



DATE: October 6, 2008
TO: State Agency Heads
FROM: Dana B. Badgerow, Commissioner
SUBJECT: **Organizational Conflict of Interest Policy**

**POLICY & PROCEDURE
ADMIN 01-13 (updated)**

Introduction

State law requires the Commissioner of Administration to make reasonable efforts to avoid, mitigate or neutralize organizational conflicts of interest that may arise during the public procurement process. In addition, all procurement transactions conducted under the authority of the Commissioner of Administration must be performed in a manner that provides full and open competition unless the transaction is specifically exempted by law from the competitive solicitation process. To ensure these ends, the following policy on organizational conflicts of interest applies to all purchasing officials acquiring goods, services and utilities for the State of Minnesota under the authority of the Commissioner of Administration. This policy is issued pursuant to Minn. Stat. §16C.03, subd.8 (2000).

Policy

It is the policy of the Department of Administration to identify, avoid, or mitigate organizational conflicts of interest in all procurement transactions.

Definition

An “organizational conflict of interest” exists when, because of existing or planned activities or because of relationships with other persons, a vendor is unable or potentially unable to render impartial assistance or advice to the State, or the vendor’s objectivity in performing the contract work is or might be otherwise impaired, or the vendor has an unfair competitive advantage.

Discussion

In an age when it is becoming commonplace to retain advisory, management, and consulting services, it is imperative that all agencies are mindful of and ready to act upon potential organizational conflicts of interest. This policy is intended to ensure adherence to two

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underlying principles: preventing the existence of conflicting roles that might bias a contractor's judgment; and preventing unfair competitive advantage in the awarding of state contracts. Attention to these basic principles will work to avoid the time and money spent addressing disputes regarding the procurement process and selections made as a result.

Organizational conflict of interest determinations cannot be made automatically or routinely. The application of sound judgment on a case-by-case basis is necessary if the policy is to be applied to satisfy the overall public interest. It is not possible to prescribe in advance a specific method or set of criteria which would serve to identify and resolve all of the organizational conflict of interest situations which might arise. However, examples are provided in this policy to guide the purchasing official in his or her role in making these determinations. Questions to ask in determining whether an organizational conflict of interest might exist include: Are there conflicting roles which might bias a vendor's judgment in relation to its work for the State? Is the vendor being given an unfair competitive advantage in any manner including being furnished unauthorized proprietary information or source selection information that is not available to all competitors? Particular attention should be paid to any proposed contractual requirements that provide for the rendering of advice, consultation, evaluation services, or similar activities that lay direct groundwork for decisions on future acquisitions. While the applicability of this policy is not limited to any particular kind of acquisition, it should be noted that organizational conflicts of interest are more likely to occur in contracts involving:

- Management support services;
- Consultant or other professional services;
- Contractor performance of or assistance in technical evaluations; or
- Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

Work performed by a vendor on an initial contract for a project may sometimes create an organizational conflict of interest for that vendor with respect to future contracts. In these situations, restrictions on the vendor's ability to compete for future work may be required. Such future restrictions must be fully disclosed in the solicitation document for the initial contract.

Examples

The following examples illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all inclusive, but are intended to provide general guidance to the purchasing official:

(1) Unequal Access to Information. Access to information that is classified as nonpublic data or is otherwise unavailable to the public could provide a vendor a competitive advantage in a later competition for another contract. For example, a consulting firm, in the course of performing services for the State, may be given access to information that is not available to the public such as government plans, opinions, interpretations or positions. This consulting firm cannot use this information to its advantage in securing a subsequent contract, and measures must be put into place to assure this. Such an advantage could be perceived as unfair by a competing vendor who is not

given similar access to the relevant information. If a situation arises where a vendor may have had access to nonpublic information, and it is foreseeable that this information could be used to the vendor's advantage in a future acquisition, the purchasing official must immediately contact the Materials Management Division ("MMD") for assistance.

(2) Biased Ground Rules. An organizational conflict of interest may arise if a vendor, in the course of performance of a contract, has in some fashion established important "ground rules" for another contract where the same vendor may be a competitor. For example, a vendor may have drafted the statement of work, specifications, or evaluation criteria of a future procurement. The primary concern is that a vendor so situated could slant key aspects of a procurement in its own favor, to the unfair disadvantage of competing vendors. If a situation arises where a vendor has established important ground rules and is participating in the subsequent procurement process, the purchasing official must immediately contact MMD for assistance.

(3) Impaired Objectivity. An organizational conflict of interest may arise if a vendor, in the course of performance of a contract, is placed in a situation of providing assessment and evaluation findings over itself, another business division or a subsidiary of the same corporation, or another entity with which it has a financial relationship. For example, it would be inappropriate for a vendor to assist in the evaluation of proposals if it will financially benefit from the selection of one company over another. Further, increased attention should be paid to situations where a vendor is in a position to assess or evaluate a competitor where detrimental findings could serve, directly or indirectly, the interests of the advising vendor. In this instance, the advising vendor may recommend a shift in the governmental unit's strategic plan away from a certain technology that its competitor exclusively provides. The concern in these instances is that the vendor's ability to render impartial advice to the State could appear to be undermined by the vendor's financial or other business relationship to the entity whose work product is being assessed or evaluated. If a situation arises where the successful vendor may be in a position to provide evaluations and assessments of itself or corporate siblings, or other entity with which it has a financial relationship, or a competitor where detrimental findings may promote the interests of the vendor providing the advice, the purchasing official must immediately contact MMD for assistance.

