

**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**

This Guidance, issued February 26, 2015, replaces the Department’s *Interim Guidance for the Disclosure of Organizational Conflict of Interest in the Use of Third-Party Contractors in Preparation of Environmental Documents by the Department of State*.

**I. Organizational Conflict of Interest**

All prospective contractors submitting proposals (Offerors) must submit as part of their proposals an Offeror’s *Organizational Conflicts of Interest Disclosure Certification* (OCI Disclosure Certification), in which the Offeror specifies, consistent with NEPA regulations, that “they have no financial or other interest in the outcome of the project.”<sup>1</sup> More information on the preparation of that Certification follows in Section II.

An Organizational Conflict of Interest (OCI) exists when the nature of the work to be performed may, without some restriction on future activities:

- a) result in an unfair competitive advantage to a contractor; or
- b) impair the contractor’s objectivity in performing the contract work.

OCIs may exist where, in the opinion of the Department, the third-party contractor, its affiliates,<sup>2</sup> and/or its key personnel have a past, present, or ongoing financial interest in a project to be covered by the third-party contract, or have an ongoing relationship with any entity or affiliate connected to the proposed project. For example, an OCI may exist if the contractor:

- a) has been involved with the applicant on the project or any of the proposed project’s connected actions before the project is proposed to the Department, or while the project is pending before the Department;
- b) has an ongoing relationship with the applicant or any of the applicant’s affiliates;

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<sup>1</sup>40 CFR §1506.5(c)

<sup>2</sup>The term "affiliates" means business concerns which are affiliates of each other when one concern or individual controls or has the power to control another, either directly or indirectly, or when a third party controls or has the power to control both.

- c) would be called on to review its own prior work; and/or
- d) has a financial or other interest in the outcome of the Department's decision.<sup>3</sup>

An OCI Disclosure Certification and the completion of the OCI Questionnaire, in accordance with the guidance provided below, are required from all Offerors. Other OCI requirements apply to the applicant, as described below. Samples of applicable disclosure certifications as well as the OCI Questionnaire are included in Annex I.

## **II. OCI Disclosure Process by Offerors**

As part of their proposals, Offerors must provide an OCI Disclosure Certification (see two sample options at Annex I). The OCI Disclosure Certification must be accompanied by the additional referenced statement explaining in detail the internal processes undertaken by the Offeror to conduct its internal OCI inquiry and review. Further, the OCI Disclosure Certification should also be accompanied by a list of all entities, or affiliates thereof, that are connected to the proposed project (Connected Entities<sup>4</sup>) with which the Offeror or its subcontractors have had a relationship (e.g., financial, contractual, personal, or organizational relationships, including any ownership interests) or are planning to have a relationship in the future, if any. The list must describe the nature of each such relationship; the period of the relationship; and the extent of the relationship (such as the value of financial interest of work, or the percent of total holdings or total work, etc.). It must also indicate any possible future financial and work transactions that may result from these relationships.

Offerors must state whether or not they believe that the relationships detailed on the list are, or may be, an OCI, real or reasonably perceived, and if so, to what extent. If such a potential OCI is found, a detailed conflict mitigation plan to address and resolve the OCI should be included in the proposal.

Any such conflict mitigation plan proposed by the Offeror should describe the mechanism(s) to be used to minimize and/or appropriately isolate the effects of any

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<sup>3</sup>In a 1981 memorandum, published in the *Federal Register*, CEQ explained that it defines the term "financial or other interest" in the project's outcome "broadly to cover any known benefits other than general enhancement of professional reputation." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (1981).

<sup>4</sup> In general, the list of Connected Entities would be developed by the Department in consultation with the Applicant for a particular project.

relationships on the current project, and the mechanism(s) to be used by project manager(s) to gather resources to ensure continuation and timely completion of assigned tasks without using resources implicated by the OCI. If the Department concludes that conflict cannot be resolved through an adequate mitigation plan, the Offeror will be ineligible for proceeding with the third-party contract process.

Subcontractors must follow the same procedures as above, including submitting an OCI Disclosure Certification and mitigation plan to resolve any real or reasonably perceived OCIs.

The Department will evaluate the OCI Disclosure Certification and accompanying materials, including any disclosed potential OCI and related conflict mitigation plans, of any Offerors (and their subcontractors) that it may be considering for provisional selection. The Department may seek additional information from the Offeror, or otherwise require changes or supplements to the OCI Disclosure Certification(s) and accompanying materials, in order to make an initial determination as to whether the Offeror and its subcontractors are capable of impartially performing the environmental services required under the contract.

All OCI materials submitted to the Department (including the Offeror's OCI disclosure certification, conflict mitigation plans, and the applicant's certification described below) will be reviewed by the Office of Legal Adviser.

