



# Organizational Conflicts of Interest Procedures, Guidance, and Information

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**Division of Procurement Services**

S.C. Code Ann. § 11-35-1840 authorizes regulations covering organizational conflicts of interest:

The board may promulgate regulations to prescribe responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest. The aims of such regulations are preventing the existence of conflicting roles that might bias a contractor's judgment, and preventing unfair competitive advantage.

Regulation 19-445.2127, effective August 2019, applies to solicitations issued after November 29, 2019. Regulation 19-445.2127G provides:

The appropriate Chief Procurement Officer may develop and issue procedures which shall be followed by all agencies to identify organizational conflicts of interest and techniques to avoid or mitigate them.

This Procedures, Guidance and Information document (PGI) provides procedures for all agencies to use in acquisitions of supplies, services, and information technology, to identify and address organizational conflicts of interest (OCI), as described in S.C. Code Ann. Reg. 19-445.2127. The PGI describes organizational conflicts of interest and techniques to identify them early in the acquisition process, as well as ways to avoid, neutralize, or mitigate them. Information regarding conflicts of interest in the acquisition of contracts for construction, architect-engineer, construction management, and land surveying services is beyond the scope of this PGI.

This PGI is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the State of South Carolina, its agencies, its officers, or any person. It is intended only to provide policy guidance to procurement officers exercising their discretion.

# Table of Contents

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<b>1.</b>	<b>General.....</b>	<b>1</b>
1.1.	Purpose.....	1
1.2.	Definition.....	1
1.3.	Affiliates and Subcontractors .....	2
1.4.	Types .....	3
1.5.	Risks.....	4
<b>2.</b>	<b>Procurement Officer Responsibilities .....</b>	<b>5</b>
2.1.	Analyze .....	5
2.2.	Identify .....	6
2.3.	Evaluate.....	7
2.4.	Address.....	8
<b>3.</b>	<b>Common Trouble Spots .....</b>	<b>8</b>
3.1.	Contractor judgment .....	8
3.2.	Current or future contracts.....	9
3.3.	Natural competitive advantage.....	10
<b>4.</b>	<b>Required Actions.....</b>	<b>10</b>
4.1.	Preparing specifications.....	10
4.2.	Preparing statements of work.....	11
4.3.	Evaluating offers .....	13
4.4.	Systems Engineering and Technical Advice (SETA) contractors.....	13
<b>5.</b>	<b>Addressing OCIs .....</b>	<b>15</b>
5.1.	General.....	15
5.2.	Avoid .....	17
5.3.	Neutralize.....	19
5.4.	Mitigate.....	20
5.5.	Assessment that risk is acceptable. ....	23
<b>6.</b>	<b>Award and Afterwards .....</b>	<b>24</b>
6.1.	Award .....	24
6.2.	Monitoring compliance .....	24
6.3.	Task order contracts .....	24

6.4.	Contract transfers.....	25
<b>7.</b>	<b>Documentation.....</b>	<b>25</b>
7.1.	Acquisition planning.....	25
7.2.	After issuing the RFP .....	25
7.3.	Waiver.....	26
<b>8.</b>	<b>Solicitation and Contract Clauses .....</b>	<b>27</b>
8.1.	Disclosure and certification .....	27
8.2.	OCI arising after award .....	28
8.3.	Disqualification or restraint on future work.....	28
8.4.	Inviting submission of a mitigation plan.....	29
8.5.	Incorporating the terms of the mitigation plan.....	29
<b>Appendix A – Contract Clauses .....</b>		<b>31</b>
<b>Appendix B - Questionnaire for agency program staff .....</b>		<b>35</b>
<b>Appendix C - OCI FAQ for Contractors.....</b>		<b>39</b>
<b>Appendix D – Reg. 19-445.2127 .....</b>		<b>43</b>

# Organizational Conflicts of Interest

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## 1. General

### 1.1. Purpose

1.1.1. The objective of this PGI is to equip procurement officers with tools to recognize and avoid the problems created by organizational conflicts of interest, thereby furthering the purposes and policies of the Consolidated Procurement Code expressed in Section 11-35-20:

- Fostering effective broad-based competition for public procurement,
- Ensuring the fair and equitable treatment of all persons who deal with the procurement system,
- Promoting increased public confidence in the procedures followed in public procurement, and
- Providing safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process.

1.1.2. This guidance applies to acquisitions of supplies, services, and information technology, not acquisitions of construction, architect-engineer, construction management, and land surveying services.

1.1.3. Some procurements present little risk of significant organizational conflicts of interest, notably purchases of commercially available off-the-shelf products (COTS) and services that are functionally fungible. Other acquisitions may be fraught with risk. See section 3.

### 1.2. Definition

1.2.1. Regulation 19-445.2127A(1) defines organizational conflicts of interest:

“Organizational conflict of interest” occurs when, because of other activities or relationships with the State or with other businesses:

- (a) a business is unable or potentially unable to render impartial assistance or advice to the State, or
- (b) the business’ objectivity in performing the contract work is or might be otherwise impaired, or
- (c) a business has an unfair competitive advantage.

1.2.2. The application of this definition is guided by two underlying principles:

- (a) Preventing the existence of conflicting roles that might bias a contractor’s judgment; and
- (b) Preventing unfair competitive advantage.

See Section 11-35-1840 (identifying these same two principles as the reason for regulations treating organizational conflicts of interest (OCIs)).

1.2.3. For three classic situations that give rise to conflicts, the regulation provides bright line rules that make it clear when a conflict exists. These rules do not limit the general applicability of the definition or the two underlying principles. To the contrary, the regulation expressly provides that “conflicts may arise in situations not expressly covered” in these three sections and that “each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract.” For any given set of facts, determining whether a significant potential conflict exists requires “the exercise of common sense, good judgment, and sound discretion.” Regulation 19-445.2127A(3).

1.2.4. An OCI may manifest itself during two different periods of time: during a pending procurement or during a future acquisition, depending upon the factors that create the conflict. See ¶ 3.2. For examples, compare ¶¶ 4.1.1 and 4.4.5.

### 1.3. Affiliates and Subcontractors

1.3.1. OCIs can result from a business’s “activities or relationships with the State or with other businesses.” R. 19-445.2127A(1.)

1.3.1.1. For purposes of this guide, businesses, organizations, or individuals are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. Parent or related companies and subsidiaries are examples of affiliates.

1.3.1.2. Work by a subcontractor on one project may create an OCI if that subcontractor later offers as a prime, or if a different contractor proposes to employ the subcontractor on a subsequent project.

1.3.1.3. A business’s activities or relationship with another business can create an OCI, whether or not the other business is either an actual or prospective contractor or subcontractor to a contract with the State. For example, a business engages a consultant to help prepare its proposal. The consultant has acquired an advance copy of the statement of work for the solicitation. The business has a conflict regardless how its consultant obtained the information.

1.3.2. The terms contractor and subcontractor are defined in the Code.

1.3.2.1. “Contractor” means any person having a contract with a governmental body, § 11-35-310(10).

1.3.2.2. “Subcontractor” means any person having a contract to perform work or render service to a prime contractor as a part of the prime contractor's agreement with a governmental body, § 11-35-310(32).

**1.3.3. When analyzing whether an OCI exists you should treat an offeror and any affiliated businesses as if they were a single organization.**

**1.3.4. Similarly, for OCI purposes you should treat any proposed subcontractor as if it were part of the offeror’s business organization.**

**1.3.5. Acquisitions involving so-called “dual primes” require OCI analysis for both prime contractors as well as their affiliates and subcontractors.**

#### 1.4. Types

Broadly speaking, OCIs fall into three categories.

1.4.1. **Unequal Access to Information.** The first group consists of situations in which a business has access to nonpublic information that may provide the firm an unfair competitive advantage in a competition for a government contract. Without limitation, such information would include nonpublic source selection information (e.g., an early copy of the specifications or scope of work), other nonpublic State data, or another contractor’s proprietary data. In unequal access to information cases, the issue is not who provided the information or whether it was acquired legitimately. The concern regards the risk of the business gaining an unfair competitive advantage. The difference between an unfair competitive advantage and a natural competitive advantage is discussed in ¶ 3.3.

1.4.1.1. Before publishing the solicitation R. 19-445.2017D(6) cautions:

When specific information about a proposed acquisition that would be necessary or advantageous for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage.

Without limitation, such information would include “potential specifications or contract terms and conditions.” R. 19-445.2017D(3).

1.4.2. **Biased Ground Rules.** The second category arises when a business, as part of its performance of a government contract, has in some sense set the ground rules for another government contract. For example, a contractor may have drafted the statement of work, specifications, or evaluation criteria for a future procurement. The State's primary concern in these cases is that a contractor could draft key aspects of a procurement in its own favor, whether intentionally or not, to the unfair disadvantage of competing vendors.

