Subsection 9.5.2 - Procedures for Handling Post Award Organizational Conflicts of Interest (August 2014)

This subsection was previously Section 9.2 of the Contracts Management Manual.

9.5.2.1 Purpose.

This subsection provides EPA Contracting Officers and program personnel with guidance on procedures for handling organizational conflicts of interest issues that arise after contract award.

9.5.2.2 Background.

EPA uses contractor support in the development and enforcement of environmental standards and regulations, as well as control of toxic substances and cleanup of hazardous wastes and oil. Our contractors often work for or have financial interests in the industries for which they are providing regulatory support to EPA. Contractors are involved in the manufacture of equipment or the marketing of software systems that may be the subject of evaluation under a resultant contract. Also, potential conflicts exist when contractors are involved in the manufacture of chemicals for which product and residue chemistry data may be reviewed and evaluated. Consequently, the objectivity of the contractors' work product for EPA and the integrity of EPA's regulations and standards could be called into question by the public. Further, it may be difficult to identify conflict of interest (COI) issues at the pre-award stage and contractors' financial and business relationships are constantly changing. Therefore, while no potential COIs may have existed at contract award, conflicts may arise during the period of performance of a contract.

EPA's Superfund cleanup contractors may also work for Potentially Responsible Parties (PRPs) responsible for pollution at Superfund sites where the contractors are working for EPA. The objectivity or integrity of the work contractors perform for EPA may be called into question as a result of their relationships with PRPs. This may prejudice EPA enforcement actions and jeopardize successful cost recovery. Due to changing cleanup priorities, multiple sites, and ongoing identification of PRPs, it is often impossible to identify work at the pre-award stage that may pose COI.

Appendix 9.5.2-A is an example of a method developed and used by the Region III Office of Acquisition and Assistance Management to evaluate whether a COI exists. These procedures can also be used when considering Limitation of Future Contracting (LOFC) requests. A parallel procedure for non-Superfund programs would be to identify the appropriate Key Indicators for the program being evaluated.

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9.5.2.3 Authority/Applicability.

This subsection is based on authority of FAR Part 9 and corresponding sections of the EPA Acquisition Regulations (EPAAR).

9.5.2.4 Definitions.

The Federal Acquisition Regulation (FAR) 2.101 defines COI as a situation in which "...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."

9.5.2.5 Policy.

9.5.2.5.1 Participants in COI Decisional Process.

(a) Contracting Officers. The FAR, the EPAAR, and EPA contract clauses make it clear that a COI determination is a Contracting Officer's (CO's) responsibility. However, all EPA employees should be sensitive to identifying and avoiding COI.

The CO should evaluate COI on a case by case basis. Before making a determination regarding whether a potential COI exists, the CO must thoroughly evaluate the facts based on program, legal, and public interest concerns, taking into consideration the best interests of the Government. In evaluating a potential COI, the CO performs a risk analysis to determine whether a significant potential COI exists. If one exists, the CO evaluates whether and how the COI can be avoided, neutralized or mitigated and may request supplemental information from the contractor to aid in making a determination. The exercise of common sense, good judgment, and sound discretion is required to make a determination and to develop an appropriate means for resolving the issue. Some cases may be clear cut so that a CO can evaluate the facts and make a quick decision based on common sense and knowledge. However, the majority of COI determinations are more complex. Often, a CO does not initially have enough information to make an informed decision.

(b) Program Offices. As part of the CO's decision-making process, COs should coordinate with the program and seek program office advice. Program personnel are in the best position to provide technical advice regarding the nature and/or relationships of the applicable work. Also, they may be aware of other issues COs should consider in evaluating whether an actual or potential COI exists.

(c) Office of General Counsel (OGC) and the Acquisition Policy and Training Service Center (APTSC). OGC and APTSC are available to provide advice and assistance to the CO in evaluating and making COI determinations. OGC and APTSC review of a COI determination is required only in the following situation; When a Work Assignment/Delivery Order/Technical Direction Document (WA/DO/TDD) has been issued to a contractor and a COI is later identified which cannot be avoided, neutralized, or mitigated, the CO must consult with OGC and APTSC before canceling the work and issuing it to another contractor. This requirement does not apply to situations where contractors have been issued a WA/DO/TDD which is specifically for preliminary COI screening only. OGC and APTSC consultation is not required in any other COI determinations.

