

# Subpart 9.5 - Organizational and Consultant Conflicts of Interest

**Parent topic:** [Part 9 - Contractor Qualifications](#)

## 9.500 Scope of subpart.

This subpart-

- (a) Prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest;
- (b) Provides examples to assist *contracting officers* in applying these rules and procedures to individual *contracting* situations; and
- (c) Implements section 8141 of the 1989 Department of Defense Appropriation Act, Pub.L.100-463, 102 Stat.2270-47 (1988).

## 9.501 Definition.

*Marketing consultant*, as used in this subpart, means any independent contractor who furnishes advice, information, direction, or assistance to an *offeror* or any other contractor in support of the preparation or submission of an *offer* for a Government contract by that *offeror*. An independent contractor is not a *marketing consultant* when rendering-

- (1) Services excluded in [subpart 37.2](#);
- (2) Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, *components*, or facilities);
- (3) Routine legal, actuarial, auditing, and accounting services; and
- (4) Training services.

## 9.502 Applicability.

(a) This subpart applies to contracts with either profit or nonprofit organizations, including nonprofit organizations created largely or wholly with Government funds.

(b) The applicability of this subpart is not limited to any particular kind of *acquisition*. However, organizational conflicts of interest are more likely to occur in contracts involving-

- (1) Management support services;
- (2) Consultant or other professional services;

(3) Contractor performance of or assistance in technical evaluations; or

(4) Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

(c) An *organizational conflict of interest* may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future *acquisition*. In the latter case, some restrictions on future activities of the contractor *may* be required.

(d) *Acquisitions* subject to unique agency *organizational conflict of interest* statutes are excluded from the requirements of this subpart.

## 9.503 Waiver.

The *agency head* or a designee *may* waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver *must be in writing, shall* set forth the extent of the conflict, and requires approval by the *agency head* or a designee. *Agency heads shall* not delegate waiver authority below the level of head of a *contracting activity*.

## 9.504 Contracting officer responsibilities.

(a) Using the general rules, procedures, and examples in this subpart, *contracting officers shall* analyze planned *acquisitions* in order to-

(1) Identify and evaluate potential organizational conflicts of interest as early in the *acquisition* process as possible; and

(2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.

(b) *Contracting officers should* obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary *solicitation* provisions and *contract clauses* (see [9.506](#)).

(c) Before issuing a *solicitation* for a contract that *may* involve a significant potential conflict, the *contracting officer shall* recommend to the *head of the contracting activity* a course of action for resolving the conflict (see [9.506](#)).

(d) In fulfilling their responsibilities for identifying and resolving potential conflicts, *contracting officers should* avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The *contracting officer's* judgment need be formally documented only when a substantive issue concerning potential *organizational conflict of interest* exists.

(e) The *contracting officer shall* award the contract to the apparent successful *offeror* unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest considerations, the *contracting officer shall* notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond. If the *contracting officer* finds that it is in the best interest of the *United States* to award

the contract notwithstanding a conflict of interest, a request for waiver *shall* be submitted in accordance with [9.503](#). The waiver request and decision *shall* be included in the contract file.

## **9.505 General rules.**

The general rules in [9.505-1](#) through [9.505-4](#) prescribe limitations on *contracting* as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest that might otherwise exist in the stated situations. Some illustrative examples are provided in [9.508](#). Conflicts *may* arise in situations not expressly covered in this section [9.505](#) or in the examples in [9.508](#). Each individual *contracting* situation *should* be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are-

- (a) Preventing the existence of conflicting roles that might bias a contractor's judgment; and
- (b) Preventing unfair competitive advantage. In addition to the other situations described in this subpart, an unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses-
  - (1) Proprietary information that was obtained from a Government official without proper authorization; or
  - (2) *Source selection information* (as defined in [2.101](#)) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

### **9.505-1 Providing systems engineering and technical direction.**

- (a) A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production *shall* not-
  - (1) Be awarded a contract to supply the system or any of its major *components*; or
  - (2) Be a subcontractor or consultant to a supplier of the system or any of its major *components*.
- (b) Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors. Therefore this contractor *should* not be in a position to make decisions favoring its own *products* or capabilities.

## 9.505-2 Preparing specifications or work statements.

(a)

(1) If a contractor prepares and furnishes complete specifications covering *nondevelopmental items*, to be used in a competitive *acquisition*, that contractor *shall* not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract. The restriction in this paragraph (a)(1) *shall* not apply to-

(i) Contractors that furnish at Government request specifications or data regarding a product they provide, even though the specifications or data *may* have been paid for separately or in the price of the product; or

(ii) Situations in which contractors, acting as industry representatives, help Government agencies prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Government representatives.

(2) If a single contractor drafts complete specifications for nondevelopmental equipment, it *should* be eliminated for a reasonable time from competition for production based on the specifications. This *should* be done in order to avoid a situation in which the contractor could draft specifications favoring its own *products* or capabilities. In this way the Government can be assured of getting unbiased advice as to the content of the specifications and can avoid allegations of favoritism in the award of production contracts.

(3) In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government *may* have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition *should* be imposed.

(b)

(1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services-or provides material leading directly, predictably, and without delay to such a work statement-that contractor *may* not supply the system, major *components* of the system, or the services unless-

(i) It is the sole source;

(ii) It has participated in the development and design work; or

(iii) More than one contractor has been involved in preparing the work statement.

(2) Agencies *should* normally prepare their own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor its own *products* or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in

paragraph (b)(1) of this section.

(3) For the reasons given in paragraph (a)(3) of this section, no prohibitions are imposed on development and design contractors.

