VN/CM, Mr. John Heilman
Room 709C, RP

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GC, Matt Eytan
Room 6891, NS

Proposed A.I.D. Regulation 14 for Commodity Shipments to Vietnam: Summary of the Principles which Underly this Regulation

Pursuant to your request, I am summarizing in this paper the major principles which shape the text of Regulation 14 and the major technical devices which the regulation introduces. I cannot in this brief paper consider each substantive provision of the regulation in detail to compare it with provisions (or omissions) in Regulation 1. However, I believe that an over-all perspective concerning this regulatory effort should first be gained before a detailed sentence-by-sentence analysis is presented.

Major Principle: Bonding of Suppliers to Specific Regulatory Provisions

The regulation has been drafted in accordance with the following analysis: if every supplier of goods beyond a minimum dollar contract amount were required to put up in favor of A.I.D. a bond supporting his undertakings to A.I.D., certain suppliers, including the following, would not furnish goods under the program: firms tempted to exploit the availability of A.I.D. funds for their own benefit and upon their own initiative through overpricing, short shipment, through similar and related irregularities; firms chosen by importers and directed to participate in schemes designed to abuse the availability of A.I.D. financing for the purpose of transforming dollar credits into cash transfers for the benefit of importers; firms which lack minimal financial capability or which have forfeited their business reputation to the point where they can comply with none of the methods allowed by the regulation for satisfying the bonding requirement.

The identity of a supplier furnishing goods to Vietnam is determined by the importer. The supplier has a claim upon A.I.D. funds without furnishing any assurance to A.I.D. (other than the uncollateralized promise of the supplier in the Supplier's Certificate) that Foreign Assistance funds will be paid in return for proper performance. Under a bonding system, the bank or surety issuing the bond would necessarily be forced to exercise a business judgment concerning the trust which may be placed in the supplier. The issuer of the bond would act, in its own interest, as a monitor of the integrity of the transaction until its bonding undertaking has expired. This system would, therefore, establish an automatic policing system which would not require detailed staff participation by A.I.D. officials in individual supplier undertakings to insure proper performance by suppliers.

For such a bonding system to be merchantable (that is, for suppliers to be able to secure the type of bond which A.I.D. has in mind), several minimal commercial and legal requirements must be met: the undertakings of the supplier must be spelled out with utmost clarity; and these undertakings must be limited to matters directly under the control of the supplier or at least within his knowledge. Thus, a supplier cannot be held responsible under such a system for the pricing patterns of his competitors or for pricing information concerning transactions of which he has no knowledge. The pricing tests in Regulation 1 which hold a supplier to a ceiling price based upon the "prevailing export price in the United States" and to prices charged in "comparable sales" in effect do hold the supplier to such a broad and vague standard. By contrast, Regulation 14 price rules are mathematically precise and are limited to the direct pricing history of the supplier. The rules are fair to the supplier, yet provide A.I.D. with protection which, in my opinion, is as broad -- yet preferable to -- the price limitations in Regulation 1. To the extent, however, that the new rules do not entirely dovetail with the "prevailing export market price" standard in Section 604(b) of the Foreign Assistance Act, the onus of compliance with this limitation should be placed not on the supplier, but rather on the Government of Vietnam.

To accommodate a bond, it has been necessary to scrap most of Regulation 1. Regulation 14 is offered as a substitute for Regulation 1, with its own new forms in place of the Regulation 1 Forms.

Regulation 14 is built around one core document, "The Certificate For Suppliers To Vietnam." This form is not geared to Regulation 1; it will replace Regulation 1 Forms 11, 282, 283, and 285. The Certificate will pass through a pre-screening procedure at which time the Vietnam Bureau will impose on the proposed transaction one or more of three optional control devices: a flat price maximum for the sale; an inspection requirement concerning the goods; or a bonding requirement. It is assumed that the bonding requirement will be used most frequently, whereas the other two control devices will be used on a selective basis. Under the bonding provision, the supplier has some degree of flexibility; the supplier may submit a one-shot bond or annual bond; the bond may take the form of an indemnity undertaking by a surety company, a letter of credit issued by a U. S. bank, or a bank guaranty payable against a certification submitted to the bank by a designated A.I.D. official to the effect that the requirements for establishing the liability of the bond issuer have been satisfied.

The Regulation considers in detail the question of who-sues-whom-and-for-what, when, and for what amount with respect to particular types of breaches of substantive undertakings by the supplier. The Regulation establishes a procedure by which claims against bond issuers will receive consideration within the Agency apart from the decisions of auditors and price analysts. I believe that this procedure accords to bond issuers a degree of fairness concerning procedural safeguards which will make the bond merchantable.

Major Principle: All Substantive Provisions Affecting Suppliers Should Appear on the Document Signed by the Supplier

Unlike Regulation 1, the Certificate for Suppliers to Vietnam contains all the substantive rules which apply to the undertakings assumed by a supplier to A.I.D. Under the Regulation 1 procedure the supplier executes a Supplier's Certificate which sets forth a number of vague undertakings. As for the rest, a supplier is held by means of the Supplier's Certificate to sections in Regulation 1 incorporated by reference into the Supplier's Certificate. By comparison, the Regulation 14 procedure all the rules are stated as certifications: there are no substantive rules applicable to a supplier which appear in the regulation and not in the Certificate. For this reason the bulk of the regulation consists of the text of the form.

Major Principle: A New Regulation for Shipments to Vietnam Should Eliminate Methods of Abuse Known by A.I.D. to Exist Under Present CIP Procedures

Regulation 14 establishes control devices in the major areas of abuse which A.I.D. has detected over a period of time. For this reason, the source/origin rules have been recast to provide not only greater clarity but more explicit limitations (and thereby more manageable enforcement); delivery terms have been standardized; anti-rebate considerations have been greatly expanded and spelled out in detail; abuses concerning ocean transportation have been expressly covered; and the commission and service payment area has been closely controlled.

Regulation 14 is clearly an innovation, but one which is urgently needed. I believe the regulation is merchantable (banks and surety companies will bond suppliers to adherence to the certifications on the new form). Most importantly, the protection afforded in Regulation 14 will adequately safeguard the Agency from the manipulations and abuses which this Agency has been unable to discourage under present procedures.

Attachments

cc: VN/GC, John Roxborough
A/PROC, Patrick M. O'Leary
C/FRD, Ralph M. Zorn

Subject
Chron
GC File
Reading File