



USAID
FROM THE AMERICAN PEOPLE

MAR 15 2013

Dr. Arthur B. Keys, Jr., President & CEO
International Relief & Development
1621 North Kent Street, Fourth Floor
Arlington, VA 22209

Subject: Appeal of Agreement Officer's Decision under Cooperative Agreement
267-A-00-06-00503-00, Community Stabilization Program (CSP) in Iraq

Ref: International Relief & Development (IRD) Appeal of January 14, 2010

Dear Dr. Keys:

This is the Final Decision by USAID on the referenced Appeal of the Agreement Officer's decision to disallow costs of (b)(4) under the subject Cooperative Agreement. Per 22 CFR 226.90(d), this decision shall be final. I have reviewed the information submitted with your Appeal and conclude that based on IRD's failure to follow USAID environmental procedures, as well as its failure to obtain prior approval for a restricted commodity, the full amount of the disallowance should be upheld, and IRD should repay the Agency in the amount of (b)(4). My decision in this Appeal is explained below.

On May 24, 2006, USAID awarded CA 267-A-00-06-00503-00 granting \$265 million to IRD to provide support to CSP. This is the second of five appeals arising under that cooperative agreement.

Per 22 CFR 216.3, USAID prepared an Initial Environmental Examination (IEE) to assess any potential environmental damage that the program could cause, and issued an Environmental Threshold Determination (ETD) on March 30, 2006 with a negative determination, finding it unlikely that program activities would cause reasonably foreseeable harm to the environment. One of the conditions of the negative determination, however, was that "If pesticides are procured or used, a Pesticide Evaluation Report and Safe User Application Plan (PERSUAP) is required." On June 21, 2006, USAID CSP Director, Edward Birgells sent the IEE to the IRD (b)(6), along with a letter communicating IRD's need for compliance with environmental regulations referenced in the Initial Environmental Examination (IEE).

In March 2009, CSP was contemplating new activities under the next phase of the award, prompting the AO, Erin McKee, to send a letter to IRD on March 10 making a formal modification to the agreement. This modification notified IRD of their need to bring all their activities past and future into compliance with environmental regulations in 22 CFR 216 and ADS 204, and made them aware that past noncompliance would result in either disallowance or retroactive approval. On July 23, 2009, IRD submitted an Environmental Assessment (EA)

Report for past activities to USAID, identifying (b)(4) in costs incurred for pesticides used without AO approval. Based on this EA report, AO Sonila Hysi demanded payment for the total amount in her October 27, 2009 Demand for Payment, stating that 1) IRD failed to provide a PERSUAP as required by the IEE and 22 CFR 216.3 and 2) IRD failed to obtain AO approval prior to the procurement of pesticides as required in the award. IRD responded by letter dated November 25, 2009 acknowledging their failure to get prior approval, and accepting (b)(4) for using a pesticide not approved by the EPA; however, it disputed the grounds used by the AO to determine that IRD failed to comply with environmental regulations. In response, the AO issued a new final decision in December maintaining that the full amount was unallowable, citing language from the ETD requiring a PERSUAP, Mr. Birgells' June 21, 2006 Letter with the attached IEE, and IRD's explicit acceptance of the Request for Application language which included compliance with Regulation 216. IRD timely appealed this decision, requesting retroactive approval for the use of pesticides and allowance of (b)(4).

DISCUSSION

In the AO's final determination letter dated December 15, 2009, the AO disallowed IRD's costs for pesticides due to noncompliance with federal procedures. Specifically, the AO's bases for disallowance were 1) IRD failed to produce a Pesticide Evaluation Report and Safe User Application Plan (PERSUAP) and 2) IRD failed to obtain AO approval prior to procurement and use of pesticides—as included by reference through the AO's October 27, 2009 decision.

1) Failure to Obtain PERSUAP

22 CFR 216.3(b)(1) states:

When a project includes assistance for procurement or use, or both, of pesticides registered for the same or similar uses by USEPA without restriction, the Initial Environmental Examination for the project shall include a separate section evaluating the economic, social and environmental risks and benefits of the planned pesticide use to determine whether the use may result in significant environmental impact.

This federal regulation is implemented at USAID through the PERSUAP. This document is prepared by the recipient in response to an ETD issued by USAID that identifies the potential use of pesticides in the program. IRD argued that they never received the ETD that required them to produce a PERSUAP, therefore they should not be held accountable for not having done one.

Firstly, the AO noted that 22 CFR 216 ("Reg. 216") is a regulation that applies to all NGOs regardless of formal incorporation into an award. The regulation's scope, at 22 CFR 216.2, specifically notes that the environmental procedures apply to all USAID programs. As a validly promulgated regulation, Reg. 216 carries the full force and effect of law, even when it is not explicitly cited in an award document. The award, at A.15.2 *Applicable Regulations and References*, did incorporate by reference ADS 303. In turn, ADS 303, *Grants and Cooperative Agreements to Non-Governmental Organizations*, references ADS 204 *Environmental Procedures* and Reg. 216. However, ADS 303 does contemplate requiring environmental procedures through inclusion of a special award provision.

Secondly, in the June 21, 2006 letter from Mr. Birgells, USAID requested IRD to “Please review this IEE and the conditions included therein since they apply to the activities that IRD will implement under the Community Stabilization Program...IRD should address and incorporate environmental considerations, and mitigation and monitoring measures.” His letter attached the IEE, which stated, “This IEE does not cover activities involving assistance for the use or procurement of pesticides...which will require an amended IEE submitted to ANE/BEO for approval.” As the IEE originated from and referred to Reg. 216, IRD had the opportunity to dispute the applicability of Reg. 216 early in the life of the award, however it chose not to.