1.4.3. **Impaired Objectivity.** The third category arises when a business, as part of its work under one government contract, could involve evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals. In these cases, the State's concern is that the contractor's ability to render impartial advice to the State could appear to be undermined by the contractor's financial or other business relationship to the entity whose work product is being assessed or evaluated.

## 1.5. Risks

1.5.1. All three kinds of OCIs undermine public confidence in the procurement process by creating a real or perceived effect on competition. The first two kinds typically create an unfair competitive advantage for one firm over other businesses who may submit bids or proposals. The third group can result in the government's accepting other than the most advantageous proposal, or in receiving less than the performance required by the contract.

1.5.1.1. When industry believes that one competitor enjoys an advantage, the most likely effect is decreased competition. Some firms may not participate in the competition because of their belief the result is a foregone conclusion.

1.5.1.2. Many contracts require a business to exercise its best judgment to provide advice or assistance to the government. That judgment may be clouded when a firm writes specifications for a product that the firm or an affiliate also produces. Similarly, a contractor's judgment might be skewed by its relationship with a firm being evaluated. In either case, the government does not get the benefit of the contractor's best judgment.

1.5.2. The State has two important interests that OCI rules are designed to protect.

1.5.2.1. *The integrity of the competitive acquisition process.* The State has an interest in preserving its ability to solicit competitive proposals and affording prospective offerors an opportunity to compete for State contracts on a level playing field. In some cases, an organizational conflict of interest will be



accompanied by a risk that the conflicted contractor will create for itself, or obtain, whether intentionally or not, an unfair advantage in competing for a future government contract. The result may be a seriously flawed competition, which is unacceptable in terms of good governance, fairness, and maintenance of the public trust; and

1.5.2.2. *The State's business interests.* As a steward of public funds, the State has an interest in ensuring both that it acquires products and services that provide the best value to the State and that the contractor's performance in meeting the State's requirements is consistent with contractual expectations. In many cases, an organizational conflict of interest will be accompanied by a risk that the conflict will affect the contractor's judgment during performance in a way that degrades the value of its services to the State. This type of risk is most likely to appear when the exercise of judgment is a key aspect of the service that the contractor will be providing.

## 2. Procurement Officer Responsibilities

The procurement officer has four basic duties respecting OCIs: analyze, identify, evaluate, and address. The process is not “one and done,” though. You must consider OCIs at different stages of the procurement:

- Before issuing the solicitation;
- Before awarding the contract;
- Before approving a contract modification;
- Before evaluating an assignment or novation; and
- For indefinite delivery contracts, before issuing a task order.

### 2.1. Analyze

2.1.1. Regulation 19-445.2127E(1)(a) requires you to “analyze planned acquisitions in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible.” You must enlist the using agency, and particularly the program staff, to gather the information needed for this analysis.

2.1.2. Regulation 19-445.2017A(2) requires using agencies to perform acquisition planning, including market research, for all acquisitions. The extent of required planning increases as the dollar value, complexity, and risk of the acquisition increases. OCIs are less common in simple procurements. See ¶ 1.1.3, above. They

are more likely to arise in the kind of acquisitions that require more extensive planning and research.

2.1.3. A thorough acquisition plan by the using agency should identify potential OCIs. Appendix A is a list of questions that may indicate the existence of an OCI or the need to make further inquiry.

2.1.4. Using agencies must incorporate OCI analysis into their market research. If you conduct industry outreach (see Reg. 19-445.2017D), consider sending to prospective offerors Appendix C - OCI FAQ for Contractors.

## 2.2. Identify

2.2.1. “Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract,” R. 19-445.2127A(3).

2.2.2. Program staff at the using agency will be the best source for identifying potential OCIs.

2.2.2.1. You must ask the using agency—especially the program staff or end users—if they are aware of circumstances that may create an OCI. When appropriate, use Appendix B - Questionnaire for agency program staff to help program staff identify potential OCIs.

2.2.2.2. On major acquisitions conducted by the Division of Procurement Services, you should ask the agency head or program manager to provide written confirmation that she has considered whether potential OCIs exist.

2.2.3. You will need to identify and gather information about prospective contractors in order to identify and evaluate potential conflicts. Gathering this information is the responsibility of the using agency. This does not mean you must create unnecessary delays, burdensome information requirements, and excessive documentation.

2.2.3.1. First look within the government or from other readily available sources for this information.

2.2.3.2. Government sources include the files and the knowledge of using agency staff, other agencies that have acquired similar supplies or services, and the program staff charged with contract administration and financing.

2.2.3.3. Non-government sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers.

2.2.3.4. Remember that OCIs can result from the activities of a contractor's affiliates or subcontractors; accordingly, seek information about those as well.

2.2.4. Competitors may point out conflicts that program staff and procurement staff miss. They may identify potential or perceived OCIs at pre-bid conferences or during Q&A. If you conduct exchanges with industry, include the FAQ to invite this information. See ¶ 2.1.4 above.

2.2.5. After opening proposals, you must evaluate any disclosures from offerors. See paragraph 8.1 and Appendix A – Contract Clauses. New information may identify potential OCIs that were not apparent during acquisition planning.

### 2.3. Evaluate

2.3.1. If you identify a potential OCI you must evaluate whether it poses a significant risk. See paragraph 1.5.

2.3.1.1. OCIs that risk impairing the integrity of the competitive acquisition process are almost always “significant.” Generally speaking, the procurement officer must take action to substantially reduce or eliminate this risk.

2.3.1.2. If the only risk created by an OCI is a performance risk relating to the State's business interests, then the procurement officer—in consultation with the using agency and program staff—has broader discretion to select the appropriate method for addressing the conflict, including the discretion to conclude that the State can accept some or all of the performance risk. See ¶ 5.1.4.

2.3.2. Regulation 19-445.2127A(3) entrusts you, as the procurement officer, with exercising good judgment when evaluating OCIs:

The exercise of common sense, good judgment, and sound discretion is required in ... the decision on whether a significant potential conflict exists....

2.3.3. In addition to consulting using agency staff, you may obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts.

2.3.4. Avoid creating unnecessary delays, burdensome information requirements, and excessive documentation.

2.3.5. A good practice is to prepare a short memo for the file in competitions explaining when a particular situation does *not* constitute a significant potential

organizational conflict of interest or any OCI at all. The significance of a potential OCI will vary in each situation based on the nature of what is being procured, the nature of the conflict for a particular offeror or class of offerors, and the impact of the conflict on an offeror's ability to do the work. Since the definition of significance is very subjective, it is important to have a memo in the file illustrating that the procurement officer analyzed the facts and made a determination that a conflict was significant or not. The short memo to the file also should contain the procurement officer's rationale for that determination.

2.3.5.1. The memo should indicate that the procurement officer identified a situation that could be a conflict, but concluded no conflict, or no significant conflict, existed. Preparing the memorandum prior to any protest gives the document more credibility since the CPOs and the Panel may give less weight to documents created after a protest is filed.

## 2.4. Address

2.4.1. If you decide that a particular acquisition involves a significant potential OCI, you must address it by avoiding, neutralizing, mitigating, or, in rare circumstances, accepting the risk of, the conflict. See Part 5.

2.4.2. Some conflicts require disqualification or restricting a business from participating in a competition. See Part 4.

2.4.3. In extraordinary circumstances an OCI can be waived if it is in the State's interest. See ¶ 7.3.

2.4.4. Any significant OCI you identify will require special solicitation provisions and contract clauses. See Part 8.

## 3. Common Trouble Spots

### 3.1. Contractor judgment

OCIs are not limited to any particular kind of acquisition. However, organizational conflicts of interest are more likely to occur in, or arise from, contracts requiring the exercise of judgment by the contractor. These typically include:

3.1.1. Management and professional support services contracts that provide assistance, advice or training for the efficient and effective management and operation of organizations, activities or systems. These services are normally closely related to the basic responsibilities and mission of the using agency. Included are efforts that support or contribute to improved organization of

program management, logistics management, project monitoring and reporting, data collection, budgeting, accounting, performance auditing, and training programs. These contractors are often positioned to influence hiring and purchasing decisions.

3.1.2. Consultant services that provide organized, analytical assessments or evaluations in support of policy development, decision-making, management, or administration. Consultants frequently have access to information about agency needs or other contractors not generally available to the public.

3.1.3. Acquisition sourcing services, including performance of or assistance in technical evaluations. The State must have confidence that these contractors are neutral with their reporting or advice.

3.1.4. Engineering and technical services used to support the program staff during the acquisition cycle, including project planning. Because these contractors occupy a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors, their impartiality is essential.

### 3.2. Current or future contracts

3.2.1. An OCI may result when the nature of the work to be performed on one contract creates an actual or potential conflict of interest on a future acquisition. Examples include:

- A contract to identify or assess an agency's future needs creates a conflict during the procurement to meet those needs.
- A contract to develop a statement of objectives or statement of work creates a conflict during a procurement to acquire the specified work.
- A contract to evaluate work if that work was previously performed by a contractor, rather than state personnel.