COs may find it helpful to obtain advice from APTSC regarding remedies when a COI exists. OGC review should be requested if legal issues are raised by the CO, the contractor, or the contractor's attorney. The Office of Regional Counsel also has attorneys available for consultation on COI matters.

d) Office of Enforcement and Compliance Assurance (OECA). Potential COI may impede successful cost recovery negotiations. OECA can provide advice on how a potential COI may impact or prejudice an enforcement and/or cost recovery action. Therefore, enforcement staff input is especially helpful where the CO is basing his/her determination on the Government's potential use of the contractor as an expert witness in cost recovery or other litigation.

9.5.2.5.2 Examples of COI Information to Request from the Contractor.

The following are examples of the kinds of information a CO may find helpful to evaluate a post-award COI issue. There may be additional information you need to consider in evaluating a COI situation. The purpose of requesting this type of information is to assess the magnitude of a contractor's relationship with another party when evaluating potential COI.

- Is the work to be performed at the same site or a contiguous site where a contractor performed work, is performing work, or will perform work for a PRP? If yes, what are the details?

- Is the work to be performed for EPA similar or related to the work performed, being performed/to be performed by the contractor for a PRP? A commercial client? An industry? Explain.

- Does the contractor have any contracts to perform work for any applicable PRP(s) and what are the terms of the contract(s)?

- Does the contractor's contract with a PRP contain any confidentiality or testimony clauses?

- Request that the contractor provide a copy of any relevant information regarding the contractor's relationship to a PRP.

- How much work was performed in the last three years for the PRP(s)/commercial client(s) that pose potential COIs?

- How much work (i.e., in dollars, percentage of business, and/or gross revenue) has the contractor performed or is in the process of performing for the PRP(s)? Commercial client(s)? Industries? What is the contractor's gross revenue for each of the past three years?

- When did the contractor perform the applicable work for the PRP(s)? Commercial client(s)? Industries?

- Is work currently being performed for the PRP(s)? Commercial client(s)? Industries? If yes, what work and how long is the work expected to continue?

- If the work in question involves an organizational relationship, what is the relationship between the parties? Does the work involve a parent, subsidiary, affiliate, etc.?

- Is the contractor under contract or does it have some other arrangement with any relevant public or private clients to begin providing services/work efforts that may represent a potential COI?

- Does the contractor own or have any financial interest in a specific technology, equipment, system, or software which will be evaluated under this contract?

- Request that the contractor provide any other pertinent information bearing on the COI of which the contractor may be aware that has not been specifically requested by EPA.

9.5.2.5.3 Examples of Basic COI Information Available Within the Agency.

- What is the value of the WA/DO/TDD? Is it a significant amount? (Note -- While this is useful information, often the dollar value is not as relevant to COI decisions as the type of work to be performed).

- Does the work performed or to be performed for EPA relate to an existing or potential cost recovery and/or enforcement action?

- Will the contractor/subcontractor testify on behalf of the United States in the litigation?

- What are the concerns in this regard if the contractor/subcontractor were to testify?

- Will the contractor testify for the PRP?

- Has a consent decree or an administrative order been signed? If so, what are the terms of the agreement? (For example, is the party with whom the contractor has a relationship a signatory of the consent decree, and if so, what are the terms?)

- Will the work be used to support an Agency regulation or standard? If so, does the contractor have any clients that would directly benefit from the Agency regulation or standard?

- Is the work non-discretionary in nature or does it involve some degree of judgment or discretion on the contractor's part?

9.5.2.5.4 Time Frame for Evaluating Post Award Conflicts.

The Agency is committed to providing timely responses on COI issues to contractors. As a general rule, COs should strive to resolve COI issues within 10 working days of receipt of all relevant information. Failure to deal with COIs in a timely manner could cause contractors to lose business and delay implementation and work on EPA programs and projects. COs should coordinate with contractors and programs to establish specific response/decision timeframes for individual COI issues.

9.5.2.5.5 Documenting COI Decisions.

COs should maintain records of COI decisions and related correspondence in the official contract file. COs should forward an information copy of all COI decisions to APTSC. In turn, APTSC will analyze the COI decisions to ensure consistency across the Agency and as a basis for developing and scheduling additional COI training.

9.5.2.5.6 Waiver Procedures.

If a determination is made that a conflict cannot be avoided, neutralized, or mitigated but it is in the best interest of the Government to award/continue the WA/DO/TDD, a request for waiver

must be approved by the Chief of the Contracting Office (CCO)). COI waivers are not required under initial time-critical response actions under the Emergency Response Cleanup Services (ERCS) or the Emergency and Rapid Response Services (ERRS) programs. However, the emergency response contractor would still be required to disclose the COI in accordance with the timeframes stated in the contract.

APPENDIX 9.5.2-A

COI EVALUATION EXAMPLE
RED LIGHT/GREEN LIGHT PROCEDURE

Determine which indicators are applicable and pertinent for the specific COI issue to be evaluated. The sample indicators provided below are a beginning point and will normally be useful in the majority of Superfund COI cases.

Score each "COI Indicator" by color coding the indicator **RED** for those indicators that present a high risk, or **GREEN** for those indicators that present a low risk. HINT: If you are unsure whether to mark an indicator either red or green, consider marking it half green and half red, or **YELLOW**. After each indicator has been evaluated and color coded, a visual picture will emerge to help in evaluating whether or not a conflict exists. If all of the indicators are green, the probability will be low that a conflict exists. If all of the indicators are red, the probability will be very high that a conflict does exist. If the indicator colors are a mixture of red and green, or yellow, the indicators in red must be given more careful consideration before making the decision. Be aware that some indicators may be more important than other indicators, depending on the facts involved in a particular situation. Thus, in a circumstance where there may be only one red indicator and all the other indicators are green, the COI may be of sufficient seriousness that a conflict would still exist and the contractor should not perform the work.

NOTE: This "red light/green light" process will not necessarily provide the best response for the Agency for all COI cases. Therefore, this method should not be considered the definitive answer or procedure to use when evaluating and making COI decisions, but rather used as a tool to improve consistency and timeliness in evaluating COI issues.

Sample COI Indicators:

a) Same Site

- Is the work to be performed at the same site or a contiguous site where the Contractor performed/is performing/will perform work for a PRP?

b) Related Services

- Is the type of work to be performed for EPA similar to the type of work performed for the PRP?

- Does the work to be performed for EPA impact the manner in which the contractor may already be performing related tasks?

c) WA Value

- What is the value of the WA?

- Is the value of the WA a significant amount?
  (NOTE: Even if the dollar value is low, if COI is an issue, the work product from the WA could be "tainted," that is, its credibility could be in question. Also, since it is possible that the work product or, at least data/information from the WA will be used later in the process (of site decision-making/cleanup), it could potentially affect other work.)

d) Financial Dollar Relationships

- How much work [in dollars ($) and/or percentage (%) of company revenue/gross] has the contractor performed for the PRP(s)/commercial client(s)/industry?

- Is the amount of work such that the contractor's credibility and bias could be questioned or challenged?

- Have any Confidential Clients been identified? If so, has the contractor disclosed any information other than it only has a confidential client? If not, obtain as much information as is possible to make a determination or decision without violating the contractor's confidentiality agreements.

e) Past, Present, and/or Future Relationship(s) ($)

- When did/will the contractor perform the work for the PRP(s)/commercial client(s)?

- Is work currently being performed for the PRP(s)/commercial client(s)? And if so, what work?

- How much work was performed for the PRP(s) in the last three years?

- Does the contractor have any contracts or other arrangements to perform work for any applicable PRP(s)?

f) Sensitivity/Visibility

- Are there any extenuating circumstances that would cause this work to be considered sensitive or highly visible? (e.g., a Superfund Accelerated Cleanup Model cleanup, press coverage, special Congressional interest.)

- Could release of sensitive information endanger the Agency's cost recovery and/or enforcement actions?

g) Other

- Add any other factors that are applicable and require evaluation, but are not included above, for example:

- If the work in question involves an organizational relationship, what is the relationship between the parties? Is it a parent, subsidiary, affiliate, sister-organization, etc.

- Has a consent decree been signed? If so, who signed and what are the terms?

After completing the evaluation of each COI indicator, before a decision is made, consider whether litigation has, is, or will occur, and whether the work involved will or will not result in any enforcement action(s).