



# US

FROM THE AMERICAN PEOPLE

(b)(4),(b)(6)

Subject: Appeal of Agreement Officer's Decision under Cooperative Agreement

(b)(4)

Ref:

(b)(4)

Appeal of December 30, 2011

Dear

(b)(6)

This is the Final Decision by USAID on the referenced Appeal of the Agreement Officer's decision 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 concluded that the (b)(4) in subcontracts should not be retroactively approved. My decision in this Appeal is explained below.

On (b)(4) USAID awarded (b)(4) a four-year cooperative agreement for (b)(4) in turn, sub-awarded funds to the (b)(4). From December 2008 to March 2009, (b)(4) issued six subcontracts, totaling (b)(4) without first obtaining prior approval from the AO as required by 22 CFR 226.25(c)(8).

(b)(4) first requested retroactive approval for the subcontracts, as described in ADS 303.3.18(b), in December 2009. In October 2010, budget revision discussions again raised the issue. When the AO modified the agreement to revise the budget, that modification stated that the budget did "not include subcontracts awarded without prior approval."

As the award's completion date approached, (b)(4) requested an extension of the program and resubmitted its request for retroactive approval on October 20, 2011. On October 31, the AO responded in writing "to formalize the decisions of the Agreement Officer as transmitted to (b)(4)" via teleconference. She stated that she would not extend the program, and she would not retroactively approve the subcontracts. Her response noted that the modification executed in October 2010 excluded the subcontracts and interpreted that as the previous AO's denial of (b)(4) request. Although she stated that she was upholding the former AO's decision, the October 31 letter unambiguously declared "I will not retroactively approve contracts totaling (b)(4) issued by your sub-grantee."

On November 3, (b)(4) requested reconsideration of the issues in the October 31 letter. It asserted that there was no previous decision to uphold and reiterated its arguments in support of retroactively approving the subcontracts. The AOTR responded via e-mail that "The AO has

made her decisions as per the letter she submitted dated October 31, 2011.” (b)(7) objected, arguing that its points from the November 3 letter had not been fully addressed and requesting further discussion on the issue.

The AO responded in a letter dated December 1, 2011. She reiterated the decision from her October 31 letter and stated, “I still uphold the decision of the former Agreement Officer... and I will not retroactively approve contracts totaling (b)(4) that were issued by your sub-grantee.” She also explained that further discussion related to the decision would only occur according to the dispute provision at 22 CFR 226. (b)(7) submitted its appeal on December 30, 2011.

Under 22 CFR 226.90(b), decisions of the USAID Agreement Officer are final unless, within 30 days of receipt of the decision, the recipient appeals the decision to the Deputy Assistant Administrator for Management. On October 31, 2011, the AO issued a letter to (b)(7) formalizing her decisions on various issues, including the request for retroactive approval of the subcontracts. This letter unambiguously communicated the AO’s decision in writing. (b)(7) seems to have understood this, as its November 3 letter requested reconsideration of the decision.

Rather than appealing the decision by the 30 day deadline, (b)(7) attempted to negotiate a different outcome with the mission staff. When the AOTR emphasized that the October 31 letter communicated the AO’s decisions, time remained in which (b)(7) could have filed a timely appeal, but it did not. Instead, (b)(7) did not file its appeal until December 30, two months after the AO issued her decision. Nothing in the correspondence with the mission extended the timeframe in which to file an appeal. Although the AO’s December 1 letter reiterating her decision stated that further discussion of the issue would only occur in accordance with 22 CFR 226.90, that neither extends the dispute provision’s deadline nor undermines the finality of the October 31 decision letter.

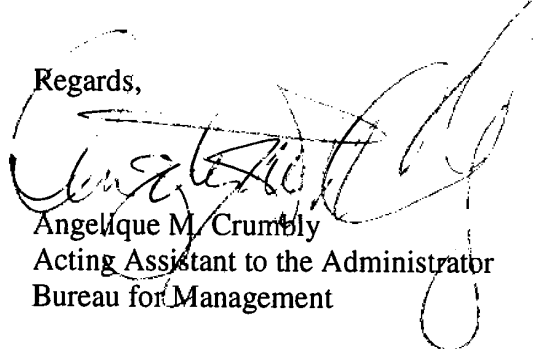
Therefore, I conclude that (b)(4) appeal is untimely. Because it did not properly appeal within 30 days of the AO’s decision, I deny (b)(4) appeal and decline to grant retroactive approval for the subcontracts.

Because (b)(4) appeal is untimely, I do not opine on whether it has fully met the elements necessary for retroactive approval. I do emphasize, though, that 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 retroactive approval remains an entirely discretionary action. 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.”

Under 22 CFR 226.25(c)(8), subrecipient (b) was required to obtain written approval from the AO before it contracted out program work. After it failed to do so, the AO considered and denied (b)(4) request that she nevertheless approve the subcontracts. She communicated her decision to (b)(7) in writing. I now decline to overturn her decision.

I have considered your appeal in my capacity as Senior Deputy Assistant Administrator and determined that I will not retroactively approve the subcontracts. In accordance with 22 C.F.R. 226.90(d), this decision is final.

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  
Acting Assistant to the Administrator  
Bureau for Management