### **9.505-3 Providing evaluation services.**

Contracts for the evaluation of *offers* for *products* or services *shall* not be awarded to a contractor that will evaluate its own *offers* for *products* or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests.

### **9.505-4 Obtaining access to proprietary information.**

(a) When a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor *may* gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information-

(1) Furnished voluntarily without limitations on its use; or

(2) Available to the Government or contractor from other sources without restriction.

(b) A contractor that gains access to proprietary information of other companies in performing *advisory and assistance services* for the Government *must* agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it was furnished. The *contracting officer shall* obtain copies of these agreements and ensure that they are properly executed.

(c) Contractors also obtain proprietary and *source selection information* by acquiring the services of *marketing consultants* which, if used in connection with an *acquisition*, *may* give the contractor an unfair competitive advantage. Contractors *should* make inquiries of *marketing consultants* to ensure that the *marketing consultant* has provided no unfair competitive advantage.

## **9.506 Procedures.**

(a) If information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, *contracting officers* first *should* seek the information from within the Government or from other readily available sources. Government sources include the files and the knowledge of personnel within the *contracting office*, other *contracting offices*, the cognizant contract administration and audit activities and offices concerned with contract financing. Non-Government sources include publications and *commercial services*, such as credit rating services, trade and financial journals, and business directories and registers.

(b) If the *contracting officer* decides that a particular *acquisition* involves a significant potential

*organizational conflict of interest*, the *contracting officer shall*, before issuing the *solicitation*, submit for approval to the chief of the *contracting office* (unless a higher level official is designated by the agency)-

(1) A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in [9.505](#) or on another basis not expressly stated in that section;

(2) A draft *solicitation* provision (see [9.507-1](#)); and

(3) If appropriate, a proposed *contract clause* (see [9.507-2](#)).

(c) The approving official *shall*-

(1) Review the *contracting officer's* analysis and recommended course of action, including the draft provision and any proposed clause;

(2) Consider the benefits and detriments to the Government and prospective contractors; and

(3) Approve, modify, or reject the recommendations *in writing*.

(d) The *contracting officer shall*-

(1) Include the approved provision(s) and any approved clause(s) in the *solicitation* or the contract, or both;

(2) Consider additional information provided by prospective contractors in response to the *solicitation* or during negotiations; and

(3) Before awarding the contract, resolve the conflict or the potential conflict in a manner consistent with the approval or other direction by the *head of the contracting activity*.

(e) If, during the effective period of any restriction (see [9.507](#)), a *contracting office* transfers *acquisition* responsibility for the item or system involved, it *shall* notify the successor *contracting office* of the restriction, and send a copy of the contract under which the restriction was imposed.

## **9.507 Solicitation provisions and contract clause.**

### **9.507-1 Solicitation provisions.**

As indicated in the general rules in [9.505](#), significant potential organizational conflicts of interest are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts. Therefore, affected *solicitations shall* contain a provision that-

(a) Invites *offerors'* attention to this subpart;

(b) States the nature of the potential conflict as seen by the *contracting officer*;

(c) States the nature of the proposed restraint upon future contractor activities; and

(d) Depending on the nature of the *acquisition*, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation.

## 9.507-2 Contract clause.

(a) If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor *must* agree to some other restraint, the *solicitation shall* contain a proposed clause that specifies both the nature and duration of the proposed restraint. The *contracting officer shall* include the clause in the contract, first negotiating the clause's final terms with the successful *offeror*, if it is appropriate to do so (see [9.506\(d\)](#)).

(b) The restraint imposed by a clause *shall* be limited to a fixed term of reasonable duration, sufficient to avoid the circumstance of unfair competitive advantage or potential bias. This period varies. It might end, for example, when the first production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction. In every case, the restriction *shall* specify termination by a specific date or upon the occurrence of an identifiable event.

## 9.508 Examples.

The examples in paragraphs (a) through (i) of this section illustrate situations in which questions concerning organizational conflicts of interest *may* arise. They are not all inclusive, but are intended to help the *contracting officer* apply the general rules in [9.505](#) to individual contract situations.

(a) Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (*i.e.*, turbines, drive shafts, propellers, etc.). Company A *should* not be allowed to supply any powerplant *components*. Company A can, however, supply *components* of the submarine unrelated to the powerplant (*e.g.*, fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying *components* is limited to those for the system only.

(b) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A *may* supply system Y or its *components*.

(c) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A *may* supply the equipment.

(d) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under Government supervision and control to refine specifications or to clarify the requirements of a specific *acquisition*. These companies *may* supply the item.

(e) Before an *acquisition* for *information technology* is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A *should* be excluded from the initial

follow-on *information technology hardware acquisition*.

(f) Company A receives a contract to define the detailed performance characteristics an agency will require for purchasing rocket fuels. Company A has not developed the particular fuels. When the definition contract is awarded, it is clear to both parties that the agency will use the performance characteristics arrived at to choose competitively a contractor to develop or produce the fuels. Company A *may* not be awarded this follow-on contract.

(g) 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.

(h) Company A is selected to study the use of lasers in communications. The agency intends to ask that firms doing research in the field make proprietary information available to Company A. The contract *must* require Company A to-

(1) Enter into agreements with these firms to protect any proprietary information they provide; and

(2) Refrain from using the information in supplying lasers to the Government or for any purpose other than that for which it was intended.

(i) An agency that regulates an industry wishes to develop a system for evaluating and processing license applications. Contractor X helps develop the system and process the applications. Contractor X *should* be prohibited from acting as a consultant to any of the applicants during its period of performance and for a reasonable period thereafter.