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LEGAL AND POLICY CONSIDERATIONS WHEN INVOLVING PARTNERS AND CUSTOMERS ON STRATEGIC OBJECTIVE TEAMS AND OTHER CONSULTATIONS

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EXECUTIVE SUMMARY

This Supplementary Reference to ADS 201 and 202 provides guidance on how USAID staff may consult actively with our development customers and partners, particularly on expanded strategic objective teams ("SOTs"), while remaining within the statutory and regulatory requirements of the U.S. Government and Agency policy. This reference supersedes the Supplementary Reference for ADS 201 titled "Guidance on Consultation and Avoidance of Unfair Competitive Advantage."

The key issues dealt with in this reference relate to 1) organizational conflict of interest ("OCI") 2) ethics and procurement integrity and 3) the Federal Advisory Committee Act ("FACA").

A. Context. (Section A, p. 4 - 6)

USAID policy requires and encourages frequent substantive interaction between USAID staff and our partners and customers, including host country citizens, foreign government representatives, higher education institutions, non governmental organizations and other donor organizations. In particular, USAID staff are expected to involve representatives from outside organizations as members of expanded SOTs.

B. Organizational Conflict of Interest ("OCI"). (Section B, p. 6 - 16)

1. Applicable regulation: FAR Subpart 9.5 for contracts. The overarching concept of fairness applies to assistance instruments.

2. What is not OCI: OCI restrictions are not required when outside organizations participate in: (a) the preliminary stages of exchanging ideas and strategies (prior to identifying a contract procurement), (b) discussions regarding ongoing and completed activities, and (c) matters regarding only assistance instruments. The Federal standard for OCI generally does not apply in these circumstances. SOTs that limit participation of outside organizations to these areas are advised to establish ground rules that clearly state this approach, but do not need to keep meeting minutes on a systematic basis. This approach is discussed in Section B.1. and illustrated in Section B.6.

3. OCI always concerns a specific contract. However, if an organization creates a design under an assistance instrument that becomes the basis for a subsequent contract, OCI rules apply because of the relationship between the design and the future contract. The OCI rules (applicable to contracts) are discussed in Section B.2 and the limited contexts in which OCI is relevant for assistance instruments

are discussed in Section B.3. Examples of how to apply the OCI rules are provided in Sections B.6 and B.7.

4. The components of OCI are bias and unfair competitive advantage:

a. Bias -- An organization might design an activity that it is particularly qualified to carry out, although not necessarily the best approach in view of USAID's interests.

b. Unfair competitive advantage -- An organization involved in design, evaluation or audit work might obtain information "competitively useful" for a future contract procurement.

5. Key standard in OCI and consequences: An organization that designs an activity or develops material that leads "directly, predictably and without delay" to a statement of work ("SOW") for a contract generally may not compete for the contract in question, either as a prime or subcontractor.

6. What can we do to resolve OCI?

a. SOTs that continue involvement of outside organizations after identifying an upcoming contract procurement must consider OCI considerations. Such organizations may compete for the contract in question only if bias is avoided and any unfair competitive advantage is mitigated. Tenets that facilitate the process of avoiding bias and mitigating unfair competitive advantage and their application are discussed in Section B.7.

b. Bias can be avoided if USAID staff participate actively to reach an informed decision regarding the best design in the Agency's interest. If USAID staff consult other sources in addition to the organization in question and make substantive revisions to the organization's work product, the "directly, predictably, and without delay" standard generally will not be reached, thereby avoiding bias.

c. Unfair competitive advantage can be mitigated by providing competitively useful information held by one organization to all other competitors. SOT members must be alert not to discuss source selection and proprietary information with outside organizations because that information cannot be disclosed to other competitors. It is thus not possible to mitigate unfair competitive advantage based on disclosure of source selection information; organizations that hold such information must be excluded from the contract procurement in question.

d. If outside organizations are involved after identifying possible implementation instruments, it is important to (i) involve the cognizant legal advisor and contracting officer in the process and (ii) document the record, such as with meeting

minutes. Record keeping facilitates the process of identifying competitively useful information and demonstrating USAID's active involvement in the design process.

e. At times it may be necessary to preclude organizations involved in design work from competing for the implementation contract. As a practical matter, USAID staff often have limited time and resources and accordingly rely on outside organizations to help prepare design work. When USAID staff depend on outside organizations to do design work and are unable to put in the time to make an independent assessment of such organizations' work, it is generally necessary to preclude the design organization from competing for the contract that implements the design.

7. Concerns in the assistance context

The overarching principle for both contracts and assistance is fairness. However, in contrast to the contract context, there are no specific legal or Agency level restrictions on participation of outside organizations when only assistance instruments (grants and cooperatives agreements) are involved. In view of the fairness concern, SOTs are encouraged to review assistance competitions case-by-case to consider whether certain restrictions make sense under the circumstances. The limited applicability of OCI to the assistance context is discussed in Section B.3 and examples four and five in Section B.6.

C. Ethics and procurement integrity (Section C, p. 16 - 19)

The procurement integrity and ethics (standards of conduct and conflict of interest) rules applicable in the SOT context are the same as those applicable in other U.S. Government work contexts. The ethics rules apply to both contracts and assistance while procurement integrity laws only apply to contracts.

As SOT members, USAID staff may come in frequent contact with outside organizations and appear to be part of the group making funding decisions. Merely being an SOT member does not create an actual conflict with all organizations receiving funds under that SOT. However, even when there is only an appearance of conflict, the employee may participate on related SOT matters only upon obtaining written authorization from the Designated Agency Ethics Officer ("DAEO") or a deputy ethics officer.

D. Federal Advisory Committee Act ("FACA") (Section D, p. 19 - 20)

FACA imposes certain restrictions on "advisory committees." However, FACA does not apply to committees that are established overseas and include non-U.S. citizens (even if only U.S. citizens attend some meetings). It also does not apply when the Agency is seeking individual views, as opposed to consensus or group recommendation or advice. These rules apply for both contract and assistance instruments, as well as for more general discussions.

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INTRODUCTION

This reference provides guidance on how USAID staff may consult actively with our development customers and partners, particularly on expanded strategic objective teams ("SOTs"), while remaining within the statutory and regulatory requirements of the U.S. Government and Agency policy.¹ Such considerations include the potential for bias and unfair competitive advantage (both of which are components of organizational conflict of interest ("OCI")), procurement integrity rules and standards of conduct, and the Federal Advisory Committee Act ("FACA"). Below, we first review the Agency's policy that encourages involvement of partners and customers. Then we address the specific issues that Agency staff must keep in mind in dealing with our partners and customers.

A. USAID REQUIRES PARTICIPATION AND CONSULTATION

USAID policy requires and encourages wide participation by and consultation with other entities involved in development, both our partners and our customers, whether host country citizens, governments, non governmental organizations ("NGOs"), business entities or other donor organizations. The Federal Acquisition Regulation ("FAR") also encourages exchanges of information in the Government contract procurement process.²

Participation and consultation are essential features of the Agency's strategic planning and implementation process as elaborated in ADS Chapters 201, 202, and 203.³ At the outset of the strategic planning process, a Mission or USAID/W operating unit is to form an internal strategic planning team to manage the process. The Mission or operating unit then sponsors seminars and public meetings in the host country, and working with

¹ This reference supersedes the Supplementary Reference to ADS 201 titled "Guidance on Consultation and Avoidance of Unfair Competitive Advantage."

² FAR 15.201. Exchanges of information between the Government and outside persons and organizations improves understanding of the Government's requirements and industry capabilities. Some of the techniques the FAR recommends for information exchanges are incorporated into the tenets discussed in Section B.7.

³ E.g., ADS 201.5.7 Participation, 202.5.2a Composition and Responsibilities of the Strategic Objective Team, 202.5.3 Including the Views of Customers and Stakeholders.

bureau management and other appropriate Agency staff, obtains input through meetings and consultations with representatives from NGOs, higher education institutions, consulting firms, other donor organizations, the business sector, host country governments and customers, as appropriate. Based on this input and other information and analysis, the strategic planning team prepares the plan for cognizant bureau management approval.

For each strategic objective, a strategic objective team ("SOT") is established and is responsible for managing activities in order to achieve that objective. The core SOT consists of USAID staff relevant to implementing the objective.⁴ The core SOT is responsible for identifying external SOT members to participate on the expanded SOT. The core SOT selects external team members based on such considerations as: local knowledge, specialized skills, relevant experience, or their role in achieving the strategic objective. External SOT members may include representatives of existing contractors or grantees, potential contractors or grantees, organizations which have no existing or expected contractual relationship with USAID, host country counterparts, customer representatives and other donors.

Within the limits described below, members of the expanded SOT are expected to discuss whatever is needed to achieve the objective. This may include ideas about new activities and progress on existing activities as well as review of overall progress in meeting the objective. The first limitation, as discussed in Section B, concerns organizational conflict of interest. Section B explains at what point SOT discussions must not include external members if such organizations might be interested in competing for contracts the SOT will design. Second, as discussed in Section C, the high level of interaction on expanded SOTs between a broad range of USAID staff and outside organizations requires USAID staff to maintain a heightened awareness of procurement integrity and standards of conduct rules. Third, as discussed in Section D, the Federal Advisory Committee Act is generally not applicable overseas, but does require consideration in USAID/W.

This reference aims to facilitate smooth relationships between USAID staff and our partners and other outside organizations by clarifying legal and policy limitations. On those occasions when USAID staff needs to exclude a partner or communicate other unwelcome news, such tidings are to be delivered in a courteous, considerate and respectful manner, in the spirit of partnership.

⁴ "USAID staff" on the core SOT consist of USAID employees and others internal to USAID, as elaborated at ADS E202.5.2a. While the core SOT may include personal service contractors ("PSCs") and others who are not U.S. direct hire employees ("USDHs"), actions of the core SOT that reflect a final policy, planning or budget decision must be cleared or signed by a USDH (See ADS 103.5.1a Delegation to U.S. Citizen Personal Services Contractors and Non-U.S. Citizen Employees).

B. ORGANIZATIONAL CONFLICT OF INTEREST ("OCI")

This reference applies the Federal standard for OCI stated at FAR Subpart 9.5.⁵ As discussed in section B.2, OCI will always involve a specific contract.⁶ As discussed in Section B.3, there are no required OCI restrictions when only assistance instruments (grants and cooperative agreements) are involved.

B.1. What is not OCI

OCI restrictions are not required when outside organizations participate in:

- a) discussions regarding concepts, ideas or strategies, i.e., the stage prior to identifying possible implementation instruments;
- b) discussions regarding ongoing and completed activities (whether under contracts or assistance instruments);
- c) matters involving only assistance (not contract) instruments, both during the competition stage and once the activity is in progress -- see Section B.3.

Regarding concepts, ideas and strategies, the key question is whether they are linked to a specific contract. OCI does not exist in the abstract. If one cannot identify a contract at issue, then there is no OCI under the Federal standard. Regarding assistance instruments, as discussed in Section B.3, SOTs are empowered to establish OCI restrictions on a case-by-case basis for such instruments, but this is not required.

Regarding ongoing and completed activities, the U.S. Government has the right to use work products produced under contracts and assistance agreements for government purposes,⁷ including SOT discussions. Such discussions may cover any activities completed or in progress under the agreements, including successes and failures, and obstacles encountered and overcome. They may not address "source selection" information, including the details of the financial terms of the contract.⁸

⁵ The Agency's Policy Division of the Office of Procurement is currently in the process of revised Agency policy regarding OCI. The revised policy will supersede current CIB 94-2 and will interpret and apply the standard in FAR Subpart 9.5.

⁶ This reference uses the term "contract" to include the competitive award process (procurement) as well as the subsequently awarded contract.

⁷ The Agency's right to use work products is broader with contracts than with assistance instruments. However, in both cases the government has the right to use such products for government purposes.

⁸ Source selection information is defined at FAR 3.104-3 and discussed further in footnote 12 herein.

Core SOTs may choose to limit involvement of external SOT members to the above-mentioned areas, as is illustrated in Section B.6. SOTs that choose this approach are advised to clarify this cut off in the SOT's ground rules or team charter. SOTs that adopt and follow this approach need not:

- 1) keep detailed records, such as through meeting minutes; or
- 2) consult the RLA ("regional legal advisor")/attorney advisor and contracting officer for every case.

B.2. OCI in Contracting

B.2.a) The OCI Framework

Once a contract procurement is identified, it is necessary to consider the bias and unfair competitive advantage components of OCI and the "directly, predictably and without delay" standard before involving external SOT members in further discussions. This section will review these OCI considerations. Note that in SOT and other team contexts, unfair competitive advantage, in particular the prohibition on release of source selection and proprietary information to potential competitors, is often the pivotal concern. The contracting officer is responsible for determining whether potential conflicts of interest exist at the time of contract procurement and whether the conflicts can be avoided or mitigated.

The unfair competitive advantage concern is that an organization may gain insights into USAID's plans for the upcoming procurement or learn its competitors' strategies. "Competitively useful" information may give an organization an unfair competitive advantage over its competitors in the upcoming procurement.⁹ The focus is always on the "competitive usefulness" of the information for a specific contract, not in the abstract. Unfair competitive advantage thus concerns information an outside organization obtains from USAID and others regarding a specific contract.

The bias concern is that an organization involved in preparing the design may design an activity towards its own strengths, i.e., a design that the organization is particularly qualified to carry out, although not necessarily the best design in USAID's interests if it is permitted to compete in the procurement to carry out the design. If USAID staff are not sufficiently involved in doing the design themselves and instead rely on the outside

⁹ Note that it is not unfair competitive advantage for an outside organization to get information/contacts in the course of carrying out an existing contract. Accordingly, an incumbent that in the course of its work develops working relationships with key host country players and gains an understanding of problems and potential solutions in the host country has generally obtained a fair advantage.

organization, USAID may be unable to detect if the organization's design is biased. Bias thus focuses on information an outside organization provides to USAID and USAID's ability to evaluate the merit of that information.¹⁰

A key standard for OCI is that an organization that designs an activity or develops material that leads "directly, predictably and without delay" to a statement of work ("SOW") for a contract generally may not compete to implement the contract in question, either as a prime or sub-contractor. Any design an organization creates that meets this standard, whether done under a contract or assistance instrument, or without USAID financing (including through SOT participation), is subject to the OCI restrictions if the design feeds into a contract. Concern is that an organization whose involvement meets this standard may provide a biased design if it can then compete to implement the design. In the process of preparing the design, the organization may also obtain information that would give it an unfair competitive advantage over the other competitors for the implementation contract.

An organization may not participate in a competitive procurement if such participation would create a bias situation or allow the organization an unfair competitive advantage (except with a waiver under FAR 9.503). However, it is often possible to mitigate unfair competitive advantage and avoid bias, enabling the organization in question to compete for the implementation contract.

B.2.b) Mitigating and Avoiding OCI

Mitigating unfair competitive advantage involves identifying competitively useful information held by one potential offeror and sharing that information with all other potential offerors. This levels the playing field, enabling the organization in question to compete on a fair basis. The contracting officer must make a judgment call regarding (1) what information is competitively useful and (2) whether it is possible to disseminate such information to mitigate the conflict.

Source selection information may not be shared with offerors on a contract procurement.¹¹ This means that a potential competitor who obtains source selection information competitively useful for a particular procurement has an unfair competitive advantage that cannot be mitigated, and must be excluded from competing for the procurement in question. Much source selection information arises only after the request for proposal ("RFP") is issued and the evaluation progress begins.¹² However,

¹⁰ While the text uses the example of bias in the design/implementation scenario, bias can arise in other contexts as well, e.g., when outside organizations are involved in evaluating and auditing other organizations.

¹¹ FAR 3.104-4.

¹² "Source selection information" is defined at FAR 3.104-3. Most types of source selection material only arise after the RFP is complete and hence not of concern in SOT meetings held prior to issuance of the RFP, e.g., competitors' technical and cost

certain source selection information may be defined at an earlier stage, e.g., budget estimates and evaluation subfactors and scoring approaches more detailed than those stated in the RFP. SOT staff and others involved in the procurement who hold this information accordingly must be careful not to discuss it in expanded SOT meetings. SOT staff must similarly be careful not to disclose in expanded SOT meetings information about outside organizations and their work products that has been identified as confidential or proprietary.

Not all information discussed concerning a specific procurement is competitively useful. For example, in expanded SOT meetings alternative approaches for the statement of work and evaluation criteria might be discussed but modified or discarded before deciding on the final version. Knowing discarded or modified approaches might not be competitively useful and thus not require distribution to other competitors. Instead, the SOT is advised to release accurate information to as wide an audience as possible (such as on the Internet) as soon as possible, and write the final statement of work and evaluation criteria as clearly as possible in the RFP. This can effectively counter confusion of those who attended the SOT meetings where discarded approaches were discussed, and a perceived disadvantage felt by those who did not attend such meetings.

Bias is avoided if (1) the role of any one outside organization is limited and (2) USAID staff actively participate to reach an informed decision on the matter. The question is whether USAID staff involvement and the range of other sources contacted are sufficient to eliminate the bias concern. In the SOT context, bias is a less frequent concern than unfair competitive advantage. This is because with the team process it is unlikely that any one external SOT member will participate in the design to the point of meeting the “directly, predictably and without delay” standard. In fact, the very act of consulting various organizations through expanded SOT and other group contexts helps avoid bias.

B.2.c) Practical steps

To facilitate the process of avoiding bias and mitigating unfair competitive advantage, when SOTs involve outside organizations after identifying upcoming contract procurements they are advised to:

- 1) Maintain records of communications involving outside organizations, such as meeting minutes. It is necessary to consider whether the record developed in a specific case is strong enough to enable identifying competitively useful information held by the organization in question. The record consists of written documentation including reports and meeting notes, as well as clear recollections of persons present when competitively useful information might have been released. If the record is too scant and unclear or it is not permitted to share the competitively useful

proposals, and the contracting officer’s and technical evaluation panel’s ranking and evaluation of the proposals.

information (e.g., source selection material), it will not be possible to mitigate and the organization in question must be kept out of the procurement competition. The level of detail of record keeping is a matter of judgment and can vary depending on the nature of the material discussed.

- 2) Document the reasoning for inclusion or exclusion of competitors when OCI is an issue.
- 3) Coordinate with the RLA/attorney advisor and contracting officer.

Section B.7 provides a series of tenets that USAID staff can follow to help insure that bias is not present and to mitigate unfair competitive advantage. The tenets are applicable to dealings with outside organizations beyond the SOT context as well. Illustrative examples apply the tenets to the SOT context.

B.3. OCI not applicable to assistance instruments

The overarching principle of fairness applies to both assistance instruments (grants and cooperative agreements) and contracts. However, no specific statutory or regulatory restrictions or Agency level policies cover OCI when implementation is carried out under assistance awards (grants and cooperative agreements). This means that there are no specific legal or Agency level restrictions on extended SOT discussions regarding existing or possible future grants and cooperative agreements. Note the caveat that occasionally an assistance instrument might be envisioned initially, but through the planning process it becomes apparent that a contract is the more appropriate instrument. In such a case, the restrictions discussed in Section B.2 apply. This highlights the importance of selecting carefully the appropriate instrument (contract versus assistance) and involving the contracting/agreement officer early in the planning process to help make this identification.

In view of the concern for fairness, SOTs, coordinating with the agreement officer, may decide on a case-by-case basis that it is in the Agency's best interest to restrict involvement of outside organizations in discussions dealing with assistance instruments. Considering the circumstances, the SOT may decide that unfair competitive advantage and bias are of sufficient concern to warrant such restrictions. The SOT is advised to balance the interest in obtaining input through team discussions from knowledgeable organizations with concern that those organizations will obtain an unfair competitive advantage and provide biased information. If information discussed in expanded SOT meetings is deemed competitively useful, SOTs may opt to distribute it to other organizations through the Internet, public meetings and clarifications in the RFA. Consistent with the Agency's core value in team empowerment, decision how to handle these situations in the assistance context is a matter of the core SOT's discretion (in consultation with the agreement officer). Example five in Section B.6 illustrates a context in which an SOT makes this case-by-case decision.

In sum, all expanded SOT members, whether contractors, assistance recipients or otherwise, may participate in discussions regarding existing and future assistance activities, unless the core SOT decides case-by-case that such participation is not in the Agency's best interest.

Note that work done under an assistance award that leads "directly, predictably, and without delay" to a contract design is subject to the OCI restrictions discussed in Section B.2. The recipient accordingly may be precluded from competing for the contract absent appropriate efforts to mitigate or avoid the OCI as discussed in Section B.2.b).¹³

Finally, note that the standards of conduct and conflict of interest rules discussed in Section C.1 and Federal Advisory Committee Act concerns discussed in Section D apply equally to contracts and assistance. The procurement integrity laws covered in Section C.2 are specific to contract procurements and thus not applicable to assistance instruments.

B.4. "Fair opportunity to be considered" standard applicable for task orders

The standard generally applicable to task orders under multiple award indefinite quantity contracts ("IQC") is "fair opportunity to be considered for each order."¹⁴ One exception to the fair opportunity to be considered standard is if a task order is a "logical follow-on" to a prior order, and all multiple award contractors had a fair opportunity to be considered for the prior order. This exception provides a basis to allow the same contractor to carry out both design and implementation despite the OCI concerns, in particular the concern that the design prepared not be biased.

The contracting officer makes the judgment call regarding what constitutes "fair opportunity to be considered" and the appropriateness of the logical follow-on exception. Contractors who feel they did not receive a "fair opportunity to be considered" may complain to the Agency's task order contract and delivery order contract ombudsman (the "OP Ombudsman"). The contracting officer and OP

¹³ Work completed under an assistance instrument generally will not be the basis of a contract design. A contract is required to be used when the principal purpose is to obtain services for the direct benefit of the U.S. Government. Development of a work statement for a U.S. Government contract is of direct benefit to the U.S. Government. However, when an assistance activity is closely related to a proposed contract activity, work done under the assistance instrument may become a basis for a contract statement of work.

¹⁴ This standard is stated at FAR Subpart 16.505(b). Note however that when work on a task order serves as the basis for a design for a different contract or visa versa, the OCI standard discussed in Section B.2 of this reference is applicable, rather than the fair opportunity to be considered standard.

Ombudsman may draw by analogy on the OCI standard in evaluating what constitutes "fair opportunity to be considered" and whether to use the logical follow-on exception.

In the SOT context, the question might arise whether an expanded SOT member from a contractor with an IQC may be involved in developing a task order under the IQC for which the contractor then wishes to be considered. Suppose Contractor A, as an expanded SOT member, participates in developing a task order and then wishes to be considered for the task order. The question is whether the other contractors under the IQC have a "fair opportunity to be considered" for that order in view of Contractor A's involvement in the design. Given the contracting officer's discretion in determining what constitutes "fair opportunity to be considered", the SOT must consult the contracting officer prior to permitting Contractor A to be involved in developing the task order.

B.5. Other policy considerations related to OCI

SOTs are meant to respond flexibly to external changes and lessons learned, which may require changing approaches and partner mix over time. While identifying and analyzing strategic choices, it is important that the core SOT not limit the outside organizations consulted to current USAID grantees or contractors because of these organizations' vested interest in maintaining a USAID strategy that values their organizations' expertise. As the core SOT considers making changes in the results framework (which might require a different partner mix), it is thus advisable to expand the range of groups engaged in the discussions beyond those partners currently implementing activities. This does not technically concern OCI if specific contracts are not yet identified. However, as a policy matter, it is important for the Agency to receive the fullest range of input in setting its strategic objectives.

B.6. Examples of SOT activities that do not raise an issue of OCI

SOTs generally may undertake the types of activities illustrated in the examples below without the need for case-by-case consultation with their RLA/attorney advisor and contracting officer. If SOTs clarify through ground rules or SOT charter documents that outside organizations will not be involved once possible contract procurements are identified, systematic record keeping (e.g., meeting minutes) is not necessary.

Example One. An expanded SOT for a democracy objective holds an annual orientation retreat to familiarize new SOT members, including newly arrived USAID staff and outside organizations, with the SOT's portfolio and operating procedures. The retreat agenda includes get-acquainted exchanges, substantive sessions regarding current and planned SOT activities, and review of the SOT's rules and procedures spelled out in an operating charter approved by the original SOT members. At this retreat, the SOT's existing activities, carried out under both contracts and assistance instruments, may be discussed. Possible future activities also may be discussed. However, the retreat agenda, distributed to all participants beforehand, clarifies that no

recommendations or decisions regarding future contract procurement actions, including possible extensions of existing contracts, will be made during these sessions. The SOT operating charter, to be reviewed at the retreat, also states that only the core SOT (USAID staff) will be involved in making decisions regarding funding and choice of instrument, and that external members will not be involved in discussions regarding identified upcoming contract procurements. While minutes might be kept of some sessions, the SOT decides it is not necessary to take minutes on a systematic basis during the retreat in view of the clear limits on discussions established in the SOT charter and retreat agenda.

Example Two. An expanded SOT (including both USAID staff and outside organizations) holds a series of meetings to compose a list of possible future activities in furtherance of its child survival strategic objective. As in example one, the SOT has ground rules that clarify that only core SOT members will make decisions regarding future funding and choice of instrument. The series of meetings results in a list of possible future activities. However, no decision is taken and no specific implementation instrument is identified.

Example Three. In anticipation of possible future funding, a core SOT (only USAID staff) writes to outside organizations, both members and non-members of the expanded SOT, soliciting their written views regarding possible activities that may be undertaken under its environment strategic objective. The core SOT includes technical staff familiar with organizations that work in this area and therefore is well able to identify several organizations to contact. The letter informs that the SOT is sending the same letter to a number of outside organizations and that suggestions received might be used in future SOT activities. Anticipating that some outside organizations might call USAID staff members rather than send written responses, the core SOT agrees that USAID staff may accept such calls and take notes regarding the organizations' suggestions. It is decided that USAID staff may inform callers that there might be future funding and that the exact activities and implementation instruments have not yet been determined. Several organizations respond in writing and by phone. Subsequently the funding comes through and the core SOT decides to proceed with a contract procurement. A subteam of the core SOT drafts the statement of work ("SOW") for the request for proposal ("RFP") using the organizations' responses as input.

Analysis of examples one, two and three:

In these examples, there is no problem of potential OCI. Communications with outside organizations on basic strategies or Agency initiatives and possible future activities generally do not raise OCI issues. Discussion clearly stops before identifying specific contracts. In examples one and two, ground rules established beforehand clarify that it is SOT procedure to stop discussion at this point. It is thus not necessary for these SOTs to keep systematic written record of their discussions on these matters. In example three, the core SOT controls the flow of information by sending the same letter to all organizations and agreeing beforehand what to inform callers. Only USAID staff review the responses from outside organizations.

Example Four. As a matter of regular practice, SOT members with immediate responsibility for administering specific contracts, grants and cooperative agreements periodically make presentations to the expanded SOT regarding progress in carrying out the activities under the agreements. The presentations do not reference possible future funding regarding the activities. All extended SOT members are invited to comment on the activities and make suggestions.

In example four, there is no OCI problem because these presentations concern ongoing activities, not possible future funding. Discussions can be held regarding ongoing activities whether carried out under contract or assistance instruments without OCI concerns.

Example Five. A core SOT makes the decision to prepare a request for applications ("RFA") for a cooperative agreement. Through the planning process, the SOT regularly consulted with the agreement officer SOT member to help identify this activity as one appropriately implemented through a cooperative agreement. The core SOT is considering whether and to what extent to involve external SOT members in the process of developing the program description for the RFA. Core SOT members believe that certain external SOT members might be interested in participating in the competition for the cooperative agreement. The core SOT notes that there are no specific legal or Agency wide policy OCI restrictions requiring that involvement of external members in this process be limited. However, in view of the concern for fairness, the core SOT, with active involvement of the agreement officer SOT member, considers whether participation of external SOT members is in the best interest of the competition. This is a judgment call for the core SOT to make, coordinating with the agreement officer.

B.7. Tenets and examples for avoiding and mitigating OCI

Basic tenets for avoiding bias and mitigating unfair competitive advantage are outlined below followed by examples. It may not be possible to follow all of these tenets in all cases. Application of these tenets often requires a high level of involvement of USAID staff and advanced planning. It is noted that USAID staff often have limited time and resources, and accordingly rely on outside organizations to help prepare design work, making bias unavoidable. Also when unfair competitive advantage is based on disclosure of source selection information, the conflict cannot be mitigate. In such cases, when OCI cannot be mitigated or avoided, organizations involved in the design work must be excluded from participating on the implementation contract.

When attempting to mitigate and avoid OCI, SOTs are advised to consult their RLA/attorney advisor and contracting officer. When involvement of outside organizations reaches the point where mitigation or avoidance practices are required to enable an organization to participate in a contract procurement, record keeping, as discussed in Tenet Four and the examples becomes important.

Tenet One. Solicit Information Early and Widely.

Soliciting input from many outside organizations, including potential offerors, during the design process can help avoid bias. Such consultations may take the form of town hall meetings and as the design starts to take form, issuing presolicitation notices and draft requests for proposals (“RFP”) requesting written comments. By starting the process early, USAID staff have the time to gather view points from different sources. Bias is avoided because obtaining information from many sources helps USAID staff make an informed assessment of the design that best suits the Agency's interests, and reduces the relative importance of views expressed or documents produced by any one organization.

Tenet Two. Distribute Information Early and Widely.

One of the principal ways to avoid unfair competitive advantage is to make sure that information is available in a timely manner to anyone who is interested. Distribute information widely, through public channels when possible. This can be through the Internet or publicized general briefings for a wide audience of potential offerors. If competitively useful information is communicated to one or a limited group of offerors, as soon as practical disseminate that information through the Internet or publicized wide group meeting to others.

Tenet Three. Write the Statement of Work and Evaluation Criteria in the Request for Proposal as clearly as possible.

The clearer the Request for Proposal (“RFP”) is on its face, the less competitively useful is information an organization has from outside of the RFP. Writing the RFP provisions clearly clarifies the lack of competitive usefulness of knowing earlier modified or discarded versions.

Tenet Four. Document Consultations and Informed USAID Decision-Making.

It is advisable for SOTs to maintain a written record of all communications with outside organizations once SOT discussion has narrowed to specific possible upcoming contract procurements. Such written communications, if deemed competitively useful, may then be distributed to all potential offerors to mitigate an unfair competitive advantage held by offerors privy to such communications. Documentation also makes it possible to demonstrate that a range of sources were contacted, and the substance of the advice the sources provided, to substantiate the position that the Agency made an informed decision, countering bias.

Maintaining such a written record provides the Agency with a basis to refute a protest claiming OCI. If records of communications between USAID staff and outside organizations are not kept or are sporadic, it is more difficult to (1) establish what the offeror in question knows, and therefore, refute a claim of unfair competitive advantage,

(2) identify competitively useful nuggets of information to share with the competitors and thus mitigate, and (3) demonstrate USAID's involvement in the design and broad range of sources consulted, to refute a claim of bias.

Example One. A core SOT has just made the decision to prepare an RFP for an upcoming contract procurement. The core SOT is seeking ways to obtain as much input as possible to be able to conduct an independent analysis in preparing the statement of work (“SOW”) for the RFP. In addition, the core SOT is concerned that incumbent contractor M, represented on the expanded SOT, may wish to propose on the upcoming contract procurement. Contractor M has not done work specifically towards design of the SOW for the upcoming procurement. However, USAID staff anticipate drawing on related work products Contractor M produced under its USAID contract in preparing the design.

The core SOT resolves the following:

- 1) To hold brainstorming sessions of the expanded SOT, to consider possible activities for the SOW, with minutes kept;
- 2) USAID staff will not discuss the draft design with outside organizations other than in group meetings with minutes kept;
- 3) USAID will not discuss preliminary drafts of the evaluation criteria in the RFP with outside organizations and will consider whether to withhold other portions of preliminary drafts of the RFP for concern not to disclose source selection information;
- 4) Once the SOW has reached the point of a final draft, a draft RFP will be publicized and written comments accepted from outside organizations;
- 5) All nonsensitive work products produced by Contractor M under its USAID contract will be made available to all potential offerors on the Internet;
- 6) Portions of minutes of SOT and any other meetings leading towards development of the SOW attended by outside organizations will be made available to all potential offerors on the Internet; and
- 7) USAID staff will document sources drawn on, including the expanded SOT meeting discussions and responses to the draft RFP, in reaching their informed determination regarding the best design for the SOW.

By discussing activity possibilities with outside organizations on the expanded SOT and inviting comments on a draft RFP, USAID staff are inviting input from a wide range of sources, enabling an informed decision regarding the best design. By limiting communication with outside organizations to group contexts in which minutes are kept,

the SOT will have the documentation to substantiate lack of bias in the design development process and to mitigate unfair competitive advantage. By not discussing preliminary versions of the evaluation criteria, the SOT addresses the concern that details regarding the criteria might drop out of the final and become source selection information that cannot be shared with competitors. By making available on the Internet all non-sensitive work products of Contractor M and relevant portions of meetings dealing with the SOW design, practically all information that could be competitively useful is dispersed, leveling the playing field and mitigating unfair competitive advantage. By releasing meeting minutes and all non-sensitive work products, USAID staff do not have to invest significant time into thinking through which of these documents are actually competitively useful.

Example Two. The director of Organization A, which is an expanded SOT member working in the health care area in a Country X, volunteers to prepare for the SOT an assessment of the health care needs in Country X. Upon completion of the assessment, the expanded SOT discusses it. Subsequently, the core SOT meets and, taking into consideration the assessment and expanded SOT discussions, decides to proceed with a contract procurement. A subteam of the core SOT composed entirely of USAID employees then designs the SOW for the RFP. The subteam includes two USAID employees who have worked extensively in the health care area. In preparing the SOW, the subteam draws on the assessment, as well as knowledge obtained from the earlier expanded SOT meetings and firsthand experience. The final design includes many points identified in the assessment prepared by Organization A, as well as other points. Upon completing the SOW, the SOT subteam writes a brief memo outlining the range of resources it considered in reaching its informed decision regarding the best design for the SOT's objectives. Organization A, which prepared the assessment, would like to compete for the contract.