The regulation recognizes that in certain cases some restrictions on future activities of the contractor may be required.

3.2.2. An OCI may also occur during performance of an existing contract.

3.2.2.1. A contract modification that changes the agency's requirements may create an OCI even where none existed in the original contract.

3.2.2.2. Individual job orders under indefinite delivery, indefinite quantity contracts must be analyzed for OCIs.

3.2.2.3. Contract transfers or a contractor's sale or acquisition of affiliates may raise OCI concerns, requiring you to re-evaluate whether an OCI exists.

### 3.3. Natural competitive advantage

OCI rules are not intended to eliminate all competitive advantage—only unfair advantages. Two examples of a “natural” competitive advantage are incumbency and development work.

3.3.1. The mere existence of a prior or current contractual relationship between a contracting agency and a firm does not create an unfair competitive advantage, and an agency is not required to compensate for every competitive advantage gleaned by a potential offeror's prior performance of a particular contract. For example, an incumbent contractor's acquired technical expertise and firsthand knowledge of the costs related to a contract's complexity are not generally considered to constitute unfair advantages the State must eliminate.

3.3.2. Development contractors have typically done the most advanced work in their respective fields. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the State. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.

## 4. Required Actions

The regulation requires contractor disqualification in three circumstances.

### 4.1. Preparing specifications

4.1.1. Regulation 19-445.2127C(1) requires disqualification of a business engaged to prepare and furnish specifications for a separate acquisition of tangible supplies (§ 11-35-310(33)) or information resources (§ 11-35-3310(1)(a)(i)), or their components, from furnishing those items, either as a contractor or as a subcontractor at any tier.

4.1.1.1. Mandatory disqualification under R. 19-445.2127C avoids a situation in which a business hired to draft specifications for the State is in a position to

draft them to favor its own products or capabilities, intentionally or not. This way the State is assured of getting unbiased advice as to the content of the specifications and can avoid allegations of favoritism in the award of supply contracts. The disqualification must be for a “reasonable” time period, but at least during the initial contract for buying the items.

4.1.1.2. R. 19-445.2127C does not require disqualification unless the business prepared the specifications pursuant to a contract with the agency. For example, item C does not bar participation in a subsequent procurement by:

4.1.1.2.1. A business that furnishes, at the State’s request, specifications or data regarding a product they already provide, even though the specifications or data may have been paid for separately or in the price of the product. In this situation, the specifications were not created for the State; rather, they pre-existed their acquisition by the State.

**Example:** The State purchases a data package from the original manufacturer, which the State will use as part of future competitions. No conflict is created and the original manufacturer may compete for the contract to supply the equipment.

4.1.1.2.2. A business, acting as industry representative, helps the State prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by State personnel. In this situation, typically the State is obtaining the input through an open information call, like an RFI, rather than a task under an existing contract. The twin evils associated with biased ground rules are attenuated by the fact that the State is receiving input from multiple contractors.

**Example:** The State holds an “industry day” to invite suggestions for a standard specification for tools used in government motor pools. Technical specialists from Acme Tool Company and ABC Machinery Company attend the outreach session and subsequently work under State supervision and control to refine the specifications and clarify the requirements of a specific acquisition. Either company may supply the item.

## 4.2. Preparing statements of work

4.2.1. Regulation 19-445.2127C(2) requires disqualification of a business engaged to prepare, or assist in preparing, a work statement to be used in a separate acquisition of a system or services from supplying the services, the system, or major components of the system, either as a contractor or as a subcontractor at any tier.

4.2.1.1. The disqualification also applies to a contractor who provides material leading “directly, predictably, and without delay” to a work statement. For example, a report used by the agency to create the work statement.

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

4.2.1.3. There are three exceptions to this disqualification rule. A contractor is not disqualified from contracting to provide the system or service if:

4.2.1.3.1. The acquisition is a sole source under R. 19-445.2105. (R. 19-445.2127C(2)(a)) A sole source can only be justified if the contractor is the *only* source for the system or services.

- The disqualification rule is specifically designed for application to a contractor that drafts a specification that only it can provide. Section 11-35-2730 requires specifications to be drafted to assure cost effective procurement of the state’s actual needs and that they not be unduly restrictive. Before relying on contractor-drafted specifications to justify a sole source, the agency must determine that the specifications are limited to its actual needs. (R. 19-445.2140B) A sole source based upon unduly restrictive specifications is improper. (R. 19-445.2105E).

**Example:** The State Museum partners with several design firms, including Acme Design, to plan and design several new exhibits. Only one firm—Acme Design—is capable of providing a certain foundation for an exhibit. No conflict.

4.2.1.3.2. The contractor participated in the development and design work. (R. 19-445.2127C(2)(b)) In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.



**Example:** The State Museum partners with Acme Design to develop a new and unique system for projecting astronomical images. Subsequently the State Museum decides to acquire one of the new systems for its planetarium. Because of its participation in the system's development and design, Acme is recognized as having done some of the most advanced work in this field. Consequently, its competitive advantage does not create an organizational conflict of interest that prevents it from submitting a proposal.

4.2.1.3.3. More than one contractor was involved in preparing the work statement. (R. 19-445.2127C(2)(c)) Involving multiple contractors may avoid eliminating any one contractor from the competition. This exception is similar to the one regarding receiving input from industry representatives. See paragraph **Error! Reference source not found.** Remember that the particular facts of the situation will determine whether using more than one contractor to prepare a work statement sufficiently mitigates the twin evils of bias and unfair competitive advantage.

**Example:** In the example above where the State Museum partnered with several design firms, including Acme Design, to plan and develop several new exhibits, Acme Design may also submit a proposal because it was one of several design firms that helped with the planning and design of the exhibits.

#### 4.3. Evaluating offers

4.3.1. Regulation 19-445.2127D disqualifies a contractor involved in evaluating bids or proposals:

If a contractor evaluates or supports the evaluation of a bid or proposal for a contract with a governmental body, that contractor and its affiliates are barred from performing under that contract as either a contractor or as a subcontractor at any tier.

4.3.2. The disqualification also applies to evaluation of task order quotes under indefinite delivery indefinite quantity (IDIQ) contracts.

#### 4.4. Systems Engineering and Technical Advice (SETA) contractors

4.4.1. Regulation 19-445.2127B requires disqualification of a contractor providing systems engineering and technical direction from selling a system or its major components, or from being a subcontractor or consultant.

4.4.2. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their

execution by other contractors. Therefore, this contractor should not be in a position to make decisions favoring its own products or capabilities.

4.4.3. The regulation lists nine activities common to SETA contracts:

- determining specifications,
- identifying and resolving interface problems,
- developing test requirements,
- evaluating test data,
- supervising design,
- developing work statements,
- determining parameters,
- directing other contractors' operations, and
- resolving technical controversies.

4.4.4. Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies.

4.4.5. SETA contracts are rare for State agencies. They mostly exist as project management assistance for major IT projects, where the contractor must coordinate multiple prime contractors to deliver an integrated system.

**Example:** AcmeSoft agrees to provide systems engineering and technical advice services for a new, modular State-owned HR data-processing system. AcmeSoft may not compete to provide any of the subsystems or for implementing the system. However, it may submit proposals for an unrelated ERP system.

4.4.6. This disqualification does not apply to a contractor who has overall contractual responsibility for system development, integration and/ or implementation, assembly and/ or production, and deployment under a single contract.

**Example:** The State enters a contract with AcmeSoft to design *and* implement a new data-processing system. AcmeSoft may perform both functions under a single contract.

## 5. Addressing OCIs

### 5.1. General.

Once the procurement officer determines that a significant potential conflict exists, the regulation requires that you address it before award. There are four basic ways to address an OCI:

5.1.1. Avoid – To prevent the occurrence of an OCI through actions such as exclusion of sources or modification of requirements. Avoidance precludes the conflict.

**Example:** An agency drafts its statement of work to exclude tasks that require contractors to utilize subjective judgment. Tasks requiring subjective judgment include making recommendations; providing analysis, evaluation, planning, or studies; and preparing statements of work or other solicitation documents. This strategy may be used to avoid or prevent organizational conflicts of interest both in the instant contract and in future acquisitions.

5.1.2. Neutralize – To counteract, through a specific action, the effects of a potential or actual OCI. The conflict remains, but the impact of the conflict has been negated.

**Example:** An agency seeks a consultant to help develop a statement of work for a line-of-business software application. The solicitation for these services includes a notice that the awarded contractor will be barred from providing the software.

5.1.3. Mitigate – To reduce the effects of an OCI to an acceptable level of risk so that the State's interests in fair competition and/or contract performance are not impaired. The conflict remains, but action was taken that minimizes the impact of the conflict to an acceptable level of risk.

**Example:** A contractor has provided an agency with a long-range IT acquisition, operations, and maintenance plan. The agency wants the contractor to compete for providing the products and services described in the plan. To mitigate the advantage the contractor achieved by developing the plan, the agency includes in the solicitation documents for those products and services both the plan and any other nonpublic information that may provide the firm a competitive advantage.