### **III. Ongoing Contractor Obligations**

The obligations of an Offeror with respect to OCI continue and carry through the actual performance period of the work covered by the RFP if the Offeror is selected to serve as the third-party contractor.

More specifically, the third-party contractor will have a continuing obligation to identify any OCI, real or reasonably perceived, that may arise. An OCI may arise for any number of reasons, including changes in corporate identity (including changes in affiliation, structure, or ownership), changes to the contract, or offers of new work. If during the performance of its work the third-party contractor contemplates, discovers, or develops (whether or not by its own actions), a relationship (e.g., a financial, contractual, personal, or organizational relationship, including any ownership interest), with any Connected Entities, the third-party contractor must notify the Department and, if deemed necessary by the Department, develop a conflict mitigation plan.

Most potential OCIs that arise during the course of a third-party contractor's (or subcontractor's) work with the Department are related to potential new work being contemplated by the contractor. When the Department receives a notice of such a potential OCI, real or reasonably perceived, the Department will conduct a case-specific analysis to determine whether the potential work described must be avoided, may be undertaken provided that firewalls or other mitigation measures are implemented (see Section II for more on mitigation), or may be undertaken without qualification. Factors considered in this analysis include, but are not limited to: the nature and significance of the notifying entity's current and future role on the project; the current phase of the project; how close a corporate connection exists between the entity soliciting the work from the third-party contractor and the Presidential Permit applicant and/or Connected Entities; and how similar the proposed work is to the work the third-party contractor is undertaking for the Department. The Department will review such factors mindful of the relevant CEQ regulatory provisions, and guidance from CEQ on its interpretation thereof.<sup>5</sup>

In general, the third-party contractor will only be asked to avoid new work for OCI reasons if that work is for a Connected Entity, or for another company on a similar project in the same geographic area or addressing the same issues, and only if the Department determines, after evaluating the factors above, that even with mitigation measures in place there could be a reasonable perception on behalf of the public that such work would impact the integrity of the third party contract work with the Department.

For potential OCIs that arise in other ways during the course of a third-party contractor's (or subcontractor's) work with the Department, the Department will evaluate the potential OCI and the sufficiency of a proposed conflict mitigation plan similarly to the way in which it considers potential OCIs that arise due to potential new work.

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<sup>5</sup> “Section 1506.5(c) prohibits a person or entity entering into a contract with a federal agency to prepare an EIS when that party has at that time and during the life of the contract pecuniary or other interests in the outcomes of the proposal. Thus, a firm which has an agreement to prepare an EIS for a construction project cannot, at the same time, have an agreement to perform the construction, nor could it be the owner of the construction site. However, if there are no such separate interests or arrangements, and if the contract for EIS preparation does not contain any incentive clauses or guarantees of any future work on the project, it is doubtful that an inherent conflict of interest will exist.” *Guidance Regarding NEPA Regulations*, 48 Fed.Reg. 34,263, 34,266 (CEQ 1983).

The third-party contractor must sign and abide by the OCI Ongoing Obligations Certification provided in Annex I and provide a description of internal controls for ensuring an OCI does not arise during the project.

#### **IV. OCI Disclosure Process by Applicant**

Should the applicant choose to suggest potential Offerors for a targeted distribution of the RFP, the applicant must disclose any potential OCI, real or reasonably perceived, that it may have with any of its suggested potential Offerors, including the Offerors' affiliates. (See Section I of the Department's *Guidance for the Selection and Use of Third-Party Contractors in Preparation of Environmental Documents by the Department of State* (Third-Party Contractor Guidance)).<sup>6</sup>

After the Department informs the applicant that it has provisionally selected an Offeror, the applicant must conduct a full OCI inquiry to discover all relationships, whether past, present or contemplated, such as financial, contractual, personal, or organizational relationships including any ownership interests, with all entities or their affiliates connected to the Offeror. The applicant must disclose the nature of each such relationship; the period of the relationship; the extent of the relationship (such as the value of financial interest of work, or the percent of total holdings or total work, etc.); and indicate any possible future financial and work transactions that may result from these relationships. The applicant must then submit an OCI Disclosure Certification (see Annex II) and supporting materials that explain in detail the internal processes undertaken to conduct its internal OCI investigation, and the results of that investigation.

The applicant must also sign and abide by the OCI Ongoing Obligations Certification provided in Annex II and provide its referenced description of internal controls for ensuring an OCI does not arise during the project.

