



NOTES -- Partners' Day: *Choice of Instrument*

Session Title: Choice of Instrument

Date: December 1, 2015

Time & Location: 1:15 p.m. – 2:15 p.m. EST at the Ronald Reagan Building

Presenters:

- Diane Perone, Acting-Ombudsman, M/OAA, USAID
- David Meyer, Senior Advisor, M/OAA, USAID
- Alan Chvotkin, Executive Vice President and Counsel, PSC
- Carol Smith, Chief Operating Officer, Winrock International; Chair of Government Relations, InsideNGO

Purpose of the Session

The purpose of this session was to discuss how USAID, the business community, and the NGO community examine choice of instrument (COI) selection, and the factors they consider in determining whether a Notice of Funding Opportunity (NOFO) or a Request for Proposals (RFP) is consistent with the instrument choice.

Discussion Topics (and Questions) –

David Meyer provided historical background on COI and the Federal Grant and Cooperative Agreement Act. Included in the background, in September 1981, GAO issued a report *Agencies Need Better Guidance for Choosing Among Contracts, Grants, and Cooperative Agreements* but Agencies did not get government-wide guidance from the Office of Management and Budget (OMB). Fundamentally, contracts should be used to buy goods and services in accordance with the requirements of the Federal Acquisition Regulation (FAR) and grants and cooperative agreements should not be burdened by the requirements for contracts.

Diane Perone discussed that choice of instrument has been dogging the Agency for years. USAID has correspondence going back decades on this issue. Why is it back in the spotlight?

1. Preliminary COI designations appear in the Business Forecast. COI is correct 90-95% of the time, but occasionally we see a “flip” from one instrument type to another. Changes in choice of instrument designation causes concern on the part of the partner community that ADS 304 isn’t being followed. However, the designation at this stage is very preliminary and subject to change. The Agency believes that the benefit of publicizing the initial COI is worth the risk of a change.
2. Spate of relatively recent GAO and federal court cases. These cases make clear that if an agency’s principal purpose is to find a service provider to implement the agency’s activities, then a contract is the correct choice of instrument. If the agency’s principal purpose is to provide financial support or other assistance to the awardee to carry out its own mission, programs, activities, or interventions, then a cooperative agreement is appropriate. The COI is subject to bid protest procedures.
3. In the past, partners would raise choice of instrument concerns post-award. More recently, however, partners are raising choice of instrument concerns more frequently at the pre-award stage, instead of post-award. The best way to address choice of instrument concerns is through early engagement by Contracting Officers and Agreement Officers in the project design process and through training, templates, and other tools. These efforts are currently underway. Until these tools are in place for Agency personnel, the Agency needs a way to address COI concerns in a systematic and consistent manner to address partner concerns. Until guidance is in place, the Procurement Executive put together a review team to review COI concerns. When an inquiry comes in, the team uses a two-pronged approach. First, the team calls the mission to ask about the factors that went into the COI

decision. The team confirms that the decision was based on ADS 304. Second, the team will review the solicitation or draft solicitation to confirm that it is consistent with the choice of instrument decision. The team reviews the solicitation or draft solicitation using factors that are similar, but not identical, to 4 out of the 5 factors that PSC will present. Complications arise when the COI decision for assistance is well-founded but the solicitation reads like acquisition – this is a heavy lift for the Agency to remediate. To some extent, this is a drafting issue related to the Agency's performance management requirements. It can be challenging to meet performance management requirements without drafting a solicitation that is prescriptive and appears more consistent with acquisition than with assistance. New tools and templates will try to address this. Also, the Agency could benefit from a crosswalk between ADS 200 planning and program design series and the ADS 300 series.

