ranging from 5 to 26 percent, with one program having no cap. This variation can make some programs look more administratively expensive than others.

Second, differences in what is defined as an administrative cost can present an even greater challenge to comparing costs across programs. Programs have different missions, priorities, services, and clients; as a result definitions of administrative costs vary from program to program. Therefore, different programs may treat similar costs differently.

A cost that may be classified as administrative in one program may be considered a direct program delivery cost by another. For example, the salary of an employee who enrolls participants in one Department of Health and Human Services (HHS) program is considered a program cost, but an employee who holds a similar position determining the eligibility of participants in another HHS program may be considered an administrative cost depending on the state where it is administered. This variation in definitions means that a program with high administrative costs may not be less efficient than a program with low administrative costs.

Given these issues, GAO found it challenging to collect comparable information for different grant programs. Any use of information on administrative costs needs to recognize these concerns particularly when comparing programs with different types of objectives, projects, or services. Comparisons of costs may be appropriate when reviewing programs that fulfill similar missions or provide similar services. However, comparisons across different types of grant programs should be made with caution.

DOD INCORPORATES DCAA'S CONTRACTOR FORWARD PRICING RATE ADEQUACY CHECKLIST IN ITS REGS

Effective December 11, 2014, DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to provide guidance to contractors for the submittal of forward pricing rate proposals.

DoD revised its DFARS at 215.403-5 by incorporating DCAA's Forward Pricing Rate Adequacy Checklist. Inasmuch as this checklist will also be used by DCAA for reviewing forward rate submissions by USAID's contractors, it should be used by them also.

DFARS 215.403-5 Instructions for submission of certified cost or pricing data and data other than certified cost or pricing data.

(b)(3) For contractors following the contract cost principles in FAR subpart 31.2, Contracts With Commercial Organizations, pursuant to the procedures in FAR 42.1701(b), the Administrative Contracting Officer shall require contractors to comply with the submission items in Table 215.403-1 in order to ensure that their forward pricing rate proposal is submitted in an acceptable form in accordance with FAR 15.403-5(b)(3).

The Contracting Officer should request that the proposal be submitted to the Government at least 90 days prior to the proposed effective date of the rates. To ensure the proposal is complete, the Contracting Officer shall request that the contractor complete the Contractor Forward Pricing Rate Proposal Adequacy Checklist at Table 215.403-1, and submit it with the forward pricing rate proposal.

Table 215.403-1--Contractor Forward Pricing Rate Proposal Adequacy Checklist

Complete the following checklist, providing the location of requested information, or an explanation of why the requested information is not provided, and submit it with the forward pricing rate proposal.

Contractor Forward Pricing Rate Proposal Adequacy Checklist

1. Is there a properly completed first page of the proposal as specified by the contracting officer?
Initial proposal elements include:
 - a. Name and address of contractor;
 - b. Name and telephone number of point of contact;
 - c. Period covered;

- d. The page of the proposal that addresses--
1. Whether your organization is subject to cost accounting standards (CAS);
 2. Whether your organization has submitted a CAS Disclosure Statement, and whether it has been determined adequate;
 3. Whether you have been notified that you are or may be in noncompliance with your Disclosure Statement or CAS (other than a noncompliance that the cognizant Federal agency official had determined to have an immaterial cost impact), and if yes, an explanation;
 4. Whether any aspect of this proposal is inconsistent with your disclosed practices or applicable CAS, and, if so, an explanation; and whether the proposal is consistent with established estimating and accounting principles and procedures and FAR part 31, Cost Principles, and, if not, an explanation;
- e. The following statement:
- "This forward pricing rate proposal reflects our estimates, as of the date of submission entered in (f) below and conforms with Table 215.403-1. By submitting this proposal, we grant the Contracting Officer and authorized representative(s) the right to examine those records, which include books, documents, accounting procedures and practices, and other data, regardless of type and form or whether such supporting information is specifically referenced or included in the proposal as the basis for each estimate, that will permit an adequate evaluation of the proposed rates and factors.";
- f. Date of submission; and
- g. Name, title, and signature of authorized representative.

2. Summary of proposed direct and indirect rates and factors, including the proposed pool and base costs for each proposed indirect rate and factor.

3. Table of Contents or index.

a. Does the proposal include a table of contents or index identifying and referencing all supporting data accompanying or identified in the proposal?

b. For supporting documentation not provided with the proposal, does the basis of each estimate in the proposal include the location of the documentation and the point of contact (custodian) name, phone number, and email address? Does the proposal disclose known or anticipated changes in business activities or processes that could materially impact the proposed rates (if not previously provided)? For example--

4. a. Management initiatives to reduce costs;

b. Changes in management objectives as a result of economic conditions and increased competitiveness;

c. Changes in accounting policies, procedures, and practices including (i) reclassification of expenses from direct to indirect or vice versa; (ii) new methods of accumulating and allocating indirect costs and the related impact; and (iii) advance agreements;

d. Company reorganizations (including acquisitions or divestitures);

e. Shutdown of facilities; or

f. Changes in business volume and/or contract mix/type.