#### **V. Retention and Public Release of OCI Information**

As described in the Third-Party Contractor Guidance, the Department will retain OCI materials submitted by Offerors, any potential subcontractors, third-party contractors, and applicants, including OCI disclosure certifications, mitigation plans, the applicant's certification, and any OCI materials submitted pursuant to

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<sup>6</sup> The Third-Party Contractor Guidance is an accompaniment to this OCI Guidance document.

ongoing contractor obligations in accordance with Department of State records retention policies and procedures. The Department shall also retain appropriate documentation of its decisions regarding potential OCIs. The Department may be required to publicly release OCI materials pursuant to law. Further, at an appropriate time during the course of the Presidential Permitting process,<sup>7</sup> the Department will publicly release materials submitted by the selected third-party contractor (with any appropriate redactions), including OCI materials. The selected 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 OCI materials, the Department will review those documents consistent with the FOIA to determine whether certain information is exempt from disclosure.<sup>8</sup> Offerors and third-party contractors are encouraged to identify confidential business information when submitting OCI materials to the Department. 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.

## **VI. Failure to Disclose**

Apart from other remedies allowed by law or contract, any deliberate non-disclosure or misrepresentation of facts relevant to the OCI disclosure certification required may result in immediate termination, and/or disqualification of the Offeror/third-party contractor from future third-party contracts.

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<sup>7</sup> 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.

<sup>8</sup> 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>.

**Annex I: Offeror OCI Materials**

**OFFEROR OCI DISCLOSURE CERTIFICATION – Sample 1, where  
Offeror has no OCI-related information to report**

I hereby certify [as a representative of my organization] that, to the best of my knowledge and belief, no facts exist relevant to any past, present or currently planned interest or activity (financial, contractual, personal, organizational or otherwise) that relate to the proposed work; and bear on whether I have [or my organization and any of its affiliates has] a possible conflict of interest with respect to (1) being able to render impartial, technically sound, and objective assistance or advice; or (2) being given an unfair competitive advantage. I provide a detailed description of the internal processes undertaken to conduct our internal OCI review for the purposes of ensuring there are no such facts in the attached page(s).

Signature: \_\_\_\_\_ Date :

Name :

Title :

Organization :

**OFFEROR OCI DISCLOSURE CERTIFICATION – Sample 2, where  
Offeror is disclosing OCI-related information**

I hereby certify [as a representative of my organization] that, to the best of my knowledge and belief, all relevant facts – concerning past, present or currently planned interests or activities that relate to the proposed work and bear on whether I have [or my organization and any of its affiliates has] a possible conflict of interest with respect to (1) being able to render impartial, technically sound, and objective assistance or advice, or (2) being given an unfair competitive advantage, are fully disclosed on the attached page(s). I also provide a detailed description of the internal processes undertaken to conduct my [organization’s] internal OCI review in the attached page(s).

Signature: \_\_\_\_\_ Date :

Name :

Title :

Organization :



**OFFEROR OCI ONGOING OBLIGATIONS CERTIFICATION**

I recognize that OCI is an ongoing obligation. Should I or my organization become aware of any real or reasonably perceived potential OCIs during performance of this contract, I or my organization will advise the Department and [contractor/applicant name] and propose mitigation or explain why none is needed. I provide a description of internal controls for ensuring an OCI does not arise during the project in the attached page(s).

Signature: \_\_\_\_\_ Date :

Name:

Title:

Organization:

## OCI Questionnaire

If you answer “Yes” to any of the questions below, you must complete the OCI Disclosure Certification Sample 2.

1. Will you (or your organization) be involved in the project for which this solicitation is seeking assistance with environmental review in any manner other than potentially assisting with this review if selected?  
  
 No.  
 Yes. The portion of the proposed project; the proposed hours and dollar value; and the type of involvement are fully disclosed on the attached pages.
  
2. What is (are) the major type(s) of business conducted by you (or your organization)? Please reply on the attached pages.
  
3. Do you (or your organization) have any affiliates? All questions in the questionnaire apply to affiliates as well. Whenever possible, each affiliate should submit a separate questionnaire. However, in the event each affiliate does not submit a separate questionnaire (for instance, to avoid completing a large number of questionnaires), this questionnaire must incorporate information regarding all affiliates.  
  
 No.  
 Yes. The name and a description of the major type(s) of business that each affiliate conducts are disclosed on the attached pages.
  
4. Will any of the following be involved in the project for which this solicitation is seeking assistance with environmental review: (a) any entities owned or represented by you (or your organization); (b) your

organization's Chief Executive or any of its directors; or (c) any affiliates?

No.

Yes. A full disclosure and discussion is given in the attached pages.

6. Within the past 3 years have you (or your organization) had a direct or indirect relationship (financial, organizational, contractual or otherwise) with any business entity that could be affected by the proposed work under this solicitation?

