

Additional Help: 200-203
File Name: 200saf_092400_cd20
Last Revised: 09/24/2000

GUIDANCE ON CONSULTATION AND AVOIDANCE OF UNFAIR COMPETITIVE ADVANTAGE

This is interim guidance on how USAID staff may conduct consultations with development customers and partners under our reengineered operations system while remaining within the statutory and regulatory requirements of the U.S. Government, in order to facilitate dialogue regarding development issues while avoiding the possibility of giving unfair competitive advantage to potential implementors.

A. IT IS USAID POLICY TO ENCOURAGE PARTICIPATION AND CONSULTATION.

It is USAID policy to require and encourage wide participation by and consultation with other entities involved in development, both our partners and our customers - whether host country citizens, governments, NGOs, PVOs, for-profits, or other donor organizations.

Participation and consultation are essential features of the agency's new strategic planning and implementation process. At the outset of the strategic planning process, the mission forms an internal strategic planning team to manage the process. The mission then sponsors seminars and public meetings in the host country and, working with USAID/W, also obtains input through meetings and consultations involving PVOs, NGOs and consulting firms. Based on this input and other information and analysis, the strategic planning team prepares the plan for USAID/W approval.

Once a plan is approved, the mission begins the implementation of the individual strategic objectives. For each objective, a strategic objective (**S.O.**) team is established with the responsibility for managing to achieve that objective. Initially, the S.O. team includes USAID staff relevant to implementing the objective, and this internal group forms the core S.O. team. It is then the responsibility of that core team to identify external S.O. team members from counterpart host-country government agencies, the private sector, PVOs\NGOs, customer representatives, and/or other donors. External S.O. team member selection is based on a number of criteria: local knowledge, specialized skills, relevant experience, role in achieving the strategic objective, etc. Members may be representatives of existing contractors or grantees, potential contractors or grantees, organizations which have no existing or expected contractual relationship with USAID, host country participants, etc.

Members of the full S.O. team are expected to discuss all aspects of whatever is needed to achieve the objective. This may include ideas about new activities and progress of existing activities, as well as review of overall progress in meeting the

objective. With the possible exception of host country counterpart organizations, external S.O. team members may not participate in activities which lead directly and predictably to a statement of work. However, they may serve on technical evaluation panels for contracts and agreements if not barred because of personal or institutional associations with grantees or contractors competing for award under the specific activity.

While the Agency encourages the broadest possible participation appropriate to a particular situation, some actions require caution in order to ensure a basic standard of fairness. The concern is to balance the need to make maximum use of the development knowledge, experience, and skills possessed by customers and partners in order to achieve development results and meet U.S. foreign assistance objectives, while ensuring that no potential implementors of USAID programs gain an unfair advantage as a result of engaging in consultation. There is an additional concern that consultation comply with the Federal Advisory Committee Act.

1. ORGANIZATIONAL CONFLICTS OF INTEREST. Policies on organizational conflict of interest are set out in the Federal Acquisition Regulation, Subpart 9.5 and in Contract Information Bulletin (CIB) 94-2 and Supplement. The pertinent provisions are discussed briefly here. If an organization designs an activity or develops material that leads **directly and predictably** to a statement of work for a contract (**regardless of whether the work is done under a contract or assistance instrument**), that organization may not, with a few limited exceptions, compete for the implementation contract, (**See Note Below**) either as a prime or sub-contractor. Organizations may conduct underlying studies or assessments that are used by USAID in developing a proposed activity without being automatically precluded from participation in the implementation phase by virtue of having done so. A contracting officer is required to determine whether potential conflicts of interest exist at the time of the implementation procurement and to take appropriate actions to mitigate any conflicts that are found. An organization doing predesign work may, therefore, still be found to have a potential conflict that must be mitigated at the time the implementation contract is being awarded.

NOTE: The exceptions are: 1) when implementation is competed with the design and 2) when more than one organization works independently on the design (i.e., not in a prime-sub contractor relationship or in a consortium) However, each case needs to be looked at independently by the contracting officer. Doubling up on designers does not necessarily mitigate the conflict.

We do not at this time have regulations covering organizational conflicts of interest under assistance agreements; however, the issue needs to be considered when Requests for Applications (**RFAs**) are issued for competitive assistance awards. If an activity that has been designed by one recipient under a USAID assistance agreement will be implemented through another assistance

agreement rather than a contract, it will be necessary to decide whether a non-competitive award to the design organization is appropriate and justifiable. If the implementation award will be competed, it will be necessary for the agreement officer (**contracting officer**) to determine whether any actions should be taken to mitigate the potentially unfair advantage of the design organization. If more than one recipient organization works on development of an activity for which USAID then issues an RFA, the design organizations would not be precluded from competing, nor would the agreement officer need to mitigate any unfair advantage beyond assuring that pertinent information is made available to interested organizations.

Discussions with individuals and organizations concerning basic strategies do not raise organizational conflict of interest issues. Nor is there an issue when discussions of specific developmental problems include illustrative activities for solving the problems. It is in connection with the design of specific activities that conflicts occur, whether it is a case of an organization's looking out for its own interests and designing towards its own strengths, or obtaining privileged information. The USAID rules are very strict on precluding potential contractors who have had involvement in design work. Even providing **material** that leads directly and predictably to a work statement is grounds for being precluded from competing. Only very preliminary and general design work not foreseeably connected to particular activities is permissible. Even though involving more than one potential recipient or bidder can help to eliminate these potential conflicts, there is still the possibility that a potential contractor will protest that the consultations were unfair in some respect, especially when mitigation is difficult because contractor involvement has been in the form of oral discussions only. Consultation with potential contractors regarding the content of the scope of work should be avoided to minimize any complaints of conflicts and the Contracting Officer should be consulted before any consultation at the design stage takes place. Following are examples of activities that do **not** raise an issue of organizational conflict of interest:

EXAMPLE 1: NGOs and others are invited to participate in a discussion of the New Partnership Initiative (**NPI**).

EXAMPLE 2: Mission staff holds a series of meetings with NGOs on how best to implement its Strategic Objective on child survival.

EXAMPLE 3: Mission solicits written views from NGOs on potential activities that could be undertaken under a strategic objective.

EXAMPLE 4: Having participated in a number of S.O. team discussions, Mission Strategic Objective Core Team members are about to begin writing a scope of work for a contract and would like to meet with a number of NGOs, customers and others. After consulting with the Contracting Officer, the core team decides that: (i) oral discussions will be

held only with end-users and others who will not be bidding; and (ii) potential bidders will be consulted only on specific issues and only in writing.

2. PROCUREMENT INTEGRITY. Procurement integrity legislation imposes limitations on actions that may be undertaken during the course of a procurement. From the time an identifiable action is taken to start a procurement (**such as drafting a statement of work**) until the contract is awarded or a work order is finalized, propriety and source selection information (**as described in the Federal Acquisition Regulation 3.104-4**) may not be released without the approval of the contracting officer. Moreover, Agency officials involved with that procurement may not, among other things, speak with potential contractors about business or employment opportunities without approval of the GC Ethics Counsel.

B. AVOIDING OR MITIGATING ISSUES OF UNFAIR COMPETITIVE ADVANTAGE.

Throwing out a potential bidder or recipient from bidding is not the only way to resolve an unfair competitive advantage. There are many other ways to both avoid the creation of an unfair advantage and mitigate one once it exists without having to resort to the most drastic one of precluding someone from competing. In certain circumstances, however, preclusion from competition is the only option unless a waiver is authorized (**see CIB 94-2**). Some basic guidelines for consultation will help to avoid problems:

- 1. CONSULT EARLY.** One way to demonstrate that an organization has not gained an unfair competitive advantage is for USAID to show that the information or advice provided by potential grantees and contractors has been independently considered by USAID in coming to a decision. In order for that to happen the information or views provided by potential bidders must be received early in the process so that USAID can consider it fully and carefully and demonstrate that it made an independent decision.
- 2. CONSULT WIDELY.** As stated above, involvement of more than one organization exempts the organizations from the requirement that they to be precluded from competing.
- 3. PUBLICIZE AS WIDELY AS PRACTICABLE.** Be inclusive, not exclusive. Have general briefings to a wide audience of potential partners and obtain feedback through such public forums.
- 4. MAKE INFORMATION ON SPECIFIC COMPETITIONS AVAILABLE** to ALL potential implementors **as early as possible** in the process. One of the principal ways to avoid unfair competitive advantages is to make sure that

information is available to all, in a timely manner and well before the procurement process begins.

5. DOCUMENT CONSULTATIONS AND INDEPENDENT ASSESSMENT.

Organizations not present can still claim that an unfair competitive advantage was gained, and effective mitigation may be difficult when involvement has been in the form of oral discussions. In order to respond to any such charges document the content of discussions. Also documentation is needed to demonstrate how outside advice was received and an independent decision was reached.

C. THE FEDERAL ADVISORY COMMITTEE ACT

The Federal Advisory Committee Act (**FACA**) and regulations require that certain "advisory committees" be chartered, approved by OMB and GSA, give notice of meetings, have open meetings and comply with other procedural requirements.

Generally speaking an **advisory committee** under FACA is any group **not** composed entirely of full-time Federal employees. However, there are exceptions. FACA does not apply to committees which are established overseas and include non-US citizens. Another exception is where the agency is seeking the individual views, as opposed to consensus advice or recommendations. However, there is no exception for one-time meetings.

The following are some examples of some common advisory committee situations:

EXAMPLE 1: In country X, a mission has a series of meetings with a group to seek consensus on a strategic objective. The group includes non-U.S. citizens as members, e.g. host government officials or representatives of local NGOs. FACA does **not** apply even if at some of the meetings only U.S. citizens are in attendance.

EXAMPLE 2: In USAID/W, the G bureau establishes a group consisting of ten USAID employees and one outside technical advisor to advise the bureau on implementation of a population research project. FACA applies unless the bureau makes it clear that only individual views are being sought.

EXAMPLE 3: In USAID/W, the G bureau is preparing a strategic plan in a specific area. As part of the effort to include partners and customers in the planning process, USAID staff can host meetings to solicit individual views of customers and partners. Once the objective is approved, the G bureau establishes an S.O. team consisting of a core group of USAID employees. As contracts and grants are negotiated, representatives of the relevant organizations, based on the terms of the contracts and grants, participate as external members of the S.O. team and offer only their individual views. FACA does not apply because only individual views are being sought.

EXAMPLE 4: The Office of Procurement holds a series of town meetings with USAID contractors to get their views on a variety of procurement issues. Anyone may attend and speak. The FACA does not apply because consensus advice is not being sought.