5. Do proposed costs based on judgmental factors include an explanation of the estimating processes and methods used, including those used in projecting from known data?
6. Does the proposal show trends and budgetary data? Does the proposal provide an explanation of how the data, as well as any adjustments to the data, were used?
7. The proposal should reconcile to the supporting data referenced. If the proposal does not reconcile to the supporting data referenced, identify applicable page(s) and explain.
8. The proposal should be internally consistent. If the proposal is not internally consistent, identify applicable page(s) and explain.
 - Direct Labor
 - Direct Labor Rates
 - Methodology and Basis of Each Estimate
9. a. Does the proposal include an explanation of the methodology used to develop the direct labor rates and identify the basis of each estimate?
b. Does the proposal include or identify the location of the supporting documents for the base-period labor rates (e.g., payroll records)?
10. Does the proposal identify escalation factors for the out-year labor rates, the costs to which escalation is applicable, and the basis of each factor used?
11. Does the proposal identify planned or anticipated changes in the composition of labor rates, labor categories, union agreements, headcounts, or other factors that could significantly impact the direct labor rates?
 - Indirect Rates (Fringe, Overhead, G&A, etc.)
12. Indirect Rates Methodology and Basis of Each Estimate.
 - a. Does the proposal identify the basis of each estimate and provide an explanation of the methodology used to develop the indirect rates?
 - b. Does the proposal include or identify the location of the supporting documents for the proposed rates?
13. Does the proposal identify indirect expenses by burden center, by cost element, by year (including any voluntary deletions, if applicable) in a format that is consistent with the accounting system used to accumulate actual expenses?
14. Does the proposal identify any contingencies?
15. Does the proposal identify planned or anticipated changes in the nature, type, or level of indirect costs, including fringe benefits?

16. Does the proposal identify corporate, home office, shared services, or other incoming allocated costs and the source for those costs, including location and point of contact (custodian) name, phone number, and email address?

17. Does the proposal separately identify all intermediate cost pools and provide a reconciliation to show where the costs will be allocated?

18. Does the proposal identify the escalation factors used to escalate indirect costs for the out-years, the costs to which escalation is applicable, and the basis of each factor used?

19. Does the proposal provide details of the development of the allocation base?

20. Does the proposal include or reference the supporting data for the allocation base such as program budgets, negotiation memoranda, proposals, contract values, etc.?

21. Does the proposal identify how the proposed allocation bases reconcile with its long range plans, strategic plan, operating budgets, sales forecasts, program budgets, etc.?

Cost of Money (COM)

22. Cost of Money.

a. Are Cost of Money rates submitted on Form CASB-CMF, with the Treasury Rate used to compute COM identified and a summary of the net book value of assets, identified as distributed and non-distributed?

b. Does the proposal identify the support for the Form CASB-CMF, for example, the underlying reports and records supporting the net book value of assets contained in the form?

Other

23. Does the proposal include a comparison of prior forecasted costs to actual results in the same format as the proposal and an explanation/analysis of any differences?

24. If this is a revision to a previous rate proposal or a forward pricing rate agreement, does the new proposal provide a summary of the changes in the circumstances or the facts that the contractor asserts require the change to the rates?

FORMER LOUIS BERGER CHAIRMAN & CEO ADMITS TO 20-YEAR CONSPIRACY TO DEFRAUD USAID OF MILLIONS IN OVERHEAD CHARGES, FACES UP TO 10 YEARS IN JAIL

The former president, chief executive officer, and chairman of the board of Louis Berger Group pleaded guilty on December 12th to conspiring to defraud USAID with respect to billions of dollars in contracts over a nearly 20-year period, U.S. Attorney Paul Fishman announced.

Derish Wolff, 79, pleaded guilty before U.S. District Judge Anne Thompson in federal court to count one of a six-count indictment, charging conspiracy to defraud the government with respect to claims in *U.S. v. Wolff* (njdc 2011cr00719, Oct. 19, 2011).

"Two years after the Louis Berger Group (LBG) and two of its executives confessed to defrauding USAID, the company's former chairman admitted his role in the scheme," U.S. Attorney Fishman said. "Derish Wolff admitted that he enriched himself and his company with money intended for important reconstruction projects in Afghanistan and Iraq."

According to documents filed in this case and statements made in court, Wolff, the former president and CEO of LBG, and the former chairman of LBG's parent company, Berger Group Holdings Inc. (BGH), led a conspiracy to defraud USAID by billing the agency on so-called "cost-reimbursable" contracts, including \$2.3 billion in contracts for reconstructive work in Iraq and Afghanistan, for LBG's overhead and other indirect costs at falsely inflated rates.

Under these contracts, LBG calculated certain overhead rates and charged USAID and other federal agencies these rates, which enabled LBG to pass on their overhead costs to the agency in general proportion to how much labor LBG devoted to the government contracts.

From at least 1990 through July 2009, LBG, through Wolff and other former executives, intentionally overbilled USAID in connection with these cost-reimbursable contracts. The scheme to defraud the government was carried out by numerous LBG employees at the direction of Wolff.