Procedures

1. Purchasing officials must assess and evaluate their acquisition to identify any potential or actual organizational conflicts of interest as early in the acquisition process as possible. Early detection of a potential or actual conflict will reduce the possibility of delays and disruptions to the acquisition process.
2. If an organizational conflict of interest is suspected, disclosed or discovered, the purchasing official must immediately notify the Department of Administration's Materials Management Division's Director at 651.201.2400.
3. In cases where an organizational conflict of interest is suspected, disclosed, or discovered, MMD will notify the vendor of the facts known by the State regarding the actual or potential organizational conflict, and allow the vendor a reasonable

opportunity to respond. Based on a review of the response and other relevant facts, the Commissioner of Administration, through MMD, may pursue any one or combination of the following actions as appropriate:

- A. Disqualify the vendor from eligibility for award;
- B. Terminate the contract, if the organizational conflict of interest is determined to exist after an award has been made;
- C. Disqualify the vendor from subsequent State contracts if it is determined that the vendor improperly failed to disclose a known organizational conflict of interest or misrepresented information regarding such a conflict;
- D. Take action to mitigate or neutralize the potential or actual organizational conflict of interest. Such steps may include: revising the statement of work so that the conflict is mitigated; allowing the vendors to propose the exclusion of task areas that create a conflict, if appropriate; asking the vendor to submit an organizational conflict of interest avoidance or mitigation plan; or making all information available to all vendors in order to level the playing field; **Note: These examples of methods to mitigate or neutralize an organizational conflict of interest stress the importance of early identification.**
- E. Approve a request by the purchasing official to waive the conflict if it is determined by the Commissioner of Administration, through MMD, to be in the best interest of the State to award the contract notwithstanding the organizational conflict of interest; or
- F. Other remedial action as may be permitted or provided by law or in the resulting contract.

Waiver

The Commissioner of Administration, through MMD, may approve a waiver of the prohibition against organizational conflicts of interest in specific cases if the Commissioner determines that it is in the best interest of the State to do so. Requests for waivers must be presented to the Director of MMD, in writing, by the agency head, and provide sufficient detail to enable the assessment of all relevant facts and the totality of the circumstances. Requests for waivers must also include a discussion on the measures available to neutralize or mitigate the conflict and detail how such measures will be implemented and monitored. Waivers will be considered in situations including where:

- The work to be performed under the contract is determined to be an emergency where there exists a threat to public health, welfare, or safety that threatens the functioning of government, the protection of property, or the health or safety of people;
- The work cannot be reasonably or satisfactorily performed except by a vendor whose interests give rise to a question of conflict of interest; or

- Contract administration and monitoring methods can be employed to neutralize the conflict.

All justification and approval documents must be maintained in the procurement file and will become public record in accordance with Minn. Stat. §16C.06 subd. 3 and Minn. Stat. Ch. 13.

Disclosure Provisions

Another measure to be taken to ensure the avoidance of organizational conflicts of interest is to include a provision in all solicitation documents requiring the vendors to provide information which concisely describes all relevant facts and circumstances concerning any past, present or planned interest, (financial, contractual, organizational, or otherwise) relating to the work to be performed and bearing on whether the vendor has a possible organizational conflict of interest. If the vendor does not disclose any relevant facts concerning an organizational conflict of interest, the language should provide that the vendor, by submitting the offer or signing the contract, warrants that to the best of its knowledge and belief, no such facts exist relevant to a possible organizational conflict of interest.

In light of the above, the following disclosure provision is required to be included in all solicitation documents:

Organizational Conflicts of Interest: Contractor warrants that, to the best of its knowledge and belief, and except as otherwise disclosed, there are no relevant facts or circumstances which could give rise to organizational conflicts of interest. An organizational conflict of interest exists when, because of existing or planned activities or because of relationships with other persons, a vendor is unable or potentially unable to render impartial assistance or advice to the State, or the vendor's objectivity in performing the contract work is or might be otherwise impaired, or the vendor has an unfair competitive advantage. The contractor agrees that, if after award, an organizational conflict of interest is discovered, an immediate and full disclosure in writing shall be made to the Director of the Department of Administration's Materials Management Division which shall include a description of the action which the contractor has taken or proposes to take to avoid or mitigate such conflicts. If an organizational conflict of interest is determined to exist, the State may, at its discretion, cancel the contract. In the event the contractor was aware of an organizational conflict of interest prior to the award of their contract and did not disclose the conflict to the contracting officer, the State may terminate the contract for default. The provisions of this clause shall be included in all subcontracts for work to be performed similar to the service provided by the prime contractor, and the terms "contract," "contractor," and "contracting officer" modified appropriately to preserve the State's rights.