



# Organizational and Consultant Conflicts of Interest

A Mandatory Reference for ADS Chapter 302

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## Purpose

This mandatory reference supplements FAR [Subpart 9.5](#), [AIDAR](#) Subpart 709.5, and [ADS 302.3.5.10](#). It provides an overview of Contracting Officer (CO) responsibilities for identifying, analyzing, and resolving Organizational Conflicts of Interest (OCI) and provides Agency OCI policy.

This mandatory reference and ADS 302mas Special Contract Requirements prescribe agency-specific special contract requirements that must be used where there is high potential for OCI when an organization:

1. Designs an USAID activity and then expects to compete for the implementation of the activity;
2. Evaluates a USAID activity or Contractor and then expects to provide services that are requested as a result of that evaluation; and
3. Audits USAID Contractors and then seeks to perform consulting services under contract with USAID (sometimes in competition with the firm(s) audited).

## Background

FAR Subpart 9.5 prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest. It also provides examples to assist COs in applying those rules and procedures to individual contracting situations. The FAR, however, cannot illustrate all potential situations needing OCI analysis, and does not provide any Government-wide standard OCI solicitation provisions or contract clauses. Prior agency-specific guidance for OCI was contained in CIB 99-17, Organizational Conflict of Interest, which is now incorporated into this mandatory reference. This mandatory reference also provides updated terminology about the types of OCI as well as updated guidance to address and resolve OCI issues.

## Types of OCI

Organizational conflicts of interest generally fall under one of the following:

1. **Biased Ground Rules**: Where a contractor sets the “ground rules” for a federal procurement (e.g., writing a procurement’s statement of work, specifications, or performing systems engineering and technical direction for the procurement), which appears to skew the competition in favor of the contractor. This comes into play when a procuring agency contracts for services to develop the terms of a procurement and the contractor or one of its affiliates subsequently competes for implementation of that contract work (see FAR 9.505-2). For example, an organization who was contracted by USAID to design an USAID activity wants to be eligible for the competition to implement the activity.

2. **Impaired Objectivity**: Where a contractor's work under a federal contract requires the contractor to evaluate proposals/past performance of itself or a competitor, which calls into question the contractor's ability to render impartial advice to the government (See FAR 9.505-3). For example, an organization contracted by USAID to evaluate an activity or contractor wants to provide services that are requested as a result of the evaluation.
3. **Unequal Access to Information**: Where a contractor has access to nonpublic information as part of its performance of a federal contract, which may provide the contractor (or an affiliate) with an unfair competitive advantage in current or future procurements (FAR 9.505-4). For example, an organization contracted by USAID to conduct audits seeks to do consulting work under contract with USAID (sometimes in competition with the firms audited)

### **Addressing and Resolving OCI Issues**

When an actual or apparent conflict of interest exists, the CO must avoid, neutralize, mitigate or waive the OCI to ensure that no unfair competitive advantage exists in a federal procurement.

1. **Avoiding OCI**. This involves preventing the occurrence of an actual or potential OCI through actions taken early in the acquisition process, such as excluding sources from competition, or eliminating a segment of work from a contract or task.
2. **Neutralizing OCI**. This involves negating a potential or an actual OCI through specific actions taken by the CO and the Government, such as invoking a limitation on a Contractor's future competition or contracting.
3. **Mitigating OCI**. This involves reducing or alleviating the impact of unavoidable OCIs to an acceptable level of risk to the Government, such as the inclusion of a Contractor's OCI mitigation plan in a contract award.
4. **Waiving OCI**. The Head of the Contracting Activity may authorize a waiver (in accordance with 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.

In some circumstances, it may not be feasible to mitigate potential OCI. Accordingly, USAID may apply certain restrictions to Contractors involved in design or evaluation of contracts, as described below. This mandatory reference also establishes requirements for use in contracts for audits to mitigate potential OCI.

For situations not specifically covered in this mandatory reference, the CO must consider the FAR standards to determine whether an OCI exists and whether it can be avoided or mitigated in a manner that would allow the Contractor to participate in a particular procurement.

## **Policy Regarding Potential OCI in USAID Contracts**

### **1. 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 the development methodology for a particular development objective/result, 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 both the development and the design work; however, as a matter of policy, USAID interprets this as applying only to research and development type work. 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 or its Subcontractors. Subcontractors whose actual level of involvement meets the above standard are precluded from implementation as well.

Exceptions from preclusion 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 IDIQ task order and the implementation is awarded as a separate task order under the same IDIQ or the same set of multiple award IQCs.

In the case of the fourth exception above, 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 CO may therefore apply the preclusive policy when the implementation task order is to be competed among multiple award Contractors IF the CO 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:

FAR16.505(b)(2)(i)(c) 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 that 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.

The CO must insert the appropriate special contract requirement from ADS 302mas in the solicitation, contract, and task order for the design work to advise the Contractors of the above standard.

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

Waivers: If the CO 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.

Even when USAID's preclusive policy on design and implementation does not apply, the CO 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 section.

## **2. 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, or inaccurate reviews of competitors in order to gain unfair competitive advantage in future solicitations. In addition, the evaluation Contractor may have access to 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, within eighteen months of USAID's acceptance of the evaluation report, the evaluation Contractor must be precluded from furnishing implementation services that are required as a result of any findings, proposals, or recommendations in the evaluation report, as a Prime or Subcontractor.

In addition, the evaluation Contractor is restricted from using information obtained during the 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 CO must obtain copies of these agreements and ensure that they are properly executed. 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. When requesting a waiver, the CO must specify the steps that will be taken to minimize OCI.

If a Subcontractor performs substantive evaluation work, the Subcontractor will be subject to the same restrictions as the Prime Contractor.

The CO must include the appropriate special contract requirements "Organizational Conflicts of Interest: Evaluation, Definite (*or Indefinite as applicable*) Quantity" provided in ADS 302mas in solicitations, contracts and task orders for evaluation services covered by this policy.

If a CO determines that additional safeguards are necessary in a particular instance, they may include additional requirements in the Schedule of the contract or in Section H – Special Contract Requirements.

### **3. Audit**

Contracts 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, will 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 CO must obtain copies of these agreements and ensure that they are properly executed.

If a Subcontractor performs substantive audit work, the Subcontractor will be subject to the same requirements as the Prime Contractor.

The CO must include the appropriate special contract requirements "Organizational Conflicts of Interest: Audit" available in ADS 302mas in solicitations, contracts and task orders for audit services covered by this policy.

These requirements are the minimal safeguards mandated by the FAR and cannot be waived. If a CO determines that additional safeguards are necessary in a particular instance, they may include additional requirements in the schedule of the contract or in Section H – Special Contract Requirements. The requirements of FAR 9.504(e) apply with regard to the Contractor's response concerning any additional safeguards.

### **Application of Policy**

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

The policies in this section do not apply to:

- Individual employees of Contractors;
- Personal Service Contractors ("PSCs"); or
- 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 CO must take steps to clarify the relationship, to include obtaining guidance from the Agency Competition Advocate when necessary.

### **Requirements for the CO**

COs must analyze planned acquisitions in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible, and avoid, neutralize, or mitigate significant potential conflicts before, during, and after contract award by inserting the special contract requirements prescribed in this mandatory reference.

COs should obtain the advice of general counsel and the assistance of appropriate

technical specialists in evaluating potential conflicts and including the appropriate special contract requirements in this mandatory reference.

If the CO decides that a particular acquisition involves a significant potential organizational conflict of interest when an organization under contract with USAID performs design, evaluation, or audit work, the CO must insert the appropriate special contract requirements from [ADS 302mas](#).

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