Alan Chvotkin on behalf of PSC - COI has been a priority for PSC recently. Partners have an expectation of transparency. The forecast has improved exponentially recently – it took awhile to get this more timely and useful info. Major points made were:

1. Partners are looking for some consistency. For example, application of statutory and regulatory provisions that guide USAID transactions. This is not really an acquisition or assistance issue but a project design issue. PSC has developed five criteria that they use in reviewing opportunities for COI: (1) eligibility (PSC contends it should be restricted for assistance), (2) degree to which USAID is the direct beneficiary or user of the work (PSC contends it should be low for assistance), (3) degree of detail of specifications provided by USAID for the project (PSC contends it should be low for assistance), (4) degree to which USAID is providing assistance based on its own deliverables (PSC contends it should be low for assistance), and (5) degree to which USAID is substantially involved in project implementation (PSC contends it should be low for assistance). (See slides). PSC doesn't start by looking at whether an opportunity should be a contract or a grant but at evaluating whether COI decisions are made according to five criteria which are based on the regulations and applicable laws.
2. COI is not just a USAID issue – applies to other agencies such as NIH, HUD. One of the court cases was HUD trying to use assistance for what should have been acquisition – HUD lost.
3. Reasons that are not appropriate criteria include urgency, level of difficulty in using one instrument over another, and the CO's familiarity with a particular instrument.
4. PSC wants to help USAID get the decisions right early on for the Agency to execute the vision that it has and use implementing partners appropriately.
5. Implementing partners want to be able to follow the implementation requirements for the appropriate instrument.

Carol Smith brought the perspective of InsideNGO. COI looks clear but it isn't that simple. The diverse context in which we are working results in complexity in putting together a development program. USAID's approach (with respect to tools, training and a review team) is a sound one. Carol addressed the five review elements put together by PSC. Specific comments included:

1. Assistance instruments are for a common good – the organization should have demonstrated expertise in a specific area.
2. A lot of contract-ease is creeping into the assistance side of things.
3. Substantial involvement – serve as a basis for negotiations with respect to how involved USAID is going to be with the day-to-day operations of the program.
4. During the solicitation Q&A, they try to understand the intent of the COI.
5. They struggle a little bit with the concept of eligibility. For example, with PEPFAR funding, there were concerns about too much concentration of resources, but organizations were able to work together.



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Regarding whether USAID and partners have common ground on the five criteria, **Diane Perone** explained that USAID does not review whether eligibility is restricted as an indicator of whether a solicitation is consistent with assistance.

USAID answered the following questions from attendees:

1. What is the status of ADS 304 revision?
USAID: A draft revision has been circulated for internal review.
2. Growing use of APS, BAAs, collaboration agreements - impact on COI.
USAID: This is not a concern that has come across the Ombudsman's desk
3. Attendee comment: Specific assistance training for COs/AOs has sensitized Agreement Officers to the assistance regulations and appropriate levels of substantial involvement. In some instances, partners have seen different behavior as a result.
4. Attendee comment: Not too many contractors welcome the onslaught of FAR rules either. Contractors would like to find ways to reduce burdens on everyone rather than select instrument based on the level of the burden of the requirements.
5. What formal way can partners question COI?
USAID: You can approach the Ombudsman with COI concerns, including questions arising at the Business Forecast stage. However, there is not much to review at that early stage where there is only a brief description of an action.
6. If partners encounter FAR creep, what can they do? Should they sign the agreement?
USAID: Work with the AO as your first line of recourse. If you want anonymity, you can work through the Ombudsman's office. The Ombudsman's office is designed to assist you.
7. The criteria do not address whether the instrument is appropriate for what you are trying to achieve and whether the selected instrument will attract the right group of people. The instrument might exclude organizations who have the skills and abilities to implement the work.
USAID: We cannot speak to this issue in depth right now, but it is addressed in the draft ADS 304 revision in circulation.
8. Tools can be used for good or evil. Will the tools solve the problem and ensure that the solicitation reflects the essence of what the government wants to buy?
USAID: In addition to ADS 304, supplemental information will be prepared such as decision trees and dos and don'ts.