

ATTACHMENT 3

Contract Information Bulletin 99-17

August 17, 1999

Subject: Organizational Conflict of Interest



U.S. AGENCY FOR
INTERNATIONAL
DEVELOPMENT

August 17, 1999

MEMORANDUM FOR ALL CONTRACTING OFFICERS AND NEGOTIATORS

TO: DISTRIBUTION LIST FAC
FROM: Rodney W. Johnson, Director, M/OP
SUBJECT: Organizational Conflict of Interest

Contract Information Bulletin 99-17

This CIB supersedes CIB 94-2 and Supplement. After five years of experience with the Organizational Conflict of Interest (OCI) requirements in CIB 94-2 and Supplement, we have determined that proper precautions and safeguards may be maintained with more limited restrictions.

This CIB clarifies and updates the coverage on design-implement conflicts and makes substantial changes in USAID's rules with regard to OCI in the case of evaluation and audit contracts. The automatic three-year preclusion applicable to certain evaluation and audit contractors is deleted, and new procedures are being implemented to assure that potential OCIs are mitigated or avoided in these cases.

Federal standards regarding organizational conflict of interest are stated in FAR Subpart 9.5. This CIB sets forth the Agency's policies and interpretations concerning the application of FAR Subpart 9.5 when an organization under contract with USAID performs design, evaluation, or audit work. In some circumstances, it is generally not feasible to mitigate potential organizational conflicts of interest. Accordingly, certain restrictions as described herein shall be applied to contractors involved in design or evaluation contracts in those cases. This CIB also establishes requirements for audit contracts to mitigate potential OCI.

For situations not specifically covered by this CIB, the contracting officer must consider the FAR standards directly to determine whether an OCI exists and whether it can be avoided or mitigated in a manner which would allow the contractor to participate in a particular procurement.

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The changes made by this CIB shall have no effect on existing contracts or task orders that contain preclusions.

This CIB covers the following scenarios in which there is high potential for OCI:

1. Where a firm that designs a USAID activity under contract with USAID wants to be eligible for the competition to implement the activity;
2. Where a firm that evaluates an activity or contractor under contract with USAID wants to provide services that are requested as a result of the evaluation; and
3. Where a firm that audits USAID contractors under contract with USAID seeks to do consulting work under contract with USAID (sometimes in competition with the firms audited).

USAID's policy with regard to each of these situations is discussed below.

I. DESIGN

It is USAID's policy to preclude a contractor from furnishing implementation services, as the prime or sub-contractor, when the contractor had a substantial role in the design of an activity under contract with USAID by providing USAID with "material leading directly, predictably and without delay" to a work statement for the implementation of the activity, subject to the exceptions discussed in this section on DESIGN. In light of substantial OCI risks of biased design and unfair competitive advantage, the preclusive policy is to be applied when a single prime contractor is responsible for the design of an activity, even if the design contract does not call for the contractor to prepare a work statement for the activity, so long as the design work contemplated reasonably appears to be for "material leading directly, predictably and without delay" to such a work statement.

While the FAR does not define the phrase "material leading directly, predictably and without delay," some examples may help clarify when OCI is likely to be a concern. In the case of very preliminary and general work prior to development of a specific design, it is not required that the design contractor be precluded from providing implementation services. For example, services related to SO/R4 development methodology would nearly always be too remote from design of a specific activity to cause OCI concerns. Also, a contract for assessment of the needs in a particular sector, would not trigger OCI concerns. However, developing a detailed proposed intervention to address a specific need would most likely be design work and could readily lead to conflicts of interest.

Proposing a series of potential ideas that might be used to address a problem without developing in detail would not be considered design work.

The FAR provides an exception from the preclusion from providing implementation services when the contractor has participated in the both the development and the design work; however, USAID interprets this as applying to research and development type work which USAID is not likely to contract for. Therefore, participation in the development and design of an activity does not exempt a contractor from USAID's preclusive policy.

