

**TITLE: CIB 94-2 Organizational Conflicts of Interest**

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U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT

MEMORANDUM FOR CONTRACTING OFFICERS AND NEGOTIATORS

TO: Distribution List FAC

FROM: M/PE, John F. Owens, Procurement Executive

SUBJECT: Organizational Conflicts of Interest

**CONTRACT INFORMATION BULLETIN 94-2**

This Contract Information Bulletin (CIB) supersedes and cancels CIB 93-2, dated December 21, 1992.

Background

As you know, USAID has increasingly relied over recent years on contractors, not only to implement projects, but also to design, evaluate and audit them. This mounting reliance on contractors has led to issues of organizational conflicts, and the appearance of such conflicts, in three principal areas:

1. where a firm which has designed a USAID project wishes to be eligible for the competition to implement the project;

2. where a firm which has evaluated USAID contractors/ projects under contract with USAID seeks to do USAID consulting work (sometimes in competition with the firms evaluated); and

3. where a firm which has audited USAID contractors under contract with USAID seeks to do USAID consulting work (sometimes in competition with the firms audited).

One obvious way to reduce such conflicts is for USAID to perform its design, audit and evaluation work with its own personnel, rather than rely on contractors. We know that some Missions and offices have been able to do this effectively. We urge you to encourage use of USAID personnel for design, audit and evaluation work whenever feasible.

Where limited OE resources will not allow such reductions in the use of outside contractors, we can expect these conflict concerns to continue or be exacerbated in the future. To meet these concerns more effectively, this CIB announces tightened procurement policy with respect to each of these three conflict areas.

#### 1. DESIGN/IMPLEMENT CONFLICT

##### General FAR Principles on OCI

Under FAR 9.501, an "organizational conflict of interest" (OCI) exists if a person is "unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage." FAR 9.504(a) provides that the Contracting Officer is to identify potential OCIs as early in the acquisition process as possible and is to avoid, neutralize or mitigate significant conflicts before contract award. FAR 9.504(e) requires the Contracting Officer to award the contract to the apparent successful offeror unless an OCI is determined to exist that cannot be avoided or mitigated.

Apart from the above-noted OCI principles of avoiding conflicting roles that would give a contractor an unfair competitive advantage or might bias its judgment, the FAR contains a very specific provision applicable to design contractors. FAR 9.505-2(b)(1) dictates that if a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring services, "or provides material leading directly, predictably and without delay to such a work statement," then the contractor is prohibited from supplying the services (subject to several minor exceptions). This provision was found to have been violated by USAID in the GIC case (GIC Agricultural Group, Comp. Gen. Decision No. B-249075, October 21, 1992). The FAR also contains a specific example relevant to the technical assistance USAID contracts customarily call for:

Company A receives a contract to Prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a curriculum that the agency endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training./1

/1 FAR 9.508(g).

USAID Policy on Preclusion of Design Contractor

Although USAID Contracting officers have in the past often allowed design contractors to bid on the related implementation contracts where steps were taken to mitigate the inherent OCI,<sup>/2</sup> we have determined that it is appropriate to take a stricter position with respect to the interpretation and enforcement of the FAR's OCI provisions applicable to design contractors. Henceforth, where it is contemplated that, under a new USAID contract solicitation, a contractor will have a substantial role in the design of a project/activity by providing USAID with "material leading directly, predictably and without delay" to a work statement for the implementation of the project/activity), that contractor will be generally precluded from the implementation contract.<sup>/3</sup> The design contractor will be notified of such preclusion through inclusion in the design contract of a provision substantially as set forth in Appendix 1.

<sup>/2</sup> Mitigation steps have often included some or all of the following: disclosing the project paper prepared by the design firm to all interested potential offerors; treating the design firm's project paper as merely a draft, subject to substantial revision by USAID project officers; limiting the design firm's access to, or role in formulating sensitive information (particularly, budget and financial data); not allowing the design firm to write the statement of work for the implementation contract or PIO/T; crafting the evaluation criteria for the implementation contract so the design firm will not be seen to have an unfair competitive advantage; and being alert to guard against possible bias in the project paper to favor the capabilities of the design firm in the implementation work.

<sup>3/</sup> An exception from this preclusion policy would be where more than one contractor has been involved in preparing the work statement, in which case, under FAR 9.505-2 (b) (1) (iii) the design contractors need not be precluded from the implementation contract.

With respect to currently existing design contracts and solicitations for new design contracts which have been issued prior to the date hereof, we have decided not to apply this stricter policy to such contractors. Rather, the prior OCI policy (which had been set forth in CIB93-2) will continue to apply to such contractors:

"Contracting officers must be sensitive to the OCI present in this context and may allow the design firm to compete for the related implementation contract only if the Contracting Officer is satisfied that steps, appropriate under the particular circumstances, have been taken to mitigate or neutralize the OCI effectively, and the contract file has been documented to reflect this."

The FAR phrase, "material leading directly, predictably and without delay," has not been precisely defined, but USAID policy is not to interpret it broadly, such that the great majority of new design contracts will be subject to the preclusive policy envisioned by the FAR. In the GIC case, for example, USAID argued to the GAO that the changes made by the Mission in the work statement prepared by the contractor and the eight months which elapsed between the time of the submission of the contractor's report and the issuance of the implementation RFP indicated that the "directly, predictably and without delay" standard had not been met, but the GAO disagreed. In

light of the substantial OCI risks of biased design and unfair competitive advantage present in the design/implement context, the preclusive policy is to be applied to design contracts involving particular contemplated projects where a single contractor is responsible for the design of the project/activity, even if the design contract does not call for the contractor to prepare a work statement for the project/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." Only in the case of very preliminary and general design work, not foreseeably connected to particular projects/activities, should the design contractor not be precluded from the implementation contract. In such cases, the general FAR Subpart 9.5 principles on OCI still apply, and the Contracting Officer must apply those principles to the particular facts (as Contracting Officers will do to "grandfathered" design contracts per the paragraph immediately above).

When design and implementation are competed together, this preclusive policy is not applicable. The possibility of unfair competitive advantage would not be at issue when the implementation phase is competed at the same time as the design. The potential OCI issue would be whether the contractor can render impartial assistance or advice to the Government.

A Contracting officer may request a waiver of this new, preclusive policy from the Agency Competition Advocate (ACA) (M/PPE, USAID/W) if he/she determines that it is in the best interests of USAID to allow the design contractor to compete for the implementation contract. Application for such a waiver may be made either prior to the issuance of the design solicitation. The ACA may approve the waiver, per FAR 9.503, in a particular contract situation, upon the ACA's determination that application of the preclusive policy would not be in USAID's interest. In this connection, the ACA will not accept vague assertions that without a waiver quality implementation firms will not be willing to bid for the design contract or that preclusion will lead to a disconnect between design and implementation of a project/activity. Although such fears have been often stated as underpinning USAID's prior more lenient policy, it is unclear that they are realistic, and Federal law as set forth in FAR 9.505-2(b)(1) generally calls for preclusion, suggesting that the OCI risks outweigh these unproven concerns. In considering a waiver, however, the ACA may consider that in some narrow, specialized areas there would not be adequate competition for the implementation contract without the design contractor. In addition, some areas such as construction and other infrastructure projects, are sufficiently well-defined that the ACA may determine that they are not susceptible to the risks of biased design and unfair competitive advantage. The ACA will also consider the likely efficacy of any proposed OCI mitigation steps, such as those noted in footnote/2. It should be noted, however, that waivers are expected to be rare, as the intention of this CIB is truly to change AID's policy with respect to design/implement OCI, such that preclusion of the design contractor shall be the rule and waiver the rare exception.

## 2. EVALUATE/CONSULT CONFLICT

Contracts calling for outside firms to evaluate USAID projects raise several OCI concerns. If the evaluation contract calls for the contractor to evaluate a current or likely competitor (as is often the case), the evaluation contractor may have an interest in criticizing the performance of the implementing firm, believing that a critical evaluation will hurt the chances of the firm in securing any follow-on contract or other work in that sector of expertise.<sup>/4</sup> The risks of a biased, unfavorable review are heightened in cases where the evaluation contractor and the evaluated firm have a history of bad relations with each other. On the other hand, an evaluation contractor may have a tendency toward the opposite bias if it perceives that a favorable review will curry favor with USAID and improve its position with respect to obtaining further USAID consulting work. Apart from these possible biases, an evaluation contractor may, during the course of the evaluation of a project, glean competitively useful information from the incumbent firm.

<sup>/4</sup> Cf. FAR 9.505-3, which states: "Contracts involving (a) technical evaluations of other contractors, offers or products . . . shall not generally be awarded to a contractor that would evaluate, or advise the Government concerning, its own products or services, or those of a competitor, without proper safeguards to ensure objectivity and protect the Government's interests."

We have determined that the best safeguard against these dangers is for the evaluation contractor to be precluded by the Contracting Officer from furnishing other services to USAID in the same sector as the project to be evaluated (except for design services<sup>/5</sup> or other evaluation services) during the three-year period after the last evaluation services are provided by the evaluation contractor. The Contracting Officer is to determine the appropriate precluded "sector" for this purpose (e.g., health, agriculture, economics, perhaps confined in some infrequent cases to the project's geographical area), so as to avoid the likelihood that the evaluation contractor will compete against the firm to be evaluated. As with the design/implement policy discussed above, this preclusive policy will apply prospectively through inclusion in new solicitations for evaluation contracts of a provision substantially as set forth in Appendix 2. It is contemplated that, as the existing USAID evaluation contracts wind down, they will be replaced with fewer, but larger, evaluation contracts with this preclusion feature, thus giving USAID a reliable pool of evaluation contractors whose objectivity will be above reproach.

<sup>5/</sup> Although evaluation contractors will not be precluded generally from design activities, they will be precluded, under Appendices 1 and 2, from evaluating their own designs.

This preclusive policy will also be subject to waiver by the Agency Competition Advocate (ACA) (M/PPE, USAID/W) when the ACA determines, per FAR 9.503, that its application would not be in USAID's interest. While the ACA retains discretion to determine when such a waiver would be in USAID's interest, it is envisioned that waivers would be extremely rare, with the most likely justification being that without

the evaluation contractor there would not be adequate competition for the particular procurement at issue.

### 3. AUDIT/CONSULT CONFLICT

Contracts calling for outside contractors to audit USAID contractors also raise OCI concerns. There is at least the possible appearance of a conflict when a firm under contract audits a USAID contractor and contemporaneously or shortly thereafter competes with that contractor for USAID consulting work. Such a situation presents at least the theoretical danger that the firm, in auditing its competitor, can gain an unfair competitive advantage in learning sensitive cost data./6

6/ USAID faced such a difficult situation recently, when the consulting division of a USAID IQC audit firm submitted a proposal for a USAID consulting contract in competition with that submitted by the USAID contractor being audited by the firm's audit division. The firm being audited strenuously objected to the audit firm's participation, alleging that it obtained proprietary data and learned how to prepare a proposal in the course of attempting to audit the contractor. Although the Contracting officer determined that there was no evidence to suggest that the audit firm abused its position by making use of the audit information in preparing its proposal (and indeed there was reasonable evidence to the contrary), the case suggested that such participation in consulting work by an audit firm can lead to difficult "appearance of conflict" issues.

We have determined that the best safeguard against these awkward real or perceived conflicts issues is for the audit contractor to be precluded from furnishing other services to USAID (except for other audit services) during the three-year period after the last audit services are provided by the audit contractor. Given that, as in the evaluation/consult conflict area, this is an admittedly stringent remedy, this preclusive policy will apply only prospectively, through inclusion in new solicitations for audit contracts of a provision substantially as set forth in Appendix 3. As with evaluation contracts, it is contemplated that, as the existing USAID audit contracts wind down, they will be replaced with a smaller number of larger audit contracts with this preclusion feature, thus ensuring that there will be no conflict appearance issues in this connection in the future.

Again, this preclusive policy will be subject to waiver by the Agency Competition Advocate (ACA) (M/PPE, USAID/W) when the ACA determines, per FAR 9.503, that its application would not be in USAID's interest. Although the ACA retains discretion to determine when such a waiver would be in USAID's interest, it is envisioned that waivers would be extremely rare, with the most likely justification being that without the audit contractor there would not be adequate competition for the particular procurement at issue.

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In addition to passing upon any waiver requests with respect to these three OCI policies, the ACA is available to respond to requests by Contracting Officers for further guidance in these areas, although it is hoped that this CIB is relatively self-explanatory.

## Appendix 1

[This should also be highlighted in the transmittal materials for the RFP.]

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 project/activity] (the "Project"). 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, OR THE EVALUATION SERVICES, FOR THE PROJECT, unless the USAID/W Competition Advocate shall have granted a prior waiver, based upon the Competition Advocate's determination, per FAR 9.503, that preclusion of the Contractor from the implementation contract would not be in the Government's interest.

## Appendix 2

[This should also be highlighted in the transmittal materials for the RFP.]

Organizational Conflicts of Interest: PRECLUSION FROM CERTAIN OTHER USAID CONTRACTS. This contract calls for the Contractor to evaluate \_\_\_\_\_ [specify project/activity] (the "Project"). It is critical USAID that such evaluation be conducted with complete impartiality and objectivity, uninfluenced by the possibility that the Contractor might in the near future compete for further USAID consulting work against the evaluated firm implementing the Project or, on the other hand, any perception that a favorable review would enhance the reputation of the Contractor with USAID and thus improve its position with respect to obtaining further USAID consulting work. Any firm which has designed or implemented the Project is thus ineligible for award of this contract. In addition, it is understood and agreed that, by accepting this contract, THE CONTRACTOR SHALL BE INELIGIBLE TO FURNISH, AS A PRIME OR SUBCONTRACTOR OR OTHERWISE, UNDER ANY NEW USAID CONTRACT, OR CONTRACT MODIFICATION WHICH INCREASES FUNDING OR EXTENDS THE TERM OF THE CONTRACT, ANY SERVICES (EXCEPT FOR DESIGN SERVICES OR OTHER EVALUATION SERVICES) TO USAID IN THE \_\_\_\_\_ [specify sector of the Project) SECTOR FOR A PERIOD OF THREE (3) YEARS AFTER THE LAST SERVICES ARE PROVIDED BY THE CONTRACTOR UNDER THIS EVALUATION CONTRACT, unless the USAID/W Competition Advocate shall have granted a prior waiver, based upon the Competition Advocate's determination, per FAR 9.503, that such preclusion of the Contractor would not be in the Government's interest.

## Appendix 3

(This should also be highlighted in the transmittal materials for the RFP.)

Organizational Conflicts of Interest: PRECLUSION FROM OTHER USAID CONTRACTS. This contract calls for the Contractor to provide certain audit services for USAID. To guard against any 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 contractors which it will audit hereunder, and to prevent any appearance of impropriety, it is understood and agreed that, by accepting this contract, THE CONTRACTOR SHALL BE INELIGIBLE TO FURNISH, AS A PRIME OR SUBCONTRACTOR OR OTHERWISE, UNDER ANY NEW USAID CONTRACT, OR CONTRACT MODIFICATION WHICH INCREASES FUNDING OR EXTENDS THE TERM OF THE CONTRACT, ANY SERVICES (EXCEPT FOR OTHER AUDIT SERVICES) TO USAID FOR A PERIOD OF THREE (3) YEARS AFTER THE LAST SERVICES ARE PROVIDED BY THE CONTRACTOR UNDER THIS AUDIT CONTRACT, unless the USAID/W Competition Advocate shall have granted a prior waiver, based upon the Competition Advocate's determination, per FAR 9.503, that such preclusion of the Contractor would not be in the Government's interest.