Section 9.5 - Organizational and Consultant Conflicts of Interest

Subsection 9.5.1 - Procedures for Documenting Organizational Conflict of Interest Decisions Prior to Contract Award (August 2014)

This subsection was previously Section 9.1 in the Contracts Management Manual.

9.5.1.1 Purpose.

This policy provides EPA Contracting Officers (COs) with guidance on procedures for documenting organizational Conflicts Of Interest (COI) decisions that occur prior to contract award.

9.5.1.2 Background.

The Federal Acquisition Regulation (FAR) Subpart 9.5 requires COs to analyze planned acquisitions in order to: 1) identify and evaluate potential organizational COIs as early in the acquisition process as possible; and 2) avoid, neutralize, or mitigate significant potential conflicts before contract award.

EPAAR Subpart 1509.5 prescribes standard EPAAR clauses to be used in most solicitations and contracts, except where a particular acquisition requires special provisions. The standard EPAAR solicitation provisions (EPAAR 1552.209-70 and 1552.209-72) require an offeror to certify that it is unaware of any potential COI or to disclose any potential COI of which it is aware. The standard EPAAR contract clause (EPAAR 1552.209-71) requires a contractor to also make full disclosure of any actual or potential COIs discovered after contract award.

In addition, a Comptroller General's (CG) decision (B-241372, 2/6/91), involving an EPA CO's decision to properly exclude a contractor due to a potential COI, provides further clarification of a CO's responsibility in evaluating COIs. This subsection, based to some degree on the CG decision, provides procedural guidance for a CO to use in resolving and documenting potential COIs prior to contract award.

9.5.1.3 Authority/Applicability.

The authority for this subsection is based on FAR subpart 9.5, EPAAR subpart 1509.5 and the CG decision.

9.5.1.4 Definitions.

The FAR defines "organizational conflict of interest," as meaning "that because of other activities or relationships with other persons, 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."

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9.5.1.5 Policy.

Contracting Officers should make every attempt to resolve potential COIs through steps that will neutralize or mitigate these potential COIs without excluding offeror from competing. Generally, offeror will be required to address issues related to COIs in their proposals. In unusual circumstances, and after consultation with the Office of General Counsel (OGC), potential offeror may be requested to address safeguards against COIs prior to submission of proposals.

When necessary due to the nature of the potential COI, and upon approval by the Director, Office of Acquisition Management (OAM), COs not able to otherwise avoid, mitigate, or neutralize an COI must exclude offeror from competition. The Acquisition Policy and Training Service Center (APTSC) and OGC must be consulted with regard to proposed actions to resolve a COI. Additionally, the Competition Advocate must be consulted before imposing any restrictions that would reduce competition. The CO must notify affected offeror of any proposed actions, including plans to exclude them from further participation in the competition, and allow them a reasonable opportunity to respond prior to the CO's final decision implementing such proposed actions.

COs should evaluate potential COI issues as early in the acquisition process as possible to avoid having offeror unnecessarily incur proposal costs only to later be excluded from competing for the contract. COs must document their evaluation only when a substantive potential COI exists. A CO's evaluation should include potential COIs at the subcontractor level as well as the prime contractor level.

COs must evaluate potential COI issues related to each procurement separately and may NOT impose across-the-board restrictions that will limit a potential offeror's ability to compete for EPA contracts.

9.5.1.5.1 Policy Support Contracts.

COs should pay particular attention to those contracts most susceptible to potential COIs, such as contracts that assist in the development of Agency policy. It would generally be considered improper to have a contractor assist in the development of policy that would have a direct impact on the same contractor, such as a Superfund Response Action Contractor (RAC) assisting in the development of policy to be followed in performing response action work. In a case such as this, the CO should evaluate how potential COIs might be neutralized or mitigated. If the CO determines that potential COIs cannot be otherwise neutralized or mitigated, the CO must avoid the COI by excluding sources with conflicts from competition.

Appendix 9.5.1-A, Sample Provisions used in a Solicitation to Exclude RAC Contractors for Award of a Policy Support Contract, contains sample provisions similar to those used in an EPA solicitation for Superfund policy support. In this sample, the CO determined that a COI could be avoided only by excluding RAC contractors from award. As indicated in Appendix 9.5.1-A, offeror were required to demonstrate that at the time of anticipated contract award it would not

be a RAC or that its status as a RAC would not create a significant potential for a COI. The CO determined prior to issuing the solicitation that the holders of certain EPA prime contracts would create a significant potential for a COI and would therefore be ineligible to compete. Offeror who first successfully demonstrated they were not RACs were eligible to submit proposals. This attachment is provided for COs that may be working on similar solicitations.

9.5.1.5.2 Procedures.

(a) The following is an overview of the basic steps a CO should take in reviewing acquisitions for potential COI prior to award and in documenting the official contract file. Each acquisition must be handled individually with these procedures adapted to the specific acquisition. The assigned CO should:

(1) Understand thoroughly what services a contractor is expected to perform under the proposed contract by reading the statement of work and through discussions with the program office and procurement officials.

(2) Review FAR and EPAAR requirements on COI and additional guidance provided by OAM to evaluate possible COI issues that may relate to the subject procurement.

(3) If COI appears to be a concern, also discuss the procurement with the APTSC, OGC and the program office. Document the evaluation whenever a significant potential COI exists. APTSC may be consulted for examples of proper documentation.