Prime contractors are held to the above standard for all work products produced by the prime itself or its subcontractors. Subcontractors whose actual level of involvement meets the above standard are precluded from implementation as well.

The preclusive policy does not apply when:

1. the design and implementation are competed and awarded together under the same contract;
2. a non-competitive award for implementation to the design contractor is justified and approved;
3. more than one prime contractor works on the design;
or
4. the design is awarded under one IQC task order and the implementation is awarded as a separate task order under the same IQC or the same set of multiple award IQCs.

In the case of exception #4, although the preclusive policy does not automatically apply when implementation is to be through a task order, the Agency still has a responsibility to ensure that the design is unbiased and will best meet the Agency's requirements. The contracting officer may therefore apply the preclusive policy when the implementation task order is to be competed among multiple award contractors IF he or she concludes that the design work is likely to be biased in favor of the design contractor AND adequate steps to mitigate the design contractor's potential competitive advantage cannot be taken.

NOTE PERTAINING TO DESIGN AND IMPLEMENTATION TASK ORDERS: FAR 16.505(b)(2)(iii) provides an exception to the requirement to provide a fair opportunity to be considered for a task order if the order is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order. This exception may be appropriately applied to an implementation task order, provided that all awardees were

advised during the course of the "fair opportunity" process for the design task order that this is the Agency's intent. Prior to awarding a task order for design work which is expected to result in a new task order for the implementation of that design, the CO must advise the awardees being considered what the Agency's intentions are regarding the implementation award and what steps are planned to avoid an appearance of an OCI.

Contracting officers shall insert the appropriate clause from Appendix 1 in the solicitation, contract, and task order for the design work to apprise the contractors of the above standard.

If the contracting officer believes that the "directly, predictably and without delay" standard is not met in a particular situation, he or she may determine not to apply this preclusion without a waiver.

If a contracting officer finds that it is in the best interest of USAID to allow the design contractor to furnish implementation services when the contractor would otherwise be precluded, a waiver must be authorized by the head of the contracting activity in accordance with FAR 9.503 before award is made. The waiver must indicate consultation with the Agency Competition Advocate (M/OP, Deputy Director for Policy, Evaluation, Support and Transportation/Commodities).

Even when USAID's preclusive policy on design and implementation does not apply, Contracting Officers still must determine whether there are Organizational Conflicts of Interest under FAR subpart 9.5 in a particular case, and if so, how they can be mitigated or avoided, or whether the organization must be precluded from working on the implementation contract even if they would not be precluded under the conditions of this CIB.

II. EVALUATION

Some OCI concerns are raised when a contractor evaluates an activity or program. Principal OCI concerns are that the evaluation contractor might give biased, unfavorable reviews of competitors, or on the other hand might give an overly favorable review to curry favor with USAID for additional work. In addition, the evaluation contractor may glean competitively useful information from other implementing organizations in the course of its evaluations.

The following steps are required in such cases in order to mitigate and avoid OCI. First, USAID must be able to provide adequate technical review of the evaluation report. Second,

the evaluation contractor shall be precluded from furnishing implementation services, as a prime or sub contractor, that are required as a result of any findings, proposals, or recommendations in the evaluation report within eighteen months of USAID's acceptance of the evaluation report.

In addition, there are restrictions on the use of information obtained as a result of an evaluation. The contractor must agree that it will not use any such information obtained about another organization in the preparation of a proposal in response to any solicitation for a contract or task order. If the contractor obtains proprietary information from another organization in its performance of a contract, FAR 9.505-4 requires an agreement between the organizations restricting disclosure and use of the information for any purpose other than that for which it was furnished. The contracting officer must obtain copies of these agreements and ensure that they are properly executed.

If a subcontractor performs substantive evaluation work, the subcontractor shall be subject to the same restrictions as the prime contractor.

These policies shall be carried out by including the appropriate provision set forth in Appendix 2 in solicitations, contracts and task orders for evaluation services covered by this policy.

