

GUIDANCE FOR THE SELECTION AND USE OF THIRD-PARTY CONTRACTORS IN PREPARATION OF ENVIRONMENTAL DOCUMENTS BY THE DEPARTMENT OF STATE

This Guidance, issued February 26, 2015, outlines the Department of State's (Department's) process for using third-party contractors to assist with preparing environmental documents consistent with the National Environmental Policy Act (NEPA) and performing related tasks as part of the Department's review of applications for Presidential Permits received pursuant to Executive Orders 13337 and 11423, as amended.¹ This Guidance replaces the Department's *Interim Guidance for the Use of Third-Party Contractors in Preparation of Environmental Documents by the Department of State*.

For purposes of this Guidance, a "third-party contractor" is a contractor selected by and working under the sole direction of the Department, but whose work is funded by the applicant for the Presidential Permit. The Department's use of third-party contractors during review of Presidential Permit applications is consistent with guidance from the Council on Environmental Quality (CEQ) in 40 CFR 1506.5(c).² Further background on using third-party contractors, including issues pertaining to conflict of interest disclosures, can be found in the Forty Most Asked Questions Concerning CEQ's NEPA Regulations³ (CEQ FAQ).

I. Preparation of a Request for Proposal (RFP)

The applicant will prepare and submit to the Department a draft Request for Proposal (RFP) for use in soliciting proposals from potential third-party contractors.⁴ (Those potential third-party contractors who submit proposals are called Offerors throughout this Guidance.) The draft RFP must contain an overview of the proposed project, a complete list of available data pertinent to the project's environmental review, and a detailed description of the services the applicant anticipates the Department will require of the third-party contractor. It is

¹These procedures were designed primarily for Presidential Permit applications submitted by private entities. Where applicants are governmental entities, certain changes may be made to accommodate their procedures, and/or avoid redundant processes. In addition, and in furtherance of the proper conduct of the foreign relations of the United States, the Department reserves the right, notwithstanding this guidance, to take whatever steps it deems appropriate in a particular case in the exercise of its border-crossing oversight and coordination responsibilities.

²Regulations For Implementing the Procedural Provisions of the National Environmental Policy Act Regulations, available at <http://ceq.hss.doe.gov/nepa/regs/ceq/1506.htm#1506.5>.

³Available at <http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm>

⁴This approach is consistent with the guidance in question 16 of the CEQ FAQ: "If a federal agency uses 'third party contracting,' the applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency's direction, so long as the agency complies with Section 1506.5(c)."

strongly recommended that applicants utilize the Department's RFP templates in preparing the draft RFP. The applicant must submit, as soon as practicable, the RFP, as well as the Presidential Permit application and all other documents intended for public disclosure, in a format accessible to persons with disabilities, pursuant to Section 508 of the Rehabilitation Act of 1973, as amended.

The Department will review, revise, and finalize the RFP. While the Department may choose to consult with the applicant during that process, the Department retains full control over the final RFP and may or may not share with the applicant the Department's changes to the applicant's draft before finalizing and releasing the RFP. Once the RFP is finalized, the Department will circulate it to a targeted list of environmental consulting firms (whenever possible, at least seven) that the Department believes are qualified to carry out the work outlined in the RFP, publish notice of the RFP in the Federal Register, or otherwise publicize the RFP to solicit responses from potential Offerors. If a targeted list is employed, the list will be developed by the Department with input from other federal agencies that have experience in similar types of environmental reviews, such as the Federal Energy Regulatory Commission (FERC), the Department of Energy, or the Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA), and after considering any potential Offerors suggested by the applicant. In making such suggestions, the applicant must disclose any potential Organizational Conflicts of Interest (OCIs) it has with such potential Offerors in accordance with the Department's *Guidance for the Disclosure of Organizational Conflict of Interest in the Selection and Use of Third-Party Contractors in Preparation of Environmental Documents by the Department of State* (OCI Guidance)⁵.

The Department will normally provide 21 days for Offerors to submit proposals in response to the RFP, but may choose a different time period. Offerors will submit proposals directly to the Department in accordance with directions provided in the RFP. Offerors should address any questions or requests for information to the Department, which will generally distribute an appropriate response to all Offerors. Proposals must be submitted without any substantive consultation, comparison of figures, or other arrangement with any other person or persons (with or without knowledge) submitting a proposal for the same work. Proposals should be

⁵ The OCI Guidance is an accompaniment to this Third-Party Contractor Guidance document.

submitted with the expectation that all or some of the proposal may be made public⁶ (see Section III, Selection Process Document Retention and Disclosure).

Proposals should be concise, well-written and organized, and contain the information requested in the RFP, which will generally include, but is not limited to, the following:

1. **Introduction.** The Offeror should explain its understanding of the project and summarize its relevant qualifications.
2. **Technical Approach.** The Offeror should present an overall technical approach for the project, a proposed approach for individual technical areas and tasks, and any recommendations to improve the scope of work.
3. **Project Organization and Management Approach.** The Offeror should describe its proposed project organization and identify key personnel.
4. **Qualifications and Experience.** The Offeror should describe its qualifications and prior experience in completing similar projects, as well as that of its key personnel (including subcontractors).
5. **Project Schedule.** The Offeror should provide a notional schedule and demonstrate that it has sufficient available resources to meet that schedule, or any reasonable schedule, for the project.
6. **References.** The Offeror should provide the names and contact information for the client project managers of at least three successfully completed or in-process projects of a similar nature (which should have been described in detail in the Qualifications and Experience section).
7. **Conflicts of Interest.** The Offeror must provide the OCI Disclosure Certification and all other information and documentation required by the OCI Guidance, as well as any other certifications, statements, or agreements that might be required in the RFP.

II. Selection of the Third-Party Contractor

⁶An Offeror may designate with appropriate markings the specific portions of its proposal that it believes are exempt from disclosure as “confidential commercial or financial information” under Exemption 4 of the Freedom of Information Act (the “FOIA”), 5 U.S.C. § 552(b)(4). Note that such designations are not determinative of whether the Department can or will withhold the information from disclosure under the FOIA. However, if the Department receives a FOIA request encompassing the designated information and determines that the information may be subject to disclosure, the Department’s regulations, 22 C.F.R. § 171.13, provide that the Department shall give the submitter of the information written notice of the FOIA request and an opportunity to object to disclosure of any portion of that information.

The Department will screen and assess all proposals received from Offerors in accordance with the criteria described in the RFP, which will likely include, but are not limited to: 1) technical approach, 2) organization qualifications and experience, 3) project management and personnel, and 4) schedule and work plan. None of these factors, on its own, is decisive. The Department may also consider relative cost levels, but cost will not be a controlling factor in the selection. The Department may reject a proposal for any reason irrespective of the criteria listed above, including but not limited to lack of an OCI Disclosure Certification or the existence of an identifiable OCI (as defined and described in the OCI Guidance) that cannot be mitigated to the satisfaction of the Department.

The OCI Guidance provides more information concerning the Department's OCI requirements. Questions concerning the Department's OCI processes should be directed to the Department's Office of Legal Adviser, and the final review of OCI-related documentation will be conducted by the Office of Legal Adviser in consultation with OES.

The Department will form a review panel consisting of at least three appropriate staff members to examine proposals and conduct reference checks. The review panel may invite some or all of the Offerors to give follow-up presentations on their respective proposals, and/or request further information from any Offerors at any point in the process. The review panel shall prepare a written summary documenting the panel's evaluations and recommendations, significant issues raised and considered during the deliberative process, and vetting and reference checks. This document will also describe the contractor selection process. The Director of the Office of Environmental Quality and Transboundary Issues will make a provisional selection of a preferred Offeror, taking into account the review panel's written recommendation.

The Department may, in its discretion:

- accept any one or more of the proposals;
- waive any irregularities, omissions, or errors in any proposal;
- select an Offeror whose proposal contains exceptions or alternatives;
- communicate or negotiate with one or more of the Offerors, at any time after the deadline for submitting proposals;
- reject a proposal for any reason; and/or
- not select any of the Offerors.