Wolff targeted a particular overhead rate, irrespective of what the actual rate was, and ordered his subordinates to achieve that target rate through a variety of fraudulent means. From at least as early as 1990 through 2000, Wolff ordered LBG's assistant controller to instruct the accounting department to pad its time sheets with hours ostensibly devoted to federal government projects when it had not actually worked on such projects.

At an LBG annual meeting in September 2001, Salvatore Pepe, who was then the controller and eventually became chief financial officer (CFO), presented a USAID overhead rate that was significantly below Wolff's target. In response, Wolff denounced Pepe, called him an "*assassin*" of the overhead rate and ordered him to target a rate above 140 percent, meaning that for every dollar of labor devoted to a USAID contract, LBG would receive an additional \$1.40 in overhead expenses supposedly incurred by LBG.

In response, Pepe and former controller Precy Pellettieri, with Wolff's supervision, hatched a fraudulent scheme from 2003 through 2007 to systematically reclassify the work hours of LBG's corporate employees, including high-ranking executives and employees in the general accounting division, to make it appear as if those employees worked on federal projects when they did not. Wolff admitted in court that Pepe and Pellettieri, at Wolff's direction, reclassified these hours without the employees' knowledge and without investigating whether the employees had correctly accounted for their time, and at times did so over an employee's objection.

In addition to padding employees' work hours with fake hours supposedly devoted to USAID work, Wolff instructed his subordinates to charge all commonly shared overhead expenses, such as rent, at LBG's Washington, D.C., office to an account created to capture USAID-related expenses, even though the D.C. office supported many projects unrelated to USAID or other federal government agencies.

"Derish Wolff spent close to 20 years creating and executing a series of elaborate fraudulent billing schemes, ultimately defrauding the federal government of tens of millions of dollars," FBI Special Agent in Charge of the Newark, N.J. Office Aaron Ford said.

On November 5, 2010, Pepe and Pellettieri both pleaded guilty before then-U.S. Magistrate Judge Patty Shwartz to separate informations charging them with conspiring to defraud the government with respect to claims. Also on that date, LBG resolved criminal and civil fraud charges related to Wolff's and others' conduct. The components of the settlement included:

- A Deferred Prosecution Agreement (DPA), pursuant to which the U.S. Attorney's Office in New Jersey suspended prosecution of a criminal complaint charging LBG with a violation of the Major Fraud Statute; in exchange, LBG agreed, among other things, to pay \$18.7 million in related criminal penalties; make full restitution to USAID; adopt effective standards of conduct, internal controls systems, and ethics training programs for employees; and employ an independent monitor who would evaluate and oversee the company's compliance with the DPA for a two-year period
- A civil settlement that required the company to pay the government \$50.6 million to resolve allegations that LBG violated the False Claims Act by charging inflated overhead rates that were used for invoicing on government contracts and
- An administrative agreement between LBG and USAID, which was the primary victim of the fraudulent scheme.

In the settlement, the government took into consideration LBG's cooperation with the investigation and the fact that those responsible for the wrongdoing were no longer associated with the company.

The charge to which Wolff pleaded guilty carries a maximum potential penalty of 10 years in prison and a maximum \$250,000 fine, or twice the gain or loss caused by the offense. Sentencing is scheduled for March 20, 2015.

This fraud originally was uncovered by a former LBG accountant who accidentally came across a sheet of paper which laid out the scheme. Upon bringing it to his supervisor, he was told to forget what he saw. Over the next 6 months, he collected evidence which he turned over to the authorities soon after he left LBG's employ. The whistleblower stands to receive up to \$13 million resulting from his filing of a *qui tam* suit under the False Claims Act.

[Editor's Note: You have to wonder how thoroughly DCAA conducted its audits of LBG to have allowed this fraud to go undetected for as long as it did.]

FORMER IRD WORKER INDICTED FOR SOLICITING BRIBES FOR AFGHAN WORK

A former employee of International Relief and Development (IRD) was indicted in the Eastern District of Texas for allegedly soliciting and accepting bribes in exchange for his influence in the award of USAID-funded subcontracts in Afghanistan.

George Green, 57, was charged with conspiracy to structure financial transactions to avoid currency transaction reporting requirements, wire fraud and receipt of bribes in connection with a program receiving federal funds.

According to the indictment, Green was the former director of contracts, procurement and grants for IRD in Afghanistan, and was part of a cooperative agreement between IRD and USAID that sought to promote long-term agricultural development in specific areas in Afghanistan.

The indictment alleges that while working for IRD in Afghanistan, Green solicited and received bribes totaling \$66,000 from a representative of an Afghan firm that contracted with IRD.

Some of those bribe payments were allegedly wired directly to an Italian automobile dealer for Green's benefit. After returning to the U.S., Green allegedly attempted to conceal the bribe proceeds by engaging in a conspiracy to structure cash deposits into his bank and credit card accounts to avoid mandatory cash reporting requirements. Additionally, even after leaving IRD, Green allegedly continued to solicit bribes from the Afghan firm by falsely claiming that he still had the ability to influence the contracting process.