If a contracting officer determines that additional safeguards are necessary in a particular instance, they may amend the clauses in Appendix 2 as necessary to include the additional requirements without a deviation.

The restrictions on use of information obtained as a result of an evaluation may not be waived. Any waiver of the preclusive provision of this policy, whether based on responses provided by a contractor in accordance with FAR 9.504(e) or other circumstances, must be authorized by the head of the contracting activity in accordance with FAR 9.503 and AIDAR 709.503, and in consultation with the Agency Competition Advocate. When requesting a waiver, the Contracting Officer shall specify the steps that will be taken to minimize OCI.

III. AUDIT

Contracts calling for the audit of other USAID contractors also raise OCI concerns. The prime OCI concern is that the auditing firm could obtain competitively useful information, including sensitive cost data, regarding its competitors.

To mitigate concerns about the possibility that information obtained from audits may be used in future competitions,

contractors must agree that any information obtained about an organization as a result of an audit, shall not be made available or used in any way to help the contractor prepare a proposal in response to a solicitation for a contract or task order. In addition, if the contractor obtains proprietary information from another organization in its performance of a contract, FAR 9.505-4 requires an agreement between the organizations restricting disclosure and use of the information for any purpose other than that for which it was furnished. The contracting officer must obtain copies of these agreements and ensure that they are properly executed.

If a subcontractor performs substantive audit work, the subcontractor shall be subject to the same requirements as the prime contractor.

This policy shall be carried out by including the provision set forth in Appendix 3 in solicitations and contracts for audit services.

These requirements are the minimal safeguards mandated by the FAR and cannot be waived. If a contracting officer determines additional safeguards are necessary in a particular instance, they may amend the clauses in Appendix 3 as necessary without a deviation. The provisions of FAR 9.504(e) apply with regard to the contractor's response concerning any additional safeguards.

IV. APPLICATION OF POLICIES

All affiliates, divisions and sub-organizations of the design, evaluation or audit contractor that are not separate legal entities are subject to the provisions implemented in accordance with this CIB. Unless there is convincing evidence to the contrary (e.g., a statement from the consortium that only certain members participated), it is presumed that each member of a consortium has full access to the work product of the consortium, and thus this policy applies to all members of consortia as well.

The policies in this CIB do not apply to:

1. individual employees of contractors;
2. Personal Service Contractors ("PSCs"); or
3. organizations that are affiliated with the precluded contractor in name only, or that have a separate legal identity. In situations where the relationship is not clear, the contracting officer is advised to obtain guidance from the Agency Competition Advocate.

While the policies apply to individuals under non-personal services contracts, any preclusions applicable to the individual shall not be attributed to any institutional contractor the individual might go to work for later. The contracting officer shall address any potential OCI resulting from such a situation in accordance with FAR Subpart 9.5.

This CIB addresses OCI at the design, evaluation and audit stages of the procurement process. If, at the implementation stage of the process, a contractor raises OCI issues relating to participating in a contract that they have been precluded from, the contracting officer shall follow FAR 9.405(e) and the applicable coverage in this CIB.

Any questions concerning this policy on OCI should be addressed to Kathleen O'Hara, M/OP/P.

APPENDIX 1.

DESIGN/IMPLEMENT

I. Clause for solicitations and contracts covering a definite quantity:

Organizational Conflicts of Interest: PRECLUSION FROM IMPLEMENTATION CONTRACT.

This contract calls for the Contractor to furnish important services in support of the design of _____ [specify activity] (the "Activity"). In accordance with the principles of FAR Subpart 9.5 and USAID policy, THE CONTRACTOR SHALL BE INELIGIBLE TO FURNISH, AS A PRIME OR SUBCONTRACTOR OR OTHERWISE, THE IMPLEMENTATION SERVICES FOR THE ACTIVITY, unless the Head of the Contracting Activity, in consultation with USAID's Competition Advocate, authorizes a waiver (in accordance FAR 9.503 and AIDAR 709.503) determining that preclusion of the Contractor from the implementation contract would not be in the Government's interest.

II. Clause for solicitations and contracts for indefinite quantity contracts.

Organizational Conflicts of Interest: PRECLUSION FROM IMPLEMENTATION CONTRACT.

Task orders under this contract may call for the Contractor to furnish important services in support of the design of specific activities. In accordance with the principles of FAR Subpart 9.5 and USAID policy, THE CONTRACTOR SHALL BE INELIGIBLE TO FURNISH, AS A PRIME OR SUBCONTRACTOR OR OTHERWISE, THE IMPLEMENTATION SERVICES FOR ANY ACTIVITIES FOR WHICH IT PROVIDES SUBSTANTIAL DESIGN SERVICES EXCEPT FOR SUCH SERVICES THAT MAY BE FURNISHED UNDER THIS CONTRACT, unless the Head of the Contracting Activity, in consultation with USAID's Competition Advocate, authorizes a waiver (in accordance FAR 9.503) determining that preclusion of the Contractor from the implementation contract would not be in the Government's interest. When a task order includes a work requirement that will preclude the contractor from furnishing implementation services, a clause stating the preclusion will be included in the task order.

III. Clause for task orders:

Organizational Conflicts of Interest: PRECLUSION FROM IMPLEMENTATION CONTRACT.

This task order calls for the Contractor to furnish important services in support of the design of _____ [specify activity] (the "Activity"). In accordance with the principles of FAR Subpart 9.5 and USAID policy, THE CONTRACTOR SHALL BE INELIGIBLE TO FURNISH, AS A PRIME OR SUBCONTRACTOR OR OTHERWISE, THE IMPLEMENTATION SERVICES FOR THE ACTIVITY, EXCEPT FOR SUCH SERVICES THAT MAY BE FURNISHED UNDER A SEPARATE TASK ORDER ISSUED UNDER THIS CONTRACT, unless the Head of the Contracting Activity, in consultation with USAID's Competition Advocate, authorizes a waiver (in accordance FAR 9.503 and AIDAR 709.503) determining that preclusion of the Contractor from the implementation contract would not be in the Government's interest.

APPENDIX 2

EVALUATION

I. Clause for solicitations and contracts covering a definite quantity:

Organizational Conflicts of Interest: PRECLUSION FROM FURNISHING CERTAIN SERVICES AND RESTRICTION ON USE OF INFORMATION.

(a) This contract calls for the Contractor to furnish important services in support of the evaluation of [specify activity or contractor]. In accordance with the principles of FAR Subpart 9.5 and USAID policy, THE CONTRACTOR SHALL BE INELIGIBLE TO FURNISH, AS A PRIME OR SUBCONTRACTOR OR OTHERWISE, IMPLEMENTATION SERVICES UNDER ANY CONTRACT OR TASK ORDER THAT RESULTS IN RESPONSE TO FINDINGS, PROPOSALS, OR RECOMMENDATIONS IN THE EVALUATION REPORT WITHIN 18 MONTHS OF USAID ACCEPTING THE REPORT, unless the Head of the Contracting Activity, in consultation with USAID's Competition Advocate, authorizes a waiver (in accordance FAR 9.503) determining that preclusion of the Contractor from the implementation work would not be in the Government's interest.

(b) In addition, BY ACCEPTING THIS CONTRACT, THE CONTRACTOR AGREES THAT IT WILL NOT USE OR MAKE AVAILABLE ANY INFORMATION OBTAINED ABOUT ANOTHER ORGANIZATION UNDER THE CONTRACT IN THE PREPARATION OF PROPOSALS OR OTHER DOCUMENTS IN RESPONSE TO ANY SOLICITATION FOR A CONTRACT OR TASK ORDER.

(c) If the contractor gains access to proprietary information of other company (ies) in performing this evaluation, the contractor must agree with the other company (ies) to protect their information from unauthorized use or disclosure for as long as it remains proprietary, and must refrain from using the information for any purpose other than that for which it was furnished. THE CONTRACTOR MUST PROVIDE A PROPERLY EXECUTED COPY OF ALL SUCH AGREEMENTS TO THE CONTRACTING OFFICER.

II. Clause for Solicitations and contracts for indefinite quantity contracts.

In the case of a solicitation for an indefinite quantity contract, paragraph (a) of the clause shall be replaced with Alternate I. Paragraphs (b) and (c) remain the same.

Alternate I

(a) Task orders under this contract may call for the Contractor to furnish important services in support of evaluation of contractors or of specific activities. In accordance with the principles of FAR Subpart 9.5 and USAID policy, THE CONTRACTOR SHALL BE INELIGIBLE TO FURNISH, AS A PRIME OR SUBCONTRACTOR OR OTHERWISE, IMPLEMENTATION SERVICES UNDER ANY CONTRACT OR TASK ORDER THAT RESULTS IN RESPONSE TO FINDINGS, PROPOSALS, OR RECOMMENDATIONS IN AN EVALUATION REPORT WRITTEN BY THE CONTRACTOR. THIS PRECLUSION WILL APPLY TO ANY SUCH AWARDS MADE WITHIN 18 MONTHS OF USAID ACCEPTING THE REPORT, unless the Head of the Contracting Activity, in consultation with USAID's Competition Advocate, authorizes a waiver (in accordance FAR 9.503) determining that preclusion of the Contractor from the implementation work would not be in the Government's interest.

III. Clause for task orders:

This task order calls for the Contractor to furnish important services in support of evaluation of [specify contractor or activity]. In accordance with the principles of FAR Subpart 9.5 and USAID policy, THE CONTRACTOR SHALL BE INELIGIBLE TO FURNISH, AS A PRIME OR SUBCONTRACTOR OR OTHERWISE, IMPLEMENTATION SERVICES UNDER ANY CONTRACT OR TASK ORDER THAT RESULTS IN RESPONSE TO FINDINGS, PROPOSALS, OR RECOMMENDATIONS IN AN EVALUATION REPORT WRITTEN BY THE CONTRACTOR. THIS PRECLUSION WILL APPLY TO ANY SUCH AWARDS MADE WITHIN 18 MONTHS OF USAID ACCEPTING THE REPORT, unless the Head of the Contracting Activity, in consultation with USAID's Competition Advocate, authorizes a waiver (in accordance FAR 9.503) determining that preclusion of the Contractor from the implementation work would not be in the Government's interest.

APPENDIX 3.

AUDIT

Clause for use in all solicitations and contracts including audit services:

Organizational Conflicts of Interest: RESTRICTION ON USE OF INFORMATION.

This contract calls for the Contractor to provide certain audit services for USAID. To guard against the possibility that the Contractor might receive an unfair competitive advantage in competing for future USAID consulting contracts through its exposure to sensitive cost and other proprietary information of USAID contracts which it will audit hereunder, BY ACCEPTING THIS CONTRACT, THE CONTRACTOR AGREES THAT IT WILL NOT USE, OR MAKE AVAILABLE TO ANYONE, FOR THE PURPOSE OF PREPARING PROPOSALS OR ANY OTHER DOCUMENTS IN RESPONSE TO A SOLICITATION FOR A CONTRACT OR TASK ORDER, ANY PROPRIETARY, COST, OR OTHERWISE SENSITIVE BUSINESS INFORMATION OBTAINED AS A RESULT OF AN AUDIT.

The contractor must agree with the companies that it audits to protect their proprietary information from unauthorized use or disclosure for as long as it remains proprietary, and must refrain from using the information for any purpose other than that for which it was furnished. THE CONTRACTOR MUST PROVIDE A PROPERLY EXECUTED COPY OF ALL SUCH AGREEMENTS TO THE CONTRACTING OFFICER.