The technical and cost proposals of the provisionally selected Offeror will be provided to the applicant, without the OCI Disclosure Certification and its accompanying materials. At that time the applicant will conduct its own OCI inquiry, and submit its own OCI Disclosure Certification to the Department. The Department will review the applicant's OCI Disclosure Certification, and may require further supplements to the applicant's or Offeror's Disclosure Certifications in order to satisfy itself that the Offeror has no OCI that cannot be satisfactorily mitigated. (See the OCI Guidance for more details.) Once satisfied, the Department will inform the applicant and Offeror that they may negotiate a contract.

The contract between the Offeror and the applicant must ensure that the Offeror, if finally selected as the third-party contractor, will be supervised exclusively by the Department, that communication between the contractor and applicant on any matters beyond routine payment must include the Department, and that the contractor must conduct its work independent of any influence or control from the applicant. Further, the contract must not allow either party to terminate without approval of the Department, and must provide that work product documents produced will be government works for purposes of the Copyright Act (*see* 17 U.S.C. 105).

The final contract must be submitted for approval to the Department. After the Department has approved the relevant terms of the contract, the applicant and Offeror may execute the contract. Once the contract is executed, the Offeror's selection will cease to be provisional, and the Offeror will become the third-party contractor.

If the applicant is unable to reach agreement with the provisionally selected Offeror, the applicant must promptly inform the Department and provide an explanation. The Department will then, in its discretion, determine an appropriate action, which could include making a new provisional selection from among the Offerors that responded to the RFP or recirculating an RFP to additional companies to solicit new proposals.

III. Selection Process Document Retention and Disclosure

The Department shall retain documentation of its internal third-party contractor selection and conflicts of interest processes, including summaries of any selection panel deliberations in accordance with Department of State records retention policies and procedures. It will also retain key documents provided by all Offerors

as part of the third-party contractor selection process, including proposals and accompanying materials. The Department may be required to publicly release any such documents pursuant to law. Further, at an appropriate time during the course of the Presidential Permitting process,⁷ the Department will publicly release the RFP and materials submitted by the selected third-party contractor (with any appropriate redactions), including its proposal, supporting documents, its final contract with the applicant, and OCI materials. Once selected, the third-party contractor will provide the Department with an electronic version of such materials that are accessible to persons with disabilities, pursuant to Section 508 of the Rehabilitation Act of 1973, as amended.

Before publicly releasing any such materials, the Department will review those documents consistent with the Freedom of Information Act (FOIA) to determine whether certain information is exempt from disclosure,⁸ including confidential business information and information the release of which would constitute a clearly unwarranted invasion of personal privacy. Offerors are encouraged to identify confidential business information when submitting materials to the Department, particularly OCI materials. Generally, prior to publicly releasing information designated as confidential business information or that is not so designated but that the Department determines is arguably confidential business information, the Department will make a good faith effort to notify the submitter and afford the submitter a reasonable period of time to object to disclosure of the information. If the submitter believes that a given document contains confidential business information and the Department's Office of Legal Adviser concurs with that determination, the Department will redact relevant text prior to the document's public release.

IV. Preparation of the Environmental Document

Once the selection of the third-party contractor has been finalized, the third-party contractor will begin work for the Department, supervised by the Department. Although the applicant will pay for the third-party contractor's work, it will have no control or influence over the work performed under the contract, and will not be

⁷ For example, in past permitting processes, the Department has released such materials in conjunction with the release of a Draft or Final EIS. The exact appropriate time(s) for release of these documents during a permitting process would be determined based on the circumstances of the particular permitting process.

⁸ See 5 U.S.C § 552(b); *Department of Justice Guide to the Freedom of Information Act*, available at <http://www.justice.gov/oip/foia-guide.html>.

able to review the work product before its release to the public unless the Department specifically authorizes such a review. The Department will:

- have complete control over the scope, content, and quality of the contractor's work;
- independently evaluate the results of the contractor's work;
- have sole ownership of all relevant work product produced for the review;
- have complete control over the schedule for completion of the third-party contractor's work; and
- have ultimate responsibility for the final document.