From an IRD statement, "IRD brought this issue to the attention of the USAID's inspector general in May 2012. Since disclosing this information, IRD has cooperated with authorities in support of their investigation."

FILING OF A WRIT OF *CERTIORARI* AT THE U.S. SUPREME COURT IN *U.S. v. CMS* EXTENDED TO JAN. 5, 2015

U.S. Supreme Court Chief Justice John Roberts granted the Solicitor General, U.S. Dept. of Justice, until January 5, 2015, to file its petition for a writ of certiorari in *U.S. v. CMS Contract Management Services, et al.* (SCt. 14A444, Nov. 25, 2014). This is the second request for an extension with the original request granted for a filing by December 5th.

In this case, the U.S. Department of Housing and Urban Development (HUD) is fighting a Federal Circuit Court decision that found the agency's agreements with private companies should be subject to the more stringent competition oversight afforded to contracts, including the ability to protest.

In this case, CMS Contract Management Services accused HUD of seeking to evade competition requirements in its administration of subsidized housing in 42 jurisdictions. The argument had been hashed out in the Government Accountability Office, which sided with the plaintiffs, and the Court of Federal Claims, which sided with HUD, before being overturned by the Federal Circuit.

The Federal Circuit, like the GAO, found that procurement contracts, subject to all the competition and protest rules in the Competition in Contracting Act, should be used when the principal purpose of the agreement is "to acquire property or services for the direct benefit or use of the United States government."

The outcome of this case could have far broader implications than to just the circumstances of this dispute. It could affect the overall contracting and grant-making of as many as 26 Federal awarding agencies, including USAID. Should the case be accepted by the Court, arguments and a resulting ruling would not come before June, at the end of this session of the Court. NGO Financial Newsletter will be closely following developments in this case and will report on it in future editions.

USAID OFFEROR PROTESTS USAID'S CORRECTIVE ACTION

In *DGC International* (DGC), B-410364.2, November 26, 2014, available for download from <http://www.gao.gov/products/B-410364.2>, (DGC) protests the corrective action proposed by USAID in connection with the agency's procurement of logistical support services for USAID's mission in Afghanistan under request for proposals (RFP) No. SOL-306-14-000014.

USAID took corrective action in response to DGC's earlier protest, which GAO subsequently dismissed as academic. See *DGC Int'l*, B-410364, Sept. 18, 2014. DGC argues that the corrective action is improper because it does not remedy what DGC views as the underlying defects in the agency's initial evaluation.

The RFP was issued on May 14, 2014, and provided for the award of a fixed-price, 2-year contract for logistical support services (such as warehousing, open-air staging, and property management services) to support USAID's efforts to reutilize and distribute foreign excess personal property available after the drawdown of international forces in Afghanistan. The solicitation stated that award would be made to the best value offeror based upon the agency's evaluation of the following four factors: technical approach, organization and key personnel, past performance, and price. The RFP established that the agency intended to make award without conducting discussions, but reserved the right to do so if necessary.

On September 16, USAID informed GAO of its intent to take corrective action in response to DGC's September 9 protest. As part of its corrective action, the agency stated that it would reopen discussions with the offerors in the competitive range, request revised proposals, evaluate the revised proposals, and make a new selection decision. On September 17, USAID canceled the contract award and reopened discussions with the four offerors in the competitive range. GAO dismissed DGC's protest as academic on September 18. This protest followed.

DGC protests the agency's proposed corrective action, arguing that it does not remedy the procurement improprieties alleged in DGC's original protest, namely, that USAID's evaluation and source selection decision were biased (in favor of the awardee) and based on unstated evaluation criteria. The protester contends that the agency does not have a reasonable basis for reopening discussions and requesting further proposal revisions.

In response to the protester's allegations, USAID states that, after receiving DGC's September 9 protest, the agency reviewed the procurement and determined that it may have conducted unequal discussions with offerors in the competitive range. Specifically, the Contracting Officer

states that, during discussions, the agency advised only two of the four offerors in the competitive range of evaluated weaknesses in their technical proposal, but failed to similarly identify weaknesses in the other two offerors' (including DGC) proposals.

GAO sees no basis to object to USAID's corrective action. In this regard, the record here supports the agency's assertion that it failed, during discussions, to identify technical weaknesses in DGC's proposal. Notably, DGC does not rebut (or address) the agency's assertion that it conducted unequal discussions, or that the agency failed, in its discussion letter, to identify weaknesses in DGC's technical proposal. Thus, GAO concludes that the agency's corrective action was reasonable because it remedies the errors uncovered by the agency.

The protester also asserts that the corrective action failed to address certain of the protester's original protest grounds. As stated above, the agency has cancelled the award, and will reopen discussions, request final proposals, and reevaluate revised proposals. Because the agency has not conducted its reevaluation of offers or indicated that the protester's offer will be excluded from award consideration, DGC's allegations merely anticipate prejudicial agency action and are, therefore, speculative and premature. In general, GAO assumes that agencies will conduct procurements in a fair and reasonable manner in accordance with the terms of the solicitation, and our Office will not consider a protest allegation which speculates that an agency will not evaluate proposals in the manner set forth in the solicitation. The protest is denied.