Organization A may compete for the contract under these circumstances. Organizations may conduct underlying studies or assessments that are used by USAID in developing a contract activity without being precluded from competing for the contract. Often, as in this case, implementation instruments will not yet be identified at the point of doing the assessment. Although the time sequence makes clear that Organization A did the assessment at a preliminary stage, the subteam opts to further clarify the basis for its informed, independent decision in the memo.

Example Three. A core SOT is about to write a statement of work ("SOW") for a contract procurement and would like to meet with a number of non governmental organizations, customers and other outside organizations to assist in the preparation process. 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 proposing; and (ii) potential offerors will be consulted only on specific issues and only in writing.

By only having written communications with potential offerors, the SOT controls the flow of information. Should it happen that competitively useful information is released in these communications, it may be easily distributed to all other offerors to mitigate any

unfair competitive advantage. In view of the limited involvement of potential offerors and the range of sources contacted, bias clearly is not an issue.

C. PROCUREMENT INTEGRITY AND ETHICS

The procurement integrity and ethics (standards of conduct and conflict of interest) rules applicable in the SOT context are identical to those applicable in other U.S. Government work contexts. In general, the ethics rules apply equally to contract and assistance matters while procurement integrity rules apply only to contracts. The ethics and procurement integrity rules are applicable to personal services contractors ("PSCs") in addition to direct hire employees.

USAID staff may find that as SOT members they come in contact frequently with outside organizations, both as fellow SOT members and when carrying out the substantive work of the SOT, i.e., in the context of SOT review of activities under potential and existing contracts and assistance instruments. Even when there is no actual conflict of interest, USAID staff must consider the appearance of conflict with organizations that currently or might in the future receive funding within the purview of the SOT. In such areas as employment search, post-employment restrictions, outside work, board membership and gifts, USAID employees who are SOT members must consider real conflicts – and the appearance of conflicts -- in relation to all outside organizations receiving USAID funds under the SOT's jurisdiction. Several Agency notices discuss these restrictions in greater detail. Agency employees may contact GC/EA for the updated list of these notices. Moreover, Agency employees are encouraged to consult the Designated Agency Ethics Official ("DAEO") who at USAID is the Deputy General Counsel for GE/EA or a deputy ethics official (generally the RLA overseas) early regarding potential conflict situations.

This section will review the basic ethics and procurement integrity rules concerning the employee's financial interests, including employment search and post employment restrictions. However, in the course of their SOT activities, USAID employees are advised to keep in mind the whole spectrum of standards of conduct and procurement integrity rules in their SOT activities.

C.1. Standards of Conduct and Conflict of Interest

By criminal statute, a Federal employee generally cannot participate "personally and substantially" on a particular matter that has a "direct and predictable" effect on the employee's financial interests.¹⁵ Actions deemed to reach the threshold of "personal and substantial" involvement include a decision, approval, disapproval, recommendation, the rendering of advice or otherwise taking an official action regarding a proceeding or other particular matter. Financial interests of the employee's spouse,

¹⁵ 18 U.S.C. Sec. 208.

organizations with which the employee has certain business relationships, and organizations with whom the employee is negotiating or has any arrangement concerning prospective employment are attributed to the employee under this statute. The employee must therefore consider if the financial interests of any of these parties might be affected by his or her actions as a SOT member. In addition, under standards of conduct rules, the employee must consider the financial interests of other parties as well, including close friends and relatives.¹⁶

Simply being a SOT member does not automatically reach the threshold of "personal and substantial" involvement. The fact that the SOT, as a team, makes a decision regarding an outside organization does not mean that each member of the SOT is held to have made that decision or have had personal and substantial involvement in making the decision. However, it is still necessary to look at the precise level of involvement of each SOT member. Every SOT member, regardless of his or her level of involvement on a specific matter, must consider whether SOT membership creates an appearance of conflict. Even if there is only an appearance of conflict, the employee may only participate on related SOT matters upon obtaining written authorization from the Designated Agency Ethics Official ("DAEO") or deputy ethics official. The DAEO or deputy ethics official must consider whether the Government's interest in the employee's participation outweighs the concern that a reasonable person may question the integrity of the Agency's programs and operations.

There are two major post-employment restrictions, as stated at 18 U.S.C. Sec. 207, concerning the impermissibility of representing non-governmental entities before the Federal Government. The prohibition on representation is permanent with reference to matters with specific parties in which the employee was personally and substantially involved as a Federal employee. The prohibition lasts two years from the date of employment termination with reference to matters that the employee knows or reasonably should know were pending under the employee's official responsibilities in his or her last year of Federal service. These prohibitions only involve "representation"; they do not prevent former U.S. Government employees from merely working for private firms, even on matters in which they participated as U.S. Government employees.

C.2. Procurement Integrity

Agency officials personally and substantially involved in a contract procurement above the simplified acquisition threshold (currently \$100,000) must report to their supervisor and Designated Agency Ethics Official or deputy ethics official any contact with a bidder or offeror during the course of the procurement about business or employment opportunities. They must unequivocally reject such possible employment opportunities in order to continue personal and substantial participation on the procurement.

¹⁶ 5 C.F.R. 2635.502

The procurement integrity post-employment rules apply only to employees with certain types of involvement in the award and administration of contracts and task orders in excess of \$10 million. Employees who meet this level of involvement are prohibited, for a period of one year following termination of the function, from receiving any type of compensation from the contractor, whether on the contract in question or otherwise.

Procurement integrity rules also require that "source selection" and "contractor bid or proposal" information (as defined in FAR 3.104-3) be limited to persons with a need to know this information for purposes of carrying out the procurement. Thus such matters must not be discussed in expanded SOT meetings or otherwise with persons who do not already hold the information, without the approval of the contracting officer.

C.3. Examples

Example One. An expanded SOT holds a series of brainstorming sessions to identify possible activities for inclusion in a five year activity plan. Some organizations on the expanded SOT might in the future receive USAID funding to carry out activities discussed at these meetings. However, no activities will be approved in these meetings; the core SOT (only USAID staff) will subsequently approve the five year plan, using these meetings, as well as other sources, as input for that decision. These meetings will not address types of instruments (contract versus assistance) or identify specific implementors that might be suitable for specific activities.¹⁷

USAID employees X and Y are core SOT members. Organizations M and N have representatives on the expanded SOT and might obtain funding in the future to conduct activities identified in these sessions. Employee X has sent her resume to Organization M, seeking possible employment. USAID employee Y's wife works on a contract Organization A has with USAID. Employees X and Y wonder whether they may participate in these sessions in view of their outside interests and if so, what actions they must take to enable participation.

The situations posed by both employees X and Y raise serious appearance problems, even though the scenario is still steps away from a specific identifiable matter. The appearance problems alone are enough to require that employees X and Y consult the Designated Agency Ethics Official or a deputy ethics official regarding proper action.

Regarding Employee X, submitting a resume may be interpreted as stating the employee's availability to work on future contracts Organization M might receive, even though the exact future contracts cannot be identified at the moment of submitting the resume. Activities discussed in these SOT meetings may lead to Organization M eventually receiving a contract to implement such activities. Participation by Employee

¹⁷ Note that this example does not pose OCI concerns since no specific contracts are identified.

X at these meetings may be interpreted as Employee X laying the foundation for the creation of his or her own job with Organization M. Employee X must thus consult the DAEO or a deputy ethics official. Most likely Employee X will need to recuse him/herself from any participation at these meetings unless the SOT requests that s/he continues performance.

Concerning Employee Y, his wife currently has a job on a contract with Organization N. More facts are needed to have a clearer sense of how her job status (and thus Employee Y's financial interests) would be affected if Organization N won a contract resulting from these activity discussions. However, regardless of the specifics of the wife's situation, the appearance of lack of impartiality makes it imperative that Employee Y discuss the situation with the DAEO or deputy ethics official. Depending on the nature of the wife's relationship with Organization N, Employee Y might have to recuse himself or might be able to participate in the meetings, with disclosure of the relationship to fellow SOT members.

This example demonstrates that even when SOT discussions do not yet concern specific, identifiable activities or implementation instruments, there can be an appearance of conflict when SOT members from USAID have or might have financial interests with external organizations that receive or might receive USAID funding under the purview of the SOT. Even an appearance of conflict requires the employee to consult the Designated Agency Ethics Official or deputy ethics official.

Example Two. Former USAID employee P left the Agency eight months ago and now works for Organization E. When P worked for USAID he was an SOT member where he participated in preparing a list of activities to be carried out under the SOT. His involvement did not reach the point of identifying implementation instruments. After P's departure, the SOT followed up with certain activities on the list to create a program description for a competitive Request for Application (for a cooperative agreement). Organization E competes and is awarded the cooperative agreement. P wonders whether his participation in preparing the original list prevents him from representing Organization E before the U.S. Government on matters related to the cooperative agreement.

P's work on the list does not violate the post employment limitations because this work did not reach the point of identifying "specific parties." The preparation of the program description and the competition by which Organization E was selected occurred after P departed. Note that there probably would be a conflict if P had worked on the program description itself or if P's preliminary work were subsequently placed verbatim into the program description. In such case, P must consult the DAEO or deputy ethics official to confirm whether under the circumstances, the representation ban would be for only two years after departing USAID or lifetime.

D. 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 that are established overseas and include non-US citizens. Accordingly, FACA generally does not apply to expanded SOTs in Missions overseas.

Another exception is where the Agency is seeking individual views, as opposed to consensus, advice or recommendations. To meet the individual views exception, external members of expanded SOTs may express their personal recommendations or advice or those of organizations they represent, and the basis for these views. However, the expanded SOT cannot reach consensus or otherwise take a position in the name of the expanded SOT. Accordingly, in order to be exempt from the FACA requirements, core SOTs based in USAID/W are advised to clarify, for example in the SOT Charter, that the expanded SOT seeks only individual views; the expanded SOT may not reach consensus, give advice or make recommendations. Such decisions may only be made by the core SOT.

The following are examples of some common advisory committee situations:

Example One. An expanded SOT holds a series of meetings to seek consensus on a strategic objective. Expanded SOT members include non-U.S. citizens, e.g., host government officials or representatives of local NGOs. The FACA limitations do not apply even if at some of the meetings only U.S. citizens are in attendance.

Example Two. In USAID/W, the Global 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. The FACA limitations apply unless the Bureau makes it clear that only individual views are being sought.

Example Three. In USAID/W, the Global 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 may host meetings to solicit individual views of customers and partners. Once the objective is approved, the G Bureau establishes a core SOT consisting of USAID employees. The core SOT identifies key outside organizations to be represented on an expanded SOT. The core SOT clarifies in its operating charter that members of the expanded SOT will offer only their individual views; all decisions will be made by the core SOT. The FACA limitations do not apply because only individual views are being sought.

Example Four. The Office of Procurement (OP) holds one town meeting with USAID contractors to get their views on a variety of procurement issues. OP makes clear that it is seeking the individual views of attendees; consensus will not be sought. Anyone may attend and speak. This meets the individual views exception of FACA.

Note that it is necessary to apply the FACA rules even though this is a one-time meeting rather than a series of meetings or a formally convened team.

Point of Contact: Questions concerning this reference may be addressed to Deborah James, GC/CCM, (202) 712-5228, Kathleen O'Hara, M/OP/POL, (202) 712-0610, and Tony Pryor, PPC/PC, (202) 712-4197.