Also, in her December 15, 2009 Final Determination Letter, AO Hysi reiterated that IRD was aware of its regulatory requirements when they responded to the Request for Application, which explicitly mentioned and required Reg. 216 compliance. In fact, IRD presented a table of “consolidated references to each RFA requirement along with a brief summary of our approach” and identified monitoring requirements that explicitly referenced “Reg. 216 environmental compliance.” IRD subsequently hired and deployed team members specifically to oversee and process IEEs and carryout mitigation measures—including checklists tailored to the ETD from inception through the life of the project.

Even without formal modification of the award, IRD was required to comply with the requirements of Reg. 216. The rule was a valid regulation with the full force and effect of law, whose scope specified that it applied to all USAID programs. Furthermore, mandatory compliance with environmental procedures was incorporated by reference to ADS 303, which in turn refers to Reg 216 and ADS 204. Such procedures were included in the award when IRD’s funding application—which proposed methods of complying with environmental requirements—were adopted as program description. The fact that IRD proposed these methods of complying demonstrated that it was aware of its responsibility to do so. By formally modifying the agreement in 2009, the AO documented in the award IRD’s continuing responsibility to comply with environmental requirements. As a result, I reject this argument as grounds for overturning the disallowance.

2) Failure to Obtain Prior Approval

In its appeal, IRD acknowledges its failure to receive AO approval prior to the procurement and use of pesticides, as required by the “USAID Eligibility Rules for Goods and Services” provision, but requests that USAID retroactively approve the cost. ADS 303.3.18 provides that the AO may review and approve expenditures made without prior approval under certain circumstances. The first of these is the requirement that the expenditures be “otherwise allocable, allowable, and reasonable.” Specifically, IRD’s failure to comply with Reg. 216 makes their expenditures unallowable and unreasonable. OMB Circular A-122, Section A.2 *Factors affecting allowability of costs*, Subsection C states that allowable costs must “be consistent with policies and procedures that apply uniformly to both federally-financed and other activities of the organization.” IRD’s failure to comply with the Reg. 216 and ADS 204 environmental procedures undermines the costs’ allowability. Additionally, A-122, Section A.3 *Reasonable Costs*, directs Agencies to consider “the restraints or requirements imposed by such factors as... Federal and State laws and regulations.” Again, by not complying with Reg. 216,

IRD did not follow the environmental procedures imposed by federal regulation. Therefore, the costs incurred for pesticides are not reasonable. With the costs being neither allowable nor reasonable according to OMB cost principles, IRD has not met the criteria ADS 303 establishes for retroactive approval.

It should also be noted that retroactive approval is an entirely discretionary action which the AO may elect to take, but the Agency need not sanction costs which lacked prior approvals. These elements are necessary, but may not be sufficient, for an AO to accept an improperly initiated cost. When it is in the government's best interests, the Agency *may* approve the expense, but need not do so. As ADS 303 cautions, "Recipients must comply with prior approval requirements that are established in the agreement. Failure to comply with prior approval requirements generally causes USAID to deem the costs unallowable."

Given that these costs are neither allowable nor reasonable, I am denying IRD's request for retroactive approval, and am upholding the AO's final decision.

Based on IRD's failure to follow USAID environmental procedures, as well as its failure to obtain prior approval for a restricted commodity, I am upholding the full amount of the disallowance.

DECISION

In my capacity as the Senior Deputy Assistant Administrator, I have fully considered your appeal and the information provided with it. I have decided to uphold the AO's previous final decision. The amount of (b)(4) remains owed to the Agency. Per 22 CFR 226.90(d), this decision shall be final.

However, I also note that this appeal has taken over two years to resolve. Therefore, I waive the collection of interest that would ordinarily be assessed against an existing debt to the Agency. Action will be taken to recover only the (b)(4) explained above.

Please remit payment of (b)(4) within 30 days of receipt of this decision to:

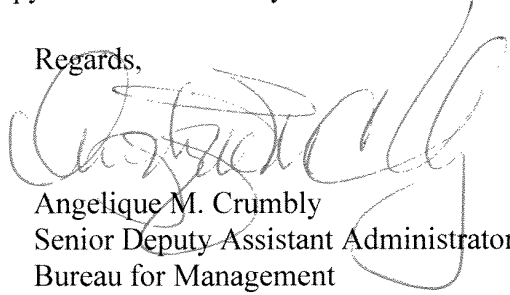
M/FM/CAR, Cashier
US Agency for International Development
1300 Pennsylvania Ave. NW
SA-44, Room 485C
Washington, DC 20523-7802

Any amounts which remain unpaid beyond that date will bear interest from the date of this letter at the rate established by the Secretary of the Treasury, for the period affected, per 31 U.S. Code Section 3717. If payment is not received within 30 days from the date of this letter, USAID intends to use non-centralized administrative offset to collect the debt plus any additional administrative expenses, if appropriate. If collection cannot be accomplished by offset, then M/FM/A will transfer the debt to the Financial Management Service in the Department of

Treasury, which will collect the amount owed to USAID plus Treasury's processing and administrative costs from the debtor. FMS will use all means available to the Federal government for debt collection, including the possibility of referral to the Department of Justice for litigation if the debt cannot be collected. Detailed procedures for collection are contained in 22 CFR 213.

Please reference the agreement number 267-A-00-06-00503-00 on the check remittance stub for our financial management section and include a copy of this letter with your remittance.

Regards,

A handwritten signature in black ink, appearing to read 'Angelique M. Crumbly', is written over the typed name and title. The signature is fluid and cursive, with a large loop at the end.

Angelique M. Crumbly
Senior Deputy Assistant Administrator
Bureau for Management