2014 WAS A BANNER YEAR WITH 30 USAID PROTESTS FILED, 2015 WILL PROBABLY SEE MORE

Even surpassing last year's record, this year has seen 30 protests filed with the Government Accountability Office in connection with USAID's contract competitions. All told, 12 protests or 40% were dismissed with USAID taking some kind of a corrective action, 7 were denied, 3 sustained in the protests of IRG, 5 withdrawn and 3 not decided as yet.

Not counting the duplicative protests filed by the same contractor for the same contract competition, USAID protesters had a better than even chance (11 out of 18) to either have their protest dismissed with USAID corrective action or have it sustained.

With more bidders competing for a shrinking USAID contract pie, plus the prospect of protests being filed by both offerors and applicants over the selection of type of instrument, 2015 will likely see even more protests.

The currently open protests are:

[Pi Consulting](#)

Solicitation Number: SOL-168-14-000006

File Number: B-410734.2 Outcome: Not Decided Status: Case Currently Open

[Open System Science of Virginia, Inc.](#)

<http://www.gao.gov/docket/B-410572.2>

Solicitation Number: SOL-CIO-13-000015
File Number: B-410572.2 Outcome: Not Decided Status: Case Currently Open

[Open System Science of Virginia, Inc.](#)
<http://www.gao.gov/docket/B-410572.1>

Solicitation Number: SOL-CIO-13-000015
File Number: B-410572.1 Outcome: Not Decided Status: Case Currently Open

Since our last reporting, the 9 bid protests have been resolved.

[Chemonics International, Inc.](#)
<http://www.gao.gov/docket/B-409346.7>

Solicitation Number: SOL-OAA-13-000033
File Number: B-409346.7 Outcome: Denied Date Decided: Dec. 11, 2014

[Chemonics International, Inc.](#)
<http://www.gao.gov/docket/B-409346.5>

Solicitation Number: SOL-OAA-13-000033
File Number: B-409346.5 Outcome: Denied Date Decided: Dec. 11, 2014

[Chemonics International, Inc.](#)
<http://www.gao.gov/docket/B-409346.3>

Solicitation Number: SOL-OAA-13-000033
File Number: B-409346.3 Outcome: Denied Status: Dec. 11, 2014

[Chemonics International, Inc.](#)
<http://www.gao.gov/docket/B-409346.8>

Solicitation Number: SOL-OAA-13-000033
File Number: B-409346.8 Outcome: Denied Date Decided: Dec. 11, 2014

[International Resources Group](#)
<http://www.gao.gov/docket/B-409346.9>

Solicitation Number: SOL-OAA-13-000033
File Number: B-409346.9 Outcome: Sustained Date Decided: Dec. 10, 2014

[International Resources Group](#)
<http://www.gao.gov/docket/B-409346.6>

Solicitation Number: SOL-OAA-13-000033
File Number: B-409346.6 Outcome: Sustained Date Decided: Dec. 10, 2014

[International Resources Group](#)
<http://www.gao.gov/docket/B-409346.2>

Solicitation Number: SOL-OAA-13-000033
File Number: B-409346.2 Outcome: Sustained Status: Dec. 10, 2014

Pi Consulting

<http://www.gao.gov/docket/B-410734.1>

Solicitation Number: SOL-168-14-000006
File Number: B-410734.1 Outcome: Dismissed Date Decided: Dec. 2, 2014

DGC International

<http://www.gao.gov/docket/B-410364.2>

Solicitation Number: SOL-306-14-000014
File Number: B-410364.2 Outcome: Denied Date Decided: Nov. 26, 2014

PROTECTING A NOT-FOR-PROFIT AFFILIATED WITH A FOR-PROFIT PARENT FROM IRS CHALLENGE

John Knab, an attorney with Washington’s Garvey Schubert Baker, wrote to us about our article on “NGOs and Contractors Setting Up Affiliated Entities with Low Indirect Cost Rates to Be Eligible for Additional International Development Funding” which appeared in last month’s Newsletter.

“I found the article regarding contractors setting up affiliated non-profit entities to be very interesting. You wrote that “[f]or-profit contractors recognize for foundation and other restricted funding they will have to set up an affiliated not-for-profit entity(ies) to be eligible for such awards.”

“You then added:

So the answer has got to be for such for-profits to set up an affiliated not-for-profit entity in order to be eligible for such awards, and to shield it from any self-dealing by the for-profit parent. (emphasis added.)”

“The underlined language is key. I would like to caution companies about the risks about ‘affiliated not-for-profit entities’ (sometimes called ‘pocket non-profit’), as this concept raises serious red flags for the IRS. The IRS is concerned about two problems:

1. Private benefit: does the for-profit company control the non-profit and use it to the for-profit company’s benefit?
2. Conflict of interest: do the directors and officers of non-profit have a conflict of interest with regard to for-profit entity?”