(4) If after these discussions the CO determines there is not a significant potential COI, the CO should still discuss the solicitation with the cognizant Chief of the Contracting Office (CCO) or Regional Acquisition Manager (RAM).

(5) Based on these discussions, determine the best way to proceed for the procurement. For example, are the existing EPAAR provisions sufficient to protect against an COI or are special measures required, such as requiring offerors to submit a conflict of interest plan which addresses how it identifies and reports conflict of interest, or other special solicitation provisions or contract clauses? In determining how to proceed for a specific procurement, COs should propose actions that allow the identification and resolution of COI issues early in the procurement process to avoid having contractors unnecessarily incur proposal costs only to be later disqualified from competition due to COI issues.

(6) Discuss the specific proposed action with involved procurement officials, OGC and the program office. However, recognize it is the CO's responsibility, not the program official's, to guard against an COI.

(7) If the acquisition involves a significant potential COI and/or if special solicitation and contract provisions are proposed, the acquisition may not proceed until the cognizant CCO concurs on the recommended action. The CO must route the proposed action through OGC then APTSC for review, to the cognizant CCO for approval. The CO's

request must include background related to the potential COI, alternative approaches considered, and the CO's rationale in his/her proposal.

(8) A COI strategy that will restrict competition due to COI (exclusion of sources) must also be approved by the Competition Advocate and Head of the Contracting Activity (HCA) - unless the procurement is a follow-on using a strategy previously approved by the HCA. (Subsection "Reviews, Concurrences, and Checklists" in EPAAG Chapter 1).

(9) Affected contractors must be provided with an opportunity to respond to any proposed actions that would withhold award from them based upon COI considerations. The CO's rationale in proposing these actions must be thoroughly explained along with an explanation of any possible contractor actions that might allow them to be considered for award of the contract.

(10) Responses from affected contractors must be evaluated by the CO and discussed with the involved procurement officials, APTSC, and OGC (as well as the program office, as necessary). Based on these discussions, the CO should propose a final decision to resolve the potential COI to the cognizant CCO. The CO's rationale and evaluation of the contractors' responses must be fully documented in the memorandum to the cognizant CCO.

(11) Once approved by the cognizant CCO, affected parties must be informed by the CO of the final decision.

(12) The cognizant CCO, Director, OAM, the Competition Advocate, and OGC should be immediately notified of any formal protests.

APPENDIX 9.5.1-A

SAMPLE PROVISIONS USED IN A SOLICITATION TO EXCLUDE RAC CONTRACTORS FOR AWARD OF A POLICY SUPPORT CONTRACT

Provision 1

Prohibition of "Response Action Contractors" from Being Considered Eligible for Award for "Management Support for the Superfund Program"

(a) An offeror shall be prohibited from receiving an award under this solicitation if:

(1) It is determined that the offeror is a Response Action Contractor (RAC) (as defined below), is affiliated with a RAC, or proposes to utilize a RAC as a team subcontractor, and

(2) It is determined that the offeror's status as a RAC, or relationship with a RAC, will create a significant potential for an actual or apparent conflict of interest in performing the contract work.

(b) A Response Action Contractor (RAC) is:

(1) Any person who enters into and is carrying out a contract or agreement to provide any response action, or ancillary services related to a response action, at a facility listed on the National Priority List (NPL); and

(2) Any person retained or hired by a response action contractor, to provide any services related to a response action.

(c) A "Response Action" is a CERCLA-authorized action at a Superfund site involving either a short term removal action or a long-term remedial response with respect to any release or threatened release of a hazardous substance, pollutant, or contaminant from a facility and includes any evaluation, planning, engineering, surveying and mapping, design, construction, equipment, and any ancillary services related to such removal action or remedial response.

(d) The determination as to whether an offeror is ineligible for award of this contract pursuant to this provision will be made by the Contracting Officer on a case-by-case basis. The Contracting Officer has determined that award of this contract to a contractor holding certain Agency prime RAC contracts would create a significant potential for an actual or apparent conflict of interest. Accordingly, contractors holding any of the following prime contracts will be ineligible for award of this contract, such as the contracts listed below:

- Response Action Contracts (RACs);

- Superfund Technical Assessment and Response Team Contracts (START);
- Emergency and Rapid Response Services Contracts (ERRS);

Provision 2

Determination of Response Action Contractor (RAC) Status

To be eligible for award of this contract, each offeror must demonstrate either that it is not a RAC and not affiliated with a RAC, or that its status as a RAC or relationship with RAC will not create significant potential for an actual or apparent conflict of interest in performing work under this contract.

If a prospective offeror is uncertain as to whether or not it will be considered a RAC, it may submit a complete description of the work it is performing at NPL facilities for consideration by the CO. The prospective offeror must explain the basis of its view that the work does not constitute response action work.

If the prospective offeror is not a RAC, but is affiliated with a RAC, it may submit information concerning measures it proposes to take to assure that its relationship with the RAC will not create a significant potential for an actual or apparent conflict of interest. The CO must be satisfied that any measures taken to avoid conflicts of interest will be in place at the time of contract award.

All offerors must submit the information necessary to demonstrate eligibility for contract award on or before (date). The Contracting Officer will issue a final determination as to the prospective offerors' status and eligibility to submit a proposal pursuant to the solicitation.