**Example:** The State works with two companies owned by the same parent. One company has access to companies selling equipment to the State and key terms of their contracts; the other company wants to provide equipment leasing for State agencies. Although the leasing company could gain a competitive advantage by knowing the companies doing business with the State and undercutting them on terms, a mitigation plan that contains an appropriate firewall may mitigate the risk.

5.1.4. Assessment that risk is acceptable – If the only risk the OCI creates is a manageable performance risk relating to the State’s business interests, the procurement officer may determine to accept the risk if doing so is in the State’s interest. **You may not use this method of assessment that the risk is acceptable to address conflicts when the conflict could impair the competitive acquisition process** (see ¶ 1.5.2).

**Example:** This method of addressing conflicts should generally be combined with other methods, particularly mitigation. The procurement officer may require a mitigation plan, and elect to accept the remaining risk if she concludes that the mitigation plan does not remove all of the performance risk associated with the conflict.

Effective resolution of OCIs often will involve a combination of these techniques.

5.1.5. If an OCI cannot be resolved by using one or more of these methods, but performance by the conflicted contractor is necessary to meet the State’s interest, an agency head or the appropriate chief procurement officer may waive the conflict. (R. 19-445.2127F) Waivers should be exceedingly rare, as they do not resolve the risk posed by the conflict. See ¶ 7.3. **A waiver is required when an agency determines to accept the risk of a conflict that could impair the competitive acquisition process.**

5.1.6. As a best practice, procurement officers should attempt to resolve OCIs by using these techniques in the order listed: avoidance, neutralization, mitigation. Waiver should be a last resort.

5.1.6.1. Early involvement in an acquisition gives the procurement officer the most flexibility to resolve an OCI since the State is better able to avoid conflicts at the planning stage.

5.1.6.2. Early involvement by the using agency—especially the program staff—is necessary since they are best able to identify conflicts while developing the statement of work or statement of objectives. That way the agency can use its best efforts to redefine its requirements to avoid a conflict.

5.1.7. Using agency staff may need training to identify conflicts using the tools in this PGI. Program staff should contact the procurement officer and, if appropriate, legal counsel, as soon as a possible conflict is identified so there is time to resolve conflicts as early as possible.

5.1.7.1. Procurement and program staff at the using agency must provide the procurement officer (whether at the Division of Procurement Services or the using agency itself) sufficient information so she can fulfill the intent of R. 19-445.2127E(1) “to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible.”

5.1.7.2. When a conflict is identified in a competitive procurement, the procurement officer should include the suggested resolution as part of the solicitation.

5.1.8. OCI resolution may require actions by the contractor, actions by the State, or actions by both.

5.1.8.1. If the resolution requires actions by the contractor, it typically means that mitigation is the technique that is being used to address a conflict.

5.1.8.2. All actions required of the contractor to address a conflict must be reflected in a mitigation plan and the mitigation plan must be incorporated in the contract. Incorporation ensures the mitigation plan is an obligation the using agency can enforce.

5.1.9. Resolution techniques must be tailored to the type of OCI, *i.e.*, biased ground rules, impaired objectivity, or unequal access to information.

## 5.2. Avoid

Avoiding an organizational conflict of interest is the cleanest way to handle organizational conflicts of interest. Avoidance requires actions on the part of the State because it typically involves modifying the scope of work. Because of this it should be accomplished early in the acquisition process. Below are some of the more common methods to avoid any OCIs you have identified.

5.2.1. Draft the statement or scope of work (SOW) so it does not require contractors to use subjective judgment.

5.2.1.1. Contracts that involve analysis, evaluation, or recommendations in areas where divergent views could exist require subjective judgment. A conflict can result when that judgment could affect other financial interests of the company.

5.2.1.2. Not all services contracts require subjective judgment. Developing a quality assurance regimen for maintenance, for example, may not require judgment if the contractor doesn't make decisions about what maintenance to perform.

5.2.1.2.1. Look for words like "reporting," "monitoring," "maintaining," "testing," and "operating." They may signal that contractor judgment is not involved.

5.2.1.2.2. If challenged, the CPO or Panel will examine what the contract actually requires, regardless of the language used, to determine if it involves subjective judgment.

5.2.2. Require work involving subjective judgment to be performed by agency staff or by a contractor that is free from conflict.

5.2.2.1. Conflicts from impaired objectivity contain two elements – the use of subjective judgment by the contractor and a financial interest in the outcome of contract performance. If the State does not have the ability or personnel to perform tasks involving subjective judgment, it should engage a contractor without a financial interest in the outcome of the work.

5.2.2.2. Consulting firms which do not compete for production or follow-on work typically do not have any interest that would impair their objectivity.

5.2.3. Involve multiple contractors in preparing specifications or the SOW for a competitive solicitation.

5.2.3.1. Reg. 19-445.2127C requires disqualification when a contractor prepares a specification or an SOW that is to be used in a competitive solicitation. This type of work involves the use of the contractor's subjective judgment. Assuming the contractor wishes to propose on the follow-on competitive solicitation, the contractor has a financial interest in how the specification or SOW is written.

5.2.3.2. Reg. 19-445.2127C(2)(c) creates an exception where more than one contractor has been involved in preparing the work statement.

5.2.3.2.1. More than one contractor must be involved in the preparation of the same part of the specification or SOW for this method of avoidance to work.

5.2.3.2.2. Having one contractor review another's proposed specification or SOW does not meet the exception. Preparing the SOW gives a contractor much more latitude to influence the requirements than simple approval.

5.2.3.3. As a best practice, including many companies in a particular industry should avoid a SOW that favors one competitor. The State should exercise oversight and independently review the SOW to ensure that it is not biased in favor of a particular approach or product.

5.2.4. Eliminate a contractor or a group of contractors.

5.2.4.1. Reg. 19-445.2127A(3) gives the procurement officer discretion to resolve an OCI. If you identify an existing OCI that may favor a potential offeror (*e.g.*, where the project team discloses that the agency used a contractor to develop the scope of work), you may exclude that contractor from a competition even when there is no actual impropriety, so long as your decision is based on hard facts and not mere innuendo or suspicion.

5.2.4.2. Procurement officers, working with the using agency, must exercise their business judgment in a way that ensures impartial, fair, and equitable treatment of all contractors.

5.2.4.3. Make sure that any decision to exclude contractors does not prevent adequate competition for the acquisition.

5.3. Neutralize

5.3.1. Limiting future competition, or future contracting, is the best example of neutralizing a conflict of interest. An impaired objectivity or biased ground rules conflict still exists when a contract contains a limitation on future competition, but the limitation resolves the conflict by preventing the contractor from exploiting its financial interest.

5.3.1.1. Limitation on future competition is required in the situations described in Reg. 19-445.2127B, C, and D. This resolution method may be used in other situations as appropriate.

5.3.1.2. Note that this circumstance is different from the one described in paragraph 5.2.4.1, because it is the instant solicitation, not a previous contract, that may create the conflict.

5.3.1.3. Because of mergers or acquisitions, some markets have become consolidated, *i.e.*, there is only a handful of vendors who can meet the State's needs. If your market research identifies significant consolidation in industry,

restricting offerors from subsequent work may limit competition for the instant solicitation.

5.3.1.4. On the other hand, where several companies can perform the effort, one of those companies may be willing to perform the smaller, up-front work with the understanding it cannot bid on the larger follow-on contract.

5.3.2. If you determine to neutralize an OCI, include a solicitation clause that alerts offerors to the restriction and a provision that will bind the contractor to the limitation. Sample clauses are included in Appendix A – Contract Clauses. See ¶ 8.3.

5.3.2.1. You must identify a reasonable limitation period.

5.3.2.2. Consider whether the limitation should apply to performance by subcontractors as well as the prime contractor.

#### 5.4. Mitigate

Mitigating an OCI means reducing the risk of the conflict to an acceptable level. It does not remove the conflict. Determining if a conflict can be resolved by mitigation, and how it will be mitigated, requires you to exercise “common sense, good judgment, and sound discretion,” Reg. 19-445.2127A(3).

5.4.1. A contractor with a significant OCI is not entitled to have a mitigation plan approved. If you determine a proposed plan is not in the interest of the State (*e.g.*, the State lacks resources for monitoring compliance with the plan), you are not required to approve it.

5.4.2. Reg. 19-445.2127E(1)(b) requires the procurement officer to “review plans to ... mitigate significant potential conflicts before contract award.” This involves several steps:

5.4.2.1. A solicitation clause inviting submission of a mitigation plan;

5.4.2.2. Receiving a mitigation plan from offerors with OCI;

5.4.2.3. Reviewing the plan. The procurement officer, agency legal counsel, and agency program staff must review the plan and bring those areas of the plan that do not adequately address conflicts to the contractor’s attention.

5.4.2.4. Negotiating any required changes to the plan; and



5.4.2.5. Incorporating the approved plan in the contract to make it a contractual requirement.

Below are the primary mitigation techniques that may be included in an OCI mitigation plan.

5.4.3. Substitute another contractor that does not have a conflict.

5.4.3.1. This method is frequently used to resolve impaired objectivity conflicts that affect only a small portion of the contract work.

5.4.3.1.1. If a contractor has an impaired objectivity conflict, it can use a subcontractor to perform that portion of the work affected by the conflict.

5.4.3.1.2. If a subcontractor has an impaired objectivity conflict, the contractor can use a different subcontractor to perform the affected portion work.

5.4.3.2. Substitution measures require a firewall between the two firms to prevent improper flow of information to and improper influence by the business with the conflict. See paragraph 5.4.5.

5.4.3.3. If no subcontractor is acceptable, the agency may perform that portion of the work.

5.4.4. Release of information.

5.4.4.1. The State can resolve unequal access to information conflicts by releasing nonpublic information to all competitors.

5.4.4.1.1. If the information must be protected, the State can require an NDA as a condition of disclosure. See Reg. 19-445.2010I.

5.4.4.1.2. Releasing information enables all potential offerors to have knowledge and use of the information.

5.4.4.1.3. Releasing information only addresses an unequal access to information OCI. Releasing information does not resolve impaired objectivity or biased ground rules conflicts.

5.4.4.2. Disclosure only mitigates unequal access to information. It does not neutralize it. Contractor personnel who perform assessment services still have a deeper understanding of an agency's needs. That advantage is not necessarily unfair, any more than the advantages of incumbency are not considered unfair.

How effectively disclosure mitigates the advantage depends on many things, like when during the overall project timeline the study was prepared, the extent to which the study was reflected in a competitive solicitation, how complete the disclosure is, how long competitors have to review and digest the disclosure, and the extent to which the agency relied on other sources of information.

#### 5.4.5. Firewalls

5.4.5.1. Firewalls involve isolating information about a project and personnel with access to protected information in one part of a company, preventing other parts of the company from having knowledge or influence over the project.

5.4.5.1.1. Firewalls must satisfy two objectives: (1) protecting information from inappropriate use or disclosure and (2) controlling the functional responsibilities of personnel having access to protected information.

5.4.5.1.2. The OCI mitigation plan should contain details regarding how a contractor “constructs” its firewall.

5.4.5.2. There are important considerations when determining if a firewall is appropriate.

5.4.5.2.1. Every party involved in a firewall has a financial interest not to comply with it.

5.4.5.2.2. Firewalls require an extraordinary effort to accomplish its result, both in the planning and evaluation phase and, more importantly, in monitoring compliance. Consider whether the procurement officer or the using agency has the resources to enforce contractor compliance with a firewall.

5.4.5.2.3. Because of these issues firewalls are usually appropriate only where there are one or two firms capable of performing the work.

5.4.5.2.4. Approving a mitigation plan that includes a firewall must be supported by a written determination explaining, among other things, how the effort required to monitor and enforce the firewall agreement is justified by mitigation, rather than avoiding or neutralizing the conflict.

5.4.5.3. Firewalls alone will only resolve unequal access to information conflicts. Nevertheless, they can and should be used as a component of broader plans to mitigate other types of OCIs.

5.4.5.4. Firewalls can include nondisclosure agreements (NDAs).

5.4.5.4.1. An individual NDA between the contractor and its employees creates an individual commitment to protect information.

5.4.5.4.2. A corporate NDA, signed by the corporate official with contractual authority, creates the business' commitment to protect information.

5.4.5.4.3. The State should have remedies if the contractor or its employees violate the NDA. Under the clause titled "Mitigation of Organizational Conflicts of Interests" in Appendix A – Contract Clauses, for example, the State may terminate the contract for default if there is a breach.

5.4.5.5. Firewall commitments usually include separate provisions to train employees about the restrictions and detailed processes to monitor compliance, report breaches, and implement necessary corrective actions.

5.5. Assessment that risk is acceptable.

The procurement officer shall not use this method of assessment that the risk is acceptable to address conflicts when the conflict could impair the competitive acquisition process (see ¶ 1.5.2).

5.5.1. The procurement officer may assess that the risk associated with an organizational conflict of interest is acceptable when:

5.5.1.1. The only risk created by the conflict is a performance risk relating to the State's business interests;

5.5.1.2. The risk is manageable; and

5.5.1.3. The potential harm to the State's interest is outweighed by the expected benefit from having the conflicted offeror perform the contract.

5.5.2. You must consider all readily available information (see ¶ 2.2.3) before concluding that the risk of harm is acceptable.

5.5.3. All assessments that the risk is acceptable must be in writing, setting forth the extent of the conflict and explaining why it is in the best interest of the State to accept the risk associated with the conflict.

## 6. Award and Afterwards

### 6.1. Award

6.1.1. Reg. 19-445.2127E(2) requires the procurement officer to determine, prior to award, if the apparent successful offeror has an OCI.

6.1.1.1. You must withhold award to the apparent successful offeror if you determine a significant conflict exists that cannot be avoided or mitigated, or is not waived. See ¶ 7.3.

6.1.1.2. Before deciding to withhold award, you must notify the contractor, disclose the reasons for withholding award, and allow him a reasonable opportunity to respond.

6.1.2. If you withhold award because of an unresolved OCI, expect a protest.

6.1.2.1. Although the regulation does not expressly require it, you should support any decision to withhold an award with a written determination.

6.1.2.2. Remember that a memo to file after a protest is lodged may carry less weight than a written determination prepared after notice to and a response from the contractor.

### 6.2. Monitoring compliance

6.2.1. If you have approved a contractor's mitigation plan you must incorporate the plan into the contract before award.

6.2.1.1. The State's obligation regarding OCIs does not end when the contract is awarded. An OCI mitigation plan is only one piece of a mitigation strategy. Mitigation also requires State monitoring of contractor compliance.

6.2.1.2. As you may surmise from the discussion in paragraph 5.4, monitoring has the potential to consume enormous resources. When reviewing a mitigation plan consider if the procurement office or the using agency has sufficient personnel with the necessary skills to monitor the contractor's compliance.

### 6.3. Task order contracts

6.3.1. Monitoring is essential for indefinite quantity or task order contracts.

6.3.2. The procurement officer must obtain and review contractor OCI disclosures and representations for every task order.

6.3.3. You must also ensure that task orders are not performed by a contractor with a conflict.

6.3.4. Regarding approval authority for task order contracts, see paragraph 5.1.2.3.1.

## 6.4. Contract transfers

6.4.1. If a contractor requests an assignment or novation, you must analyze the new relationships (parent-subsidary or other related entities) that may result from the transfer to determine if any OCIs may be created.

6.4.2. Remember that for identifying and evaluating OCIs there is no meaningful distinction between a business and its parent company or affiliates. See paragraph 1.3.

## 7. Documentation

### 7.1. Acquisition planning

7.1.1. Ideally, organizational conflicts should be identified during acquisition planning. That is also the best time to determine how potential OCIs might be resolved.

7.1.2. Remember that the obligation to identify and address significant OCIs also applies to individual task orders issued under indefinite delivery indefinite quantity contracts.

7.1.3. If the using agency or the procurement officer identifies a significant potential conflict, address it before issuing the solicitation.

7.1.3.1. Assist the agency in preparing a written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in Part 4 or ¶ 4.3.2 of this PGI.

7.1.3.2. The analysis should include appropriate solicitation and contract clauses, which must be included in the RFP. See Part 8.

### 7.2. After issuing the RFP

7.2.1. If an OCI is identified after the RFP is published, address it before responses are due.

7.2.2. Consider any additional information provided by prospective contractors in response to the solicitation or during negotiations.

7.2.2.1. Appendix C is an “FAQ” for contractors. It will be published on the Division’s website. Prospective offerors with questions about OCIs can be directed to the FAQ.

7.2.3. As described in paragraph 7.1.3.1, document the procurement file with a memorandum analyzing the conflict and explaining how it may be resolved.

7.2.4. Amend the RFP to add solicitation or contract clauses as appropriate. See Part 8.

### 7.3. Waiver

7.3.1. As discussed in paragraph 5.1.5, waiving a significant OCI outright must be a resolution of last resort.

7.3.2. Although not expressed in Reg. 19-445.2127F, waivers must be granted only after all other possible steps have been taken to resolve the conflict. **This requirement is implicit because it is necessary to explain why a waiver is in the State’s interest.**

7.3.3. A partial waiver may be effective when used in combination with one of the other techniques discussed in Part 4.3.2.

7.3.3.1. If the risk of an OCI can be largely minimized by using one or more of avoidance, neutralization, or mitigation, the minimal residual risk may be waived under Reg. 19-445.2127F.

7.3.4. Regulation 19-445.2127F requires audits performed by DPS to report all waivers of OCIs.

7.3.5. Waiving a conflict that otherwise requires disqualification under Reg. 19-445.2127B, C, or D, should only occur in the most extraordinary circumstances, if ever.

#### 7.3.6. Requirements

7.3.6.1. Waivers must be thoroughly explained and justified in a written determination. At a minimum the determination must include:

- The name of the offeror or contractor with the conflict

- A description of the conflict, including what type(s) (unequal access to information, biased ground rules, or impaired objectivity)
- An explanation of what efforts, if any, were or should have been taken to address the conflict and why none were acceptable (see ¶ 7.3.2)
- The activity giving rise to the conflict (e.g., prior or current contract)
- The risks to the State the conflict poses and their significance, specifically including whether the risk is solely to the State's business interest or if it undermines the competitive process
- How the risks posed by the conflict will be addressed (e.g., risk to the State that the contractor will enjoy an unfair competitive advantage)
- An explanation why accepting those risks is in the State's interest
- An explanation why the benefits of accepting the risks outweigh the detriment

7.3.6.2. All waivers must be approved by the agency head or her designee above the level of the agency's senior procurement official.

7.3.6.3. If the contract to be awarded by waiving an OCI exceeds the agency's certification or \$1 million, whichever is less, it must be approved by the appropriate chief procurement officer and the written determination must be published with the award statement.

7.3.6.3.1. In the context of a task or delivery order issued against an indefinite delivery contract, the requirements for CPO approval and publication apply if the value of the task or delivery order exceeded either the agency's certification or \$1 million, whichever is less.

7.3.6.4. Every waiver issued during an audit period will be disclosed in the procurement audit conducted by DPS.

## 8. Solicitation and Contract Clauses

Appendix A – Contract Clauses includes the text of required and sample solicitation and contract clauses. A brief description of each follows.

### 8.1. Disclosure and certification

8.1.1. Every solicitation should include clause no. 2A047, [Disclosure of Conflicts of Interest or Unfair Competitive Advantage](#).

8.1.2. This clause requires a bidder to disclose any work it has performed related to the solicitation and any other facts that could create an OCI.

## 8.2. OCI arising after award

8.2.1. Every solicitation should include clause no. 7A054, [Organizational Conflict of Interest](#).

8.2.2. This is a contract clause requiring a contractor to disclose any OCI that arises or is discovered after award. It also permits the State to terminate the contract for convenience if the conflict is significant and cannot be resolved.

## 8.3. Disqualification or restraint on future work

8.3.1. Reg. 19-445.2127B, C, and D list three types of contracts that require disqualification from future competitions. Your analysis of a planned acquisition may disclose other circumstances requiring disqualification of the successful offeror from future work. In either case the solicitation should include a provision that:

8.3.1.1. Invites offerors' attention to Reg. 19-445.2127;

8.3.1.2. Describes the nature of the potential conflict; and

8.3.1.3. States the nature of the restraint upon future contractor activities.

8.3.1.3.1. The restraint imposed by a clause shall be limited to a fixed term of reasonable duration, sufficient to avoid the circumstance of unfair competitive advantage or potential bias.

8.3.1.3.2. This period varies. It might end, for example, when the first supply or production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction.

8.3.1.3.3. In every case, the restriction shall specify termination by a specific date or upon the occurrence of an identifiable event.

8.3.1.4. If you determine the disqualification should extend to subcontractors (see ¶ 5.3.2.2), add a paragraph to the sample clause requiring the contractor to include it in agreements with its subcontractors.

A sample clause appears in the appendix titled "[Exclusion from Future Agency Contracts—Organizational Conflicts of Interest](#)."



#### 8.4. Inviting submission of a mitigation plan

You may identify a significant OCI that affects an offeror's eligibility for award, but an outright disqualification may not be in the State's interest. For example, there are only a couple of vendors who are able to satisfy the State's requirements, and you will consider a proposal to mitigate the conflict. In this case, the solicitation should include a provision that:

- 8.4.1. Provides the information described in paragraphs 8.3.1.1 and 8.3.1.2;
- 8.4.2. Invites or requires the submittal of an offeror's proposed plan to mitigate the OCI;
- 8.4.3. States the nature of the proposed restraint upon future contractor activities, if any; and
- 8.4.4. Depending on the nature of the acquisition, states whether the terms of any proposed clause are subject to negotiation, and/ or whether the State will consider a contractor's plan to mitigate an OCI.

A sample clause appears in the appendix titled "[Organizational Conflict of Interest - Mitigation Plan Required.](#)"

#### 8.5. Incorporating the terms of the mitigation plan

If, as a condition of award, the contractor and the State have negotiated a mitigation plan, the solicitation must contain a contract clause that incorporates the plan.

- 8.5.1. The mitigation plan may be as simple as a limitation or restraint on future contracting.

A sample clause appears in the appendix titled "[Mitigation of Organizational Conflicts of Interest.](#)"



# Appendix A – Contract Clauses

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## **DISCLOSURE OF CONFLICTS OF INTEREST OR UNFAIR COMPETITIVE ADVANTAGE (APR 2023)**

(“OCI FAQ for Contractors” is available at [www.procurement.sc.gov](http://www.procurement.sc.gov))

(a) You certify that, to the best of your knowledge and belief:

(1) your offer identifies any services that relate to either this solicitation or the work and that have already been performed by you, a proposed subcontractor, or an affiliated business or consultant of either; and

(2) there are no relevant facts or circumstances that may give rise to an actual or potential organizational conflict of interest, as defined in S.C. Code Ann. Reg. 19-445.2127, or that your offer identifies and explains any unfair competitive advantage you may have in competing for the proposed contract and any actual or potential conflicts of interest that may arise from your participation in this competition or your receipt of an award.

(b) If you, a proposed subcontractor, or an affiliated business or consultant of either, have an unfair competitive advantage or a significant actual or potential conflict of interest, the State may withhold award. Before withholding award on these grounds, the State will notify you of the concerns and provide a reasonable opportunity for you to respond. The State may consider efforts to avoid or mitigate such concerns, including restrictions on future activities.

(c) The certification in paragraph (a) of this provision is a material representation of fact upon which the State will rely when considering your offer for award. [02-2A047-3]

## **ORGANIZATIONAL CONFLICT OF INTEREST (APR 2023)**

(a) The Contractor agrees to immediately advise the Procurement Officer if an actual or potential organizational conflict of interest is discovered after award, and to make a full written disclosure promptly thereafter to the Procurement Officer. This disclosure shall include a description of actions which the Contractor has taken or proposes to take, after consultation with the Procurement Officer, to avoid, mitigate, or neutralize the actual or potential conflict.

(b) The State may terminate this contract for convenience, in whole or in part, if it deems such termination necessary to avoid an organizational conflict of interest. Contractor’s failure to include an appropriate termination for convenience clause in any subcontract shall not increase the obligation of the State beyond what it would have been if the subcontract had contained such a clause.

(c) The disclosure required by paragraph (a) of this provision is a material obligation of the contract. If the Contractor knew or should have known of an organizational conflict of interest prior to award, or discovers an actual or potential conflict after

award, and does not disclose, or misrepresents, relevant information to the Procurement Officer, the State may terminate the contract for default.  
[07-7A054-1]

## **EXCLUSION FROM FUTURE AGENCY CONTRACTS— ORGANIZATIONAL CONFLICTS OF INTEREST**

*[This clause should be used where the Procurement Officer has determined that an OCI described in Reg. 19-445.2127B, C, or D exists and that the regulation requires restraint on the awarded contractor's eligibility for future contracts]*

(a) The State has determined that this acquisition may give rise to an organizational conflict of interest (OCI). Accordingly, the attention of prospective Offerors is invited to S.C. Code Ann. Reg. 19-445.2127, Organizational Conflicts of Interest. Additional information is available at <http://procurement.sc.gov> (.)

(b) The nature of this organizational conflict of interest is...

*[Describe the nature of the conflict here. For purposes of this clause, it should correspond to one of the conflicts described in Reg. 19-445.2127B, C, or D.]*

(c) Required OCI Resolution. In order to prevent a future OCI resulting from potential bias, unfair competitive advantage, or impaired objectivity, the Contractor will be subject to the following restrictions:

(1) The Contractor will be excluded from competition for, or award of any government contracts as to which, in the course of performance of this contract, the Contractor has received advance procurement information before such information has been made generally available to other persons or firms.

(2) The Contractor will be excluded from competition for, or award of any using agency contract for which the contractor actually assists in the development of the specifications or statements of work.

(3) The Contractor will be excluded from competition for or award of any State contract which calls for the evaluation of system requirements, system definitions, or other products supplied or developed by the Contractor under this contract.

(4) The Contractor will be excluded from competition for, or award of any government contract which calls for the construction or fabrication of any system, equipment, hardware, and/or software for which the Contractor participated in the development of requirements or definitions pursuant to this contract.

(d) This clause will not exclude the Contractor from performing work under any amendment or modification to this contract or from competing for award for any future contract for work that is the same or similar to work performed under this contract.

(d) The term “contractor” as used in this clause, includes any person, firm or corporation which has a majority or controlling interest in the contractor or in any

parent corporation thereof, any person, firm, or corporation in or as to which the contractor (or any parent or subsidiary corporation thereof) has a majority or controlling interest. The term also includes the corporate officers of the contractor, those of any corporation that has a majority or controlling interest in the contractor, and those of any corporation in which the contractor (or any parent or subsidiary corporation thereof) has a majority or controlling interest.

(e) The agency may in its sole discretion, waive any provisions of this clause if deemed in the State's interest, in accordance with Reg. 19-445.2127F. The exclusions contained in this clause will apply for the duration of this contract and for three (3) years after completion and acceptance of all work performed hereunder.

(f) If any provision of this clause excludes the Contractor from competition for, or award of any contract, the Contractor will not be permitted to serve as a subcontractor, at any tier, on such contract.

## **ORGANIZATIONAL CONFLICT OF INTEREST - MITIGATION PLAN REQUIRED**

*[Use this clause to request submittal of an OCI mitigation plan.]*

(a) The policy of the State is to avoid contracting with contractors who have unacceptable organizational conflicts of interest. The State has determined that this acquisition may give rise to an organizational conflict of interest (OCI). Accordingly, the attention of prospective Offerors is invited to S.C. Code Ann. Reg. 19-445.2127, Organizational Conflicts of Interest. Additional information is available at <http://procurement.sc.gov> (.). The State shall not award a contract until it determines any conflict of interest is reasonably resolved. It is not the State's intention to foreclose a vendor from a competitive acquisition due to a perceived OCI. The Procurement Officer is fully empowered to evaluate each potential OCI scenario based upon the applicable facts and circumstances. The final determination of such action may be negotiated between the impaired vendor and the Procurement Officer. As such, the State may communicate with any Offeror at any time during the evaluation process concerning its OCI plan. The State is committed to working with potential vendors to eliminate or mitigate actual and perceived OCI situations, without detriment to the integrity of the competitive process or the legitimate business interests of the vendor community.

(b) Description of Potential Conflict. The nature of this organizational conflict of interest is...

*[Describe the nature of the conflict here.]*

(c) Mitigation Plans. The successful contractor may be required to permit a State audit of internal OCI mitigation procedures for verification purposes. The State reserves

the right to reject a mitigation plan, if in the opinion of the Procurement Officer, such a plan is not in the State's interest. Considerations that may lead to rejection include, but are not limited to, whether the State possesses sufficient resources to monitor the contractor's compliance with the plan. Additionally, after award the State may review and audit OCI mitigation plans as needed, in the event of changes in the vendor community due to mergers, consolidations, or any unanticipated circumstances that may create an unacceptable OCI.

## **MITIGATION OF ORGANIZATIONAL CONFLICTS OF INTEREST**

*[This clause should only be used in contracts where a potential OCI has been identified prior to award and an OCI mitigation plan is involved in the resolution of the OCI.]*

- (a) Mitigation plan. The Organizational Conflict of Interest Mitigation Plan and its obligations are hereby incorporated in the contract by reference.
- (b) Changes. (1) Either the Contractor or the State may propose changes to the Organizational Conflict of Interest Mitigation Plan. Such changes are subject to the mutual agreement of the parties and will become effective only upon incorporating the change into the plan by contract amendment. (2) In the event that the State and the Contractor cannot agree upon a mutually acceptable change, the State reserves the right to make a unilateral change to the OCI Plan as necessary, subject to Contractor appeal as provided in the Disputes clause.
- (c) Violation. The Contractor shall report any violation of the Organizational Conflict of Interest Mitigation Plan, whether by its own personnel or those of the State or other contractors, to the Procurement Officer. This report shall include a description of the violation and the actions the Contractor has taken or proposes to take to mitigate and avoid repetition of the violation. After conducting such further inquiries and discussions as may be necessary, the Procurement Officer and the Contractor shall agree on appropriate corrective action, if any, or the Procurement Officer shall direct corrective action.
- (d) Breach. Any breach of the above restrictions or any nondisclosure or misrepresentation of any relevant facts required regarding organizational conflicts of interests to be disclosed may result in termination of this contract for default or other remedies as may be available under law or regulation.
- (e) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (e), in subcontracts where the work includes or may include tasks related to the organizational conflict of interest. The terms "Contractor" and "Procurement Officer" shall be appropriately modified to reflect the change in parties and to preserve the State's rights.

# Appendix B - Questionnaire for agency program staff

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Before sending the questionnaire to the agency you should remove the **Explanatory Notes**.

Please provide the following information. The information must be provided by the using agency's program staff, not procurement staff. The answers are intended to assist procurement officers in determining whether an actual or potential OCI exists and, if so, how best to address the conflict. For each business or person identified, provide a separate written explanation.

The first four requests pertain to firms or individuals whom you expect may offer to perform the work described in the solicitation.

1. Identify any business that has performed work related in any way to the goods or services to be acquired by this procurement.

**Explanatory Note:** This question is intentionally broad. It is intended to elicit information that might be overlooked by those answering other questions.

2. Identify any business that was involved in any way in either the design or specification of the goods or services to be acquired or in the planning of this procurement.

**Explanatory Note:** Contracts for acquisition sourcing services or project planning carry enhanced risk for creating OCIs. The using agency must identify any contractor retained for those services relating to the current acquisition.

3. If this procurement is to acquire systems engineering and technical direction identify the system and its major components that you expect will be the subject of subsequent acquisitions.

**Explanatory Note:** R. 19-445.2127B requires eliminating from future competition any business that has provided systems engineering and technical direction. You must include a clause like the one titled EXCLUSION FROM FUTURE AGENCY CONTRACTS—ORGANIZATIONAL CONFLICTS OF INTEREST in Appendix A – Contract Clauses.

4. Explain whether the intended contract puts any business in a position to influence the award of future contracts to any other business.

***Explanatory Note:*** Depending on the facts, putting a business in a position to influence future contracts might indicate circumstances that allow for unequal access to information, an opportunity to create biased ground rules, or a lack of objectivity in performing the instant contract. Ask agency staff to identify applicable businesses, to explain how they might influence the acquisition, and to identify any non-public information they may have acquired.

5. Please identify any former agency staff, temporary workers, or consultants who are employed by a business that might compete for the proposed contract.

***Explanatory Note:*** In working for the using or purchasing agency, a person may gain access to information that could help their new (or soon to be new) employer win the contract. A few examples are proprietary information of the incumbent contractor, non-public information regarding the incumbent's performance, the agency's acquisition plan, a draft solicitation, or an insider's understanding of the acquiring program's needs. Agency staff may need to start with a list of people (in house or outside) who were involved in the current or prior procurements.

6. Please identify any prior, current, or planned procurements that relate to this one.

***Explanatory Note:*** Whether the agency plans to award "follow-on" contracts is critical to your OCI analysis. You may determine that performance of the current contract will disqualify the contractor from some or all of the subsequent work.

7. Please identify every business you anticipate might participate in the awarded contract in any way. Without limitation, the participation might be as a contractor, a subcontractor, or as an affiliate or consultant of either.

***Explanatory Note:*** If a business appears in the answer to this question and in an answer to any of the first five questions, chances are good there is an actual or potential OCI.

The next four questions pertain to the contract that will result from this solicitation:

1. Will the contract include drafting long-range plans, technical specifications, or statements of work that may form the basis for future contracts?

***Explanatory Note:*** The answer to this question will help you identify unequal access to information and biased ground rules OCIs. It may also identify a business subject to mandatory disqualification under R. 19-445.2127C.



2. Will performance of the contract provide unusual insight into your agency's decision-making process in awarding other contracts?

***Explanatory Note:*** The answer to this question will help you identify unequal access to information OCIs.

3. Will the performance of the contract involve access to or the use of another business' proprietary information?

***Explanatory Note:*** The answer to this question may identify a business with an unfair competitive advantage.

4. Will the work require the contractor to provide advice, analysis and evaluation, opinions, alternatives, or recommendations that could significantly influence agency policy development or decision-making?

***Explanatory Note:*** The answer to this question may identify circumstances that create conflicting roles that might bias a contractor's judgment.

The following four questions pertain to any business to which the contract may be awarded, as well as any affiliates or subcontractors of that business:

1. Will the contractor be evaluating the work of another business, or providing advice to agency staff in a procurement evaluation?
2. Does the contract allow the contractor to inspect or accept products or activities on behalf of the State?

***Explanatory Note:*** The answers to either of these questions may identify a business subject to mandatory disqualification under R. 19-445.2127D.

3. Will the work, under this contract, put the contractor in a position to influence government decision-making (*e.g.*, developing regulations) that could affect the contractor's current or future business?
4. Will the work under this contract affect the interests of the contractor's other clients?

***Explanatory Note:*** The answers to these questions may identify circumstances that create conflicting roles that might bias a contractor's judgment.



# Appendix C - OCI FAQ for Contractors

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It is the policy of the State not to award a contract to an offeror with a significant actual or potential organizational conflict of interest that cannot be resolved to the State's satisfaction. This publication is intended to provide information about organizational conflicts of interest, or OCIs, to companies intending to do business with State.

## *What is an OCI?*

An organizational conflict of interest occurs when, because of other activities or relationships with the State or with other businesses: (a) a business may be unable to render impartial assistance or advice to the State, or (b) the business' objectivity in performing the work might be impaired, or (c) the business may have an unfair competitive advantage. The two underlying principles are (a) preventing the existence of conflicting roles that might bias a contractor's judgment; and (b) preventing unfair competitive advantage.

## *What kinds of OCIs are there?*

Broadly speaking, OCIs fall into three categories.

**Unequal Access to Information.** The first category arises when a business or an intended subcontractor has access to nonpublic information that may provide it with a competitive advantage in a later competition for a State contract. Without limitation, such information would include nonpublic information about an upcoming procurement (e.g., an early copy of the specifications or scope of work) or access to the proprietary data of a potential competitor on an upcoming procurement. For purposes of identifying a conflict, the source of information is irrelevant. The State's concern is the risk of the business gaining a competitive advantage.

**Biased Ground Rules.** The second category arises when a business, as part of its performance of a government contract, has in some sense set the ground rules for another government contract. For example, a contractor may have drafted the statement of work, specifications, or evaluation criteria for a future procurement. The State's primary concern in these cases is that a contractor could draft key aspects of a procurement in its own favor, whether intentionally or not, to the unfair disadvantage of competing vendors.

**Impaired objectivity.** The third category arises when a business, as part of its work under one government contract, could involve evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals. In these cases, the State's concern is that the contractor's ability to render impartial advice to the State could appear to be undermined by the contractor's financial or other business relationship to the entity whose work product is being assessed or evaluated.

### ***How can OCIs arise?***

An OCI may result when factors create an actual or potential conflict of interest on a current contract, or when the nature of the work performed on the current contract creates an actual or potential conflict of interest on a future acquisition.

OCIs can also result from activities of a business' affiliates—parent or related companies or subsidiaries. When analyzing whether an OCI exists, the State treats an offeror and any affiliated businesses as if they were a single organization.

Finally, OCIs can occur because of a business's consultant or proposed subcontractor. For OCI purposes these consultants or subcontractors are treated as if they were part of the contractor's business organization.

### ***What does my business have to do?***

Every solicitation you participate in requires you to identify any services related to the work described in the RFP that you, an affiliate, or any proposed subcontractor have already performed. Additionally, an offeror must either certify that there are no circumstances that may create an actual or potential OCI; or identify and explain any actual or potential OCIs. If you are awarded the contract, you are required to disclose to the procurement officer in writing any OCI arising after award.

### ***Is my business automatically ineligible if it has an OCI?***

Not necessarily. Much depends on the particular facts. The State seeks to maximize competition whenever possible.

### ***Is there a way to resolve OCIs short of disqualification?***

Yes. Other than a few circumstances directly addressed by regulation (R. 19-445.2127B, C, and D), the State may consider measures to avoid, neutralize, or mitigate an OCI.

**Avoiding a conflict** typically means modifying the scope of work so that performance does not create conflict on future work. OCIs can also be avoided by excluding specific sources with known and irreconcilable conflicts.

**Neutralizing a conflict** requires some limitation on future competition or contracting. For example, a consulting contract to prepare a statement of work for a specific acquisition should include a specific provision excluding the contractor from offering to provide the goods or services.

**Mitigating an OCI** means reducing the risk of the conflict to an acceptable level. It is the most complicated technique to resolve a conflict because it requires submittal and negotiation of a written plan, incorporating the plan into the contract, and monitoring compliance throughout contract performance.

### ***Who decides if an OCI can be resolved?***

The procurement officer is responsible for reviewing plans to avoid, neutralize, or mitigate significant potential OCIs before awarding the contract. The procurement officer is expected to exercise common sense, good judgment, and sound discretion when she makes these decisions. She will be guided by two underlying principles: preventing the existence of conflicting roles that might bias a contractor's judgment; and preventing unfair competitive advantage.



# Appendix D – Reg. 19-445.2127

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19-445.2127. Organizational Conflicts of Interest.

## A. General.

(1) “Organizational conflict of interest” occurs when, because of other activities or relationships with the State or with other businesses:

(a) a business is unable or potentially unable to render impartial assistance or advice to the State, or

(b) the business’ objectivity in performing the contract work is or might be otherwise impaired, or

(c) a business has an unfair competitive advantage.

(2) This regulation applies to acquisitions of supplies, services and information technology, except for acquisitions made pursuant to Section 11-35-1550. Unless the procurement uses a project delivery method identified in Section 11-35-3005(1)(e), 1(f), or (2)(a), this regulation does not apply to acquisitions under Article 9 (Construction, Architect-Engineer, Construction Management, and Land Surveying Services).

(3) The general rules in sections B (Providing systems engineering and technical direction), C (Preparing specifications or work statements), and D (Providing evaluation of offers) below prescribe limitations on contracting as the means of avoiding organizational conflicts of interest that might otherwise exist in the stated situations. Conflicts may arise in situations not expressly covered in sections B, C, and D. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are

(a) Preventing the existence of conflicting roles that might bias a contractor’s judgment; and

(b) Preventing unfair competitive advantage. Without limitation, an unfair competitive advantage exists where a business competing for award of a State contract possesses (i) proprietary information that was obtained from the State without authorization; or (ii) source selection information (R.19-445.2010C) that is relevant to

the contract but is not available to all competitors, and such information would assist that business in obtaining the contract.

(4) The terms “contractor” and “subcontractor” are defined by Section 11-35-310.

B. Providing systems engineering and technical direction. (1) A business shall not be awarded a contract to supply a system or any of its major components, or be a subcontractor or consultant, if that business, as a contractor, provided or provides a combination of substantially all of the following activities:

- (a) determining specifications or developing work statements,
- (b) determining parameters,
- (c) identifying and resolving interface problems,
- (d) developing test requirements,
- (e) evaluating test data,
- (f) supervising design,
- (g) directing other contractors’ operations, and
- (h) resolving technical controversies.

(2) This section B does not prohibit a contractor providing systems engineering and technical direction, from developing or producing a system if the entire effort is conducted under a single contract.

C. Preparing specifications or work statements.

(1) If a contractor prepares and furnishes specifications for a specific acquisition of tangible supplies or information resources, or their components, that contractor shall not be allowed to furnish these items, either as a contractor or as a subcontractor at any tier, for a reasonable period of time including, at least, the duration of the initial contract for purchase of the items.

(2) If a contractor prepares, or assists in preparing, a work statement to be used in a specific acquisition of a system or services—or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services, either as a contractor or as a subcontractor at any tier, unless (a) the acquisition is a sole source under R.19-445.2105; (b) it has participated in the development and design work; or (c) more than one contractor has been involved in preparing the work statement.

D. Providing evaluation of offers. If a contractor evaluates or supports the evaluation of a bid or proposal for a contract with a governmental body, that contractor and its affiliates are barred from performing under that contract as either a contractor or as a subcontractor at any tier.



#### E. Procurement Officer Responsibilities.

(1) The responsible procurement officer shall (a) analyze planned acquisitions in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and (b) review plans to avoid, neutralize, or mitigate significant potential conflicts before contract award.

(2) The responsible procurement officer shall determine whether the apparent successful offeror has an organizational conflict of interest. The responsible procurement officer shall award the contract to the apparent successful offeror unless (i) a conflict of interest is determined to exist that cannot be avoided or mitigated, or (ii) the conflict is not waived as provided in section F. Before determining to withhold award based on conflict of interest considerations, the procurement officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond.

F. Waiver. With respect to the award of an individual contract, the using agency may waive an organizational conflict of interest by determining that the application of these rules in a particular situation would not be in the State's interest. A determination to waive a conflict of interest must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or her designee above the level of the agency's senior procurement official. If a waiver involves an acquisition with a value that exceeds either the limits of the governmental body's authority under Section 11-35-1210(1) or one million dollars, the appropriate Chief Procurement Officer must concur in the waiver and the written determination must be published with the notice of intent to award. Any report required by R.19-445.2020A(2) must include every waiver addressing a procurement during the audit period.

G. The appropriate Chief Procurement Officer may develop and issue procedures which shall be followed by all agencies to identify organizational conflicts of interest and techniques to avoid or mitigate them.

**HISTORY: Added by SCSR 43-8 Doc. No. 4895, eff August 23, 2019 (interim). Reserved by SCSR 44-4 Doc. No. 4861, eff April 24, 2020. Amended by SCSR 44-6 Doc. No. 4894, eff June 26, 2020.**

#### Editor's Note

Regulation 19-445.2127 applies only to solicitations issued after November 29, 2019.