No.

Yes. List the business entity(ies) showing the nature of your relationship (including the dates of the relationship, and the dollar value of any financial relationship) and how it would be affected by the proposed work under this solicitation.

7. What percentage of your total income for the current and preceding fiscal years resulted from arrangements with any of the entities identified in Question 6 above?

% For the current fiscal year –from // to // .

% For the preceding fiscal year – from / / to / / .

% For the second preceding fiscal year – from / / to / / .

8. Do you (or your organization) currently have or have you had during the last 6 years any arrangements (for example, contracts and cooperative agreements) awarded, administered, or funded -- wholly or partly -- by the Department or any other Federal agency which relate to the proposed Statement of Work?

No.

Yes. A full disclosure and discussion is given on the attached pages.

9. Do you (or your organization) have or have you ever had any contracts, agreements, special clauses, or other arrangements which could prohibit you (or your organization) from proposing work to be performed in this solicitation or any portion thereof?

No.

Yes. A full disclosure and discussion is given on the attached pages.

10. Do you (or your organization) have any involvement with or interest (direct or indirect) in technologies which are or may be subjects of the contract, or which may be substitutable for such technologies?

No.

Yes. A full disclosure and discussion is given on the attached pages.

11. Could you (or your organization), in either your private or Federal Government business pursuits, find use for information acquired in the performance of the proposed work under this solicitation; such as:

(a) Data generated under the contract? (b) Information concerning Commission plans and programs? (c) Confidential and proprietary data of others?

No.

Yes. A full disclosure and discussion is given on the attached pages.

12. In conducting the proposed work sought by this solicitation, would you (or your organization) evaluate or inspect your own services or products, or the services or products of any other entity that has a relationship (such as client, organizational, financial, or other) with you (or your organization)? This could include evaluating or inspecting a competitor's goods and services.

No.

Yes. A full disclosure and discussion is given on the attached pages.

13. To avoid what you perceive as a possible OCI, do you (or your organization) propose to: exclude portions of the proposed work; employ special clauses; or take other measures?

No.

Yes. A full discussion is given on the attached pages.

I hereby certify that I have authority to represent my organization and that the facts and representations presented on the pages of this questionnaire and on the pages of the attachment(s) to it and my OCI Disclosure Certification are accurate and complete.

Signature \_\_\_\_\_ Date:

**Annex II: Applicant OCI Materials**

**APPLICANT OCI DISCLOSURE CERTIFICATION – Sample 1, where  
Applicant has no OCI-related information to report**

I hereby certify as a representative of my organization that, to the best of my knowledge and belief, no facts exist relevant to the existence of any past, present or contemplated relationship between me or my organization and [Offeror name]; and that I and my organization neither know nor should know of facts relevant to whether [Offeror name] would have a possible conflict of interest that would affect [Offeror name]'s (1) being able to render impartial, technically sound, and objective assistance or advice, or (2) being given an unfair competitive advantage, should it be selected as the third-party contractor assisting the Department of State with the environmental review of the project for which my organization has applied for a Presidential Permit. I provide a detailed description of the internal processes undertaken to conduct our internal OCI review for the purposes of ensuring there are no such facts in the attached page(s).

Signature: \_\_\_\_\_ Date :

Name :

Title :

Organization :

**APPLICANT OCI DISCLOSURE CERTIFICATION – Sample 2, where  
Applicant is disclosing OCI-related information**

I hereby certify as a representative of my organization that, to the best of my knowledge and belief, all facts relevant to the existence of any past, present or contemplated relationship between me or my organization and [Offeror name], and all facts that I or my organization know or should know relevant to whether [Offeror name] would have a possible conflict of interest that would affect [Offeror name]'s (1) being able to render impartial, technically sound, and objective assistance or advice, or (2) being given an unfair competitive advantage, should it be selected as the third-party contractor assisting the Department of State with the environmental review of the project for which my organization has applied for a Presidential Permit, are fully disclosed on the attached page(s). I also provide a detailed description of the internal processes undertaken to conduct our internal OCI review in the attached page(s).

Signature: \_\_\_\_\_ Date :

Name :

Title :

Organization :

**APPLICANT OCI ONGOING OBLIGATIONS CERTIFICATION**

I recognize that OCI is an ongoing obligation. Should I or my organization become aware of any real or reasonably perceived potential OCIs during performance of this contract, I or my organization will advise the Department and [contractor/applicant name] and propose mitigation or explain why none is needed. I provide a description of internal controls for ensuring an OCI does not arise during the project in the attached page(s).

Signature: \_\_\_\_\_ Date :

Name:

Title:

Organization: