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CONFLICTS OF INTEREST

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Overview

A Federal agency has an obligation to avoid making any grant awards which are tainted by the existence of a conflict of interest.¹ A conflict of interest exists when a person participates in a matter which is likely to have a direct and predictable effect on his or her personal and financial interests. A conflict is also present when, because of other activities, relationships, or associations with individuals, there is an appearance that a person's objectivity in performing his responsibilities is impaired or that a person is unable or potentially unable to render impartial assistance or advice. In certain circumstances, the interests of family members and others are imputed to the person who is participating in a matter or performing the responsibilities. There is a potential for conflicts of interest to arise at every stage of the

financial assistance awards and subawards. Conflicts may occur as program officials carry out their responsibilities during the evaluation and selection process, during the review panel process, and as recipients perform their requirements under an award. Thus, it is important for all individuals involved in the financial assistance process (program officials, reviewers and recipients) to be aware of the potential for conflicts as well as their responsibilities when conflicts are present. It is the intent of this article to highlight areas where conflicts of interest could arise, and to identify some typical conflict situations. It is hoped that heightened awareness of the potential for conflicts by those involved in the process will decrease the actual occurrence of unresolved conflicts.

A. Agency Evaluation and Selection

In most competitive financial assistance programs, a variety of program officials

¹ *Burgos & Associates, Inc.*, 59 Comp. Gen. 273 (1980).

participate in the evaluation and selection process. Federal officials participating in the process must ensure that they are free from conflicts. Under a criminal conflicts of interest statute,² and Government-wide Standards of Conduct,³ a Federal employee may not participate in his or her official capacity in a matter which is likely to have a direct and predictable effect on his or her financial interests.

A particular matter will have a direct and predictable effect on a financial interest if there is a causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest.⁴ Under these restrictions, the financial interests of the following are imputed to the employee: 1) the employee's spouse; 2) the employee's minor child or general partner; 3) an organization or entity which the employee serves as officer, director, trustee, general partner or employee; and 4) a person with whom the employee is negotiating or has an arrangement concerning prospective employment.⁵ This means that an employee may not participate in the evaluation or review of a financial assistance application where there may be a direct and predictable effect on their financial interests or the financial interests of a spouse, minor child, general partner, nonfederal employer or prospective employer.

An employee also may not participate in the review of an award if he knows that a person with whom he has a covered relationship is or represents a party in

the award, where it is determined that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.⁶ An employee has a covered relationship with (i) someone with whom the employee has or seeks a business relationship; (ii) a household member or close relative; (iii) a person for whom the employee's spouse, parent or dependent child is serving, or seeking to serve, as an officer, director, trustee, general partner, attorney, consultant, contractor or employee; (iv) any person for whom the employee has, within the last year, served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or (v) an organization in which the employee is an active participant.⁷

Essentially, employees may not review applications or participate in the evaluation or selection process in any circumstances where their participation in the review process would create the appearance that they are: 1) giving preferential treatment to any person; 2) losing complete independence and impartiality; 3) making a government decision outside official channels; or 4) affecting adversely the confidence of the public in the integrity of the Government.⁸ Thus, it is important that employees participating in the financial assistance award evaluation process receive appropriate training and guidance on conflict of interest matters. Situations which present an actual conflict or the appearance of a conflict should be brