TITLE: CIB 94-2 (Supplement) Organizational Conflicts of Interest

March 24, 1994

MEMORANDUM TO CONTRACTING OFFICERS AND NEGOTIATORS

FROM: DAA/M, Mr. Michael Sherwin, Procurement Executive

SUBJECT: Organizational Conflicts of Interest

CONTRACT INFORMATION BULLETIN 94-2 (Supplement)

Not surprisingly, we have received a number of questions on CIB 94-2, Organizational Conflicts of Interest (OCI), and the related General Notice. This supplement provides additional guidance.

As a starting point, please note that the new requirements do not cover all the situations where potential OCI may exist and do not substitute for a contracting officer's judgment in particular cases. The general OCI rules set forth in FAR Subpart 9.5 (and noted briefly in CIB 94-2) remain as an overlay to be complied with in all OCI situations. Implementing the new policy will, in many cases, require the contracting officer to make judgments about what preclusions should be applied in particular cases. Situations not covered by the new OCI restrictions will still require the contracting officer to determine whether potential OCI exists and whether it can be mitigated in some way that would allow the contractor to participate in a particular procurement.

Following are several questions and answers on the new OCI requirements:

Do the requirements in CIB 94-2 apply to individuals, whether contractor employees, independent contractors, or PSCs?

No. Individuals who work on design, evaluation or audit contracts that are covered by the guidelines in CIB 94-2 are not restricted from working under any implementation contracts by the terms of CIB 94-2 regardless of whether they worked as PSCs, independent contractors, or as employees of a contractor organization. AID employees, however, whether direct hire or PSCs, would be restricted under the post-employment provisions of the Procurement Integrity Act from working on a contract for which they were a procurement official.

Situations may arise, of course, where a contracting officer believes that some type of restriction is necessary with regard to an individual. Again, this new policy does not prevent contracting officers from exercising such discretion. It is possible that, in order to protect the integrity of the procurement process, a contracting officer may determine if necessary to preclude an independent contractor who worked on design from participating in proposal preparation for the implementation contract. It may even be necessary to disqualify a firm employing an individual who had worked on design. For example, this might be appropriate where a PSC wrote the statement of work, had access to USAID's budget and cost estimates and other inside information and then shared all this information with a firm proposing for the implementation award. This would probably be precluded by various provisions of the Procurement Integrity Act, thus creating a situation serious enough to warrant disqualification.

Do the requirements in CIB 94-2 apply to existing IQCs or Buy-in contracts?

Not automatically. Because the existing contracts did not contain the prohibitions when they were competed, it is more appropriate for the cognizant contracting officer to determine case-by-case for each delivery order whether potential OCI exists and what remedies can be applied. While the contracting officer may decide that it is necessary to preclude a contractor from participating in a particular procurement in order to avoid OCI, he or she may determine that another remedy is adequate to mitigate potential OCI.

How will contracting officers know which contractors are precluded from which contracts?

At present, the only "system" is to rely on the contractors. In the future, this information should be available through the automated system being developed under the current Acquisition and Assistance Business Area Analysis.

Are all affiliates, divisions, sub-organizations, etc., of a contractor affected by a restriction?

This question cannot be answered across-the-board. On one end of the spectrum, organizations which are not separate legal entities from the restricted contractor should be subject to the same restrictions. At the other end, organizations which are affiliated in name only should not be subject to restrictions. In cases where the relationship is not so clear cut, you may request guidance from the Agency Competition Advocate.

Are design contractors precluded from implementation when more than one works on the design?

Contractors generally need not be precluded from competing for the implementation contract if more than one prime contractor is involved in the design work, provided that none of the contractors could be said to control the final design. FAR Subpart 9.5 rules on avoiding OCI still apply, and contracting officers continue to have discretion to preclude multiple design team members if an OCI problem

exists that cannot be mitigated despite the exception applying. Contracting officers should be careful to authorize multiple firm arrangements for design work only when there are bona fide, objective reasons to engage more than one contractor in the design work.

Does the use of subcontractors by the design contractor mean that the prime and subcontractors need not be precluded from the implementation contract?

No. The FAR states that preclusion is not required when more than one contractor was involved in doing the work. Our interpretation is that "one contractor", when read in context with the purpose and scope of FAR conflict of interest coverage, would include the prime contractor and any subcontractors whose professional work product led directly, predictably, and without delay to the statement of work. Therefore, the prime contractor and subcontractors should be precluded unless a waiver has been authorized.

How are the preclusion requirements applied to consortia?

We presume that each member of a consortium has full access to the work product of the consortium. Absent compelling evidence to the contrary (e.g., a statement from the consortium that only specified members participated), every member of the consortium should be precluded whenever the consortium is precluded from implementation because of evaluation or audit work it has performed.

For design work, we consider the situation analogous to the prime/sub contactor relationship under a design contract. Thus, every member of the consortium would be precluded unless there is compelling evidence that the member did no professional work which led directly, predictably, and without delay to the statement of work.

What types of evaluation contracts are subject to the requirements of the CIB?

The requirements apply to direct contracts for evaluations of contractors or of a project or program activity. They do not apply to evaluations of a Mission's portfolio - a program review or strategic assessment - nor do they apply to widespread program sector evaluations. The restrictions also do not automatically apply to evaluations of grants or cooperative agreements. Remember, however, that even where the CIB restrictions do not apply, OCI issues may well still exist that must be mitigated.

How is a "sector" defined for purposes of the evaluation restrictions?

The contracting officer has leeway to determine the appropriate definition of a sector depending on the circumstances. The restriction should be based on whether the contractor would be likely to compete against firms which is has evaluated or audited, or whether the firm is likely to gain information from firms which it has evaluated or audited which would be useful to it in future procurements. The sector may be somewhat narrowly defined (such as agricultural marketing, child survival), and it may also be reasonable to limit the prohibition to a particular region provided it covers the areas where OCI is likely to

arise, as described in the first paragraph of the "Evaluate/Consult Conflict" in CIB 94-2. Questions that come up in a particular case may be addressed to the Agency Competition Advocate.

Following are clarifications of other issues concerning the design/implementation policy:

To the extent a contractor is precluded from being a prime contractor, it is also precluded from being a subcontractor.

The DAP and DAD contracting mechanisms may still be used. Whenever design and implementation are covered in the same contract, the preclusion is not applicable.

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We recognize that many questions will arise in the course of implementing the new OCI policy. Please address any questions and comments to the Agency Competition Advocate or the Policy Division of M/PPE.