“For “affiliated not-for-profit entities,” the answer is that the organization and its founders must be extremely careful to avoid answering ‘yes’ to both questions. It is harder than it appears.”

“An example shows the problems:

Help, Inc. is a for-profit company that does international economic development work. Help helps form Free Help, Inc., a not for profit, so that Free Help can apply for and perform international economic development work for U.S. foundations, which Help cannot do cost-effectively. Help and Free Help do the same work -- international economic development work. The goal of Help is that Help will do the USG-funded, high indirect cost rate (ICR) work and that Free Help will do the foundation-funded low-ICR work. In addition, many of the employees of Help are also employees of Free Help and there is some overlapping management. By keeping Help’s employees busy on Free Help projects, Help can [recover] some of its compensation and overhead costs.”

“This scenario raises two serious concerns: (1) private benefit to Help and (2) conflict of interest by the directors and officers of Free Help.”

“Under IRS rules, Free Help must be completely independent of Help. However, if Free Help’s directors and officers defer to Help’s management and never bid on the USG-funded, high ICR work (leaving that to Help), then arguably (A) Free Help is operating in significant part in order to provide a benefit to Help, i.e., keeping Help’s employees busy and helping to cover overhead; and (B) the Free Help directors have a conflict of interest with regard to Help, i.e., they are rejecting opportunities that could go to Free Help in order to leave them for Help. If Free Help were truly independent, why wouldn’t its directors and officers bid on USG-funded, high-ICR programs within Free Help’s area of expertise? In short, there is a significant risk of an allegation that Free Help is controlled by Help and is not an independent organization.”

“What are the solutions?”

There are ways for Help and Free Help to co-exist with less risk of running afoul of the rules prohibiting private benefit and conflict of interest. As examples, (a) Help and Free Help can have separate areas of expertise or focus, so that Free Help’s opportunities differ from Help’s and/or (b) Free Help can be truly independent and can compete with Help for the USG-funded, high-ICR work.”

“In sum, the for-profit entities need to keep these rules in mind, analyze their proposed plans from the view point of a skeptical IRS analyst, and be willing to surrender control of the non-profit to its independent directors and officers.”

If you would like to contact Mr. Knab directly about his comments, his email address is jknab@gsblaw.com.

STANDARD IRS MILEAGE RATES UP FOR 2015

Optional standard mileage rates for use of a vehicle will change a little for 2015, the IRS announced on Wednesday, with the business use rate going up and the medical and moving rate going down ([Notice 2014-79](#)). Taxpayers can use the optional standard mileage rates to calculate the deductible costs of operating an automobile.

For business use of a car, van, pickup truck, or panel truck, the 2015 rate will be 57.5 cents per mile, slightly higher than the 56 cents per mile rate that applies for 2014. Driving for moving purposes may be deducted at 23 cents per mile, which is one-half cent lower than for 2014.

The portion of the business standard mileage rate that is treated as depreciation will be 24 cents per mile for 2015, up two cents from the 22-cent rate in effect for 2014.

For purposes of the allowance under a fixed and variable rate (FAVR) plan, the maximum standard automobile cost for 2015 is \$28,200 for automobiles (not including trucks and vans) and \$30,800 for trucks and vans, with no change for automobiles but an increase of \$400 for trucks and vans, from 2014. Under a FAVR plan, a standard amount is deemed substantiated for an employer's reimbursement to employees for expenses they incur in driving their vehicle in performing services as an employee for the employer.

FISCAL 2015 NATIONAL DEFENSE AUTHORIZATION ACT PASSES WITH MANY CONTRACT AND GRANT REFORMS

Annually, the national defense authorization acts (NDAA) contain many, government-wide acquisition reforms which, within 1-2 years, make their way into amendments to the Federal Acquisition Regulation and then into RFPs and contracts and subcontracts. This year is no exception. But what is different this year is that there are also a sprinkling of some changes which will impact grants and cooperative agreements throughout the U.S. government.

This year, in Title VIII – Acquisition Policy, Acquisition Policy and Related Matters of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act of 2015 (HR 3979), there are a number of pertinent, non-defense oriented provisions worthy of your attention, namely:

1. Permanent authority for use of simplified acquisition procedures for certain commercial items (Sec. 815): This authority is made permanent herewith.
2. Temporary extension of and amendments to a controversial test program for negotiation of comprehensive small business subcontracting plans (Sec. 821): To its critics, this program has not produced a single report from the major contractors nor has it produced any quantifiable results. In an attempt to assuage these concerns, the language in this provision requires contractors to report greater detail on subcontracting more frequently.
3. Plan for improving data on bundled or consolidated contracts (Sec. 822): This provision would require the Small Business Administration to work with other agencies to create and implement a data quality improvement plan to promote greater accuracy in the reporting of contract bundling and consolidation.
4. Matters relating to reverse auctions (Sec. 824): This would prohibit the use of reverse auctions for procurement of certain goods and services if the contract is awarded using a Small Business Act procurement authority.
5. Sole source contracts for small business concerns owned and controlled by women (Sec. 825): This would allow for sole source contracting to certain women owned small businesses **if** the Contracting Officer does not have a reasonable expectation that 2 or

more businesses will submit offers; (2) the anticipated award price of the contract (including options) will not exceed (a) \$6,500,000, in the case of a contract opportunity assigned a standard industrial classification code for manufacturing, or (b) \$4,000,000, in the case of any other contract opportunity; and (3) the contract award can be made at a fair and reasonable price. (According to Sen. Maria Cantwell, head of the Senate Small Business and Entrepreneurship committee, "it opens up a market opportunity of \$4 billion in U.S. government contracts for women entrepreneurs.")

6. Enhancement of whistleblower protection for employees of grantees (Sec. 856): This provision enhances the whistleblower safeguards for employees of grantees.
7. Prohibition on reimbursement of contractors for congressional investigations and inquiries (Sec. 857): This would prohibit reimbursement of costs incurred by a contractor in connection with a congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition.

The following legislative provisions were not adopted:

- Consolidating the verification and appeals processes for Service-Disabled Veteran-Owned Small Business (SDVSB) programs at the Department of Veterans Affairs and the Small Business Administration (Sec. 812 of H.R. 4435)
- Increasing the Small business and subcontract participation goals from 23% to 25% (Sec. 818 of H.R. 4435)
- Authority of DCAA to interview contractor employees in connection with the examination of contractor records (Sec. 825 of S. 2410)

PROVISION INCREASING SHIPMENT OF FOOD AID STRICKEN FROM SENATE-PASSED REAUTHORIZATION

A coalition of food aid NGOs were successful in getting lawmakers to purge a provision in a bill (HR 4005), introduced by Rep. Duncan Hunter, that could have cut the amount of food aid they would be able to distribute in the future.

Section 318 of the Bill would have increased from 50 percent to 75 percent the amount of food aid that must be transported on privately owned, U.S.-flagged ships. In 2012, Congress had lowered the requirement from 75 percent to 50 percent.

The Senate approved a two-year Coast Guard funding reauthorization bill on December 10 after striking the provision and sent along the Howard Coble Coast Guard and Maritime Transportation Act of 2015 and 2016 (S. 2444) to President Obama on December 12.

FOUR FOREIGN AID BILLS NOT PASSED BY END OF 113RD CONGRESS

Feed the Future Act of 2014 (HR 5656): Passed the House on December 10 and received in the Senate on December 11 too late to be taken up. Expressed the sense of Congress that U.S. efforts to end global poverty should build upon the progress and successes of the Feed the Future

Initiative in supporting agricultural development and addressing chronic hunger and malnutrition. Directs the President, acting through specified federal departments and agencies, to provide assistance to reduce poverty and hunger in developing countries.

Electrify Africa Act of 2014 (HR 2548): Passed the House on May 8 and sent to the Senate where it remained in the Senate Foreign Relations Committee at the end of this Congress. Directed the President to establish a multiyear policy, partnership, and funding strategy to assist countries in sub-Saharan Africa develop an appropriate mix of power solutions to provide sufficient electricity access to people living in rural and urban areas in order to alleviate poverty and drive economic growth.

Ebola Emergency Response Act (HR 5710): Would authorize USAID to provide emergency assistance under the International Disaster Assistance account to countries affected by the Ebola epidemic. Reported by the House Foreign Affairs Committee on November 20th; no action in the Senate.

Global Development Act of 2014 (HR 4905 & S. 2502): Not reported out by the House Foreign Affairs and Science and the Space and Technology Committees or the Senate Foreign Relations Committee. Would have authorized within USAID the U.S. Global Development Laboratory.

ANN MEI CHANG JOINS USAID AS GLOBAL DEVELOPMENT LAB EXECUTIVE DIRECTOR

Ann Mei Chang, a more than 20-year technology veteran, has been named as the first executive director of USAID's U.S. Global Development Lab.

She aims to help the lab drive innovation and partnerships to reduce poverty across the world in her new position, according to a USAID blog post.

Chang previously served as chief innovation officer for the humanitarian aid organization Mercy Corps and as a senior adviser at the State Department, where she developed programs to improve women's representation across the technology industry.

Before these roles, she was a Google senior engineering director for eight years and led a product development team that offers Internet and mobile services in emerging markets.

She also held leadership positions at Apple, SGI and Intuit and has worked with USAID through the Alliance for Affordable Internet.

UPCOMING SEMINARS

The following seminars to be conducted by Bob Stross under the auspices of SustainAbility Solutions PC will be held early in 2015 in the Washington, DC area and throughout the U.S.:

January 28, 2015/2014: Year in Review at USAID/Holiday Inn Rosslyn at Key Bridge/Washington DC (Arlington, VA.)

January 29/USAID/CDC/State/USDA Implementation of the SuperCircular/Holiday Inn Rosslyn at Key Bridge/Washington DC (Arlington, VA.)

February 2/USAID/CDC/State/USDA Implementation of the SuperCircular/NYC Seminar and Conference Center - 23rd Street/New York, NY

February 3/Mastering the FAR and AIDAR/NYC Seminar and Conference Center - 23rd Street/New York, NY

February 5/USAID/CDC/State/USDA Implementation of the SuperCircular/Courtyard by Marriott/Boston, MA.

February 6/Mastering the FAR and AIDAR/Courtyard by Marriott/Boston, MA.

February 9/USAID/CDC/State/USDA Implementation of the SuperCircular/Holiday Inn Express Seattle City Center/Seattle, WA.

February 10/Mastering the FAR and AIDAR/Holiday Inn Express Seattle City Center/Seattle, WA.

February 11/USAID/CDC/State/USDA Implementation of the SuperCircular/Holiday Inn Golden Gateway/San Francisco, CA.

February 12/Preparing or Reviewing a NFE's Indirect Cost & Annual "True-Up" Report/Holiday Inn Golden Gateway/San Francisco, CA.

February 13/Mastering the FAR and AIDAR/Holiday Inn Golden Gateway/San Francisco, CA.

April 21/USAID/CDC/State/USDA Implementation of the SuperCircular/Holiday Inn Rosslyn at Key Bridge/Washington DC (Arlington, VA.)

April 22/Preparing or Reviewing a NFE's Indirect Cost & Annual "True-Up" Report/Holiday Inn Rosslyn at Key Bridge/Washington DC (Arlington, VA.)

April 23/Mastering the FAR and AIDAR/Holiday Inn Rosslyn at Key Bridge/Washington DC (Arlington, VA.)

May 5/Complying with USAID Contracts and Subcontracts/Holiday Inn Rosslyn at Key Bridge/Washington DC (Arlington, VA.)

May 6/USAID/CDC Grant Administrative Compliance Requirements/Holiday Inn Rosslyn at Key Bridge/Washington DC (Arlington, VA.)

May 7/Primer on DSSR, FAM, FAH and LCPs/Holiday Inn Rosslyn at Key Bridge/Washington DC (Arlington, VA.)

Other sites overseas and dates will be posted soon. For more information on these seminars or to register, please go to: <http://www.sustainabilitysolutionspc.com/#courses>

Seminar Fees: \$425 for a 1-day seminar, take 10% discount when registering and paying for 2 or more seminars by the same participant or for more than 3 participants at the same seminar. Prepayment required.

NEW IN-HOUSE SEMINARS

The following 1-day, cost-effective seminars are available to be conducted on-site your organization by Bob Stross:

USAID/CDC/State/USDA Implementation of OMB's SuperCircular
Winning USAID Applications Under the *NEW* Grant Rules
The *NEW* Cost Principles for Nonprofit Organizations & Educational Institutions

Preparing or Reviewing a NFE's Indirect Cost Proposal and Annual "True-Up" Report
Complying with USAID Contracts and Subcontracts
Primer on DSSR, FAM, FAH & LCPs for Overseas Employee Benefits

Mastering the FAR and AIDAR
USAID/CDC Administrative Compliance Requirements
Fraud Awareness and Prevention on Overseas Projects
Surviving a SIGAR/DCAA/USAID OIG Audit

Prices for these seminars are available upon request.

INDIRECT COST RATE PROPOSAL PREPARATION AND NEGOTIATION OF NICRAs

Mr. Stross is an expert in preparing indirect cost rate proposals, establishing separate Facilities and Administration (F&A) rates, negotiating NICRAs with USAID's Overhead Branch, conducting sensitivity analyses of optimum cost recovery structures, restructuring indirect costs, preparing Cost Accounting Standards (CAS) Disclosure Statements, and conducting fiscal assessments of an organization's indirect costs.

AUDIT RESOLUTION

In responding to an agency contracted audit or an OMB Circular A-133, recipient-contracted or DCAA audit, Mr. Stross can apply his extensive knowledge of authoritative US Government and USAID rules in challenging questioned costs. His expertise is so well regarded that even USAID itself retained him to rebut the major findings in one of its own IG audit reports. He has also consulted with a host of NGOs and contractors in responding to, and negotiating, their audit findings.

COMPLIANCE SERVICES

Drawing upon his 45 years of experience in advising organizations on how to comply with the US Government's regulations, and 15 years with specific USAID regulatory experience, Robert Stross, CPA, CFCM, CGMS would conduct a comprehensive review of an organization's compliance with the USG's and USAID's rules and regulations and of its compliance and internal accounting controls, reporting the confidential results solely to the organization's CFO, CEO or Finance/Audit Committee. In addition, he is well known for preparing accounting policies and procedures, as well as conducting staff compliance training.

INTERNET-BASED CONSULTING

Either over the Internet or by telephone, Robert Stross, who prepares this Newsletter and has over 45 years in the Federal marketplace, provides consultations under retainer to a limited number of NGOs on the range of accounting, bidding, pricing, indirect costing, teaming and contracting, regulatory compliance, and audit resolution issues involving USAID. Inquire about this service and his low initial retainer and hourly rate.

Please consult our homepage at <http://www.robertstrosschartered.net> for more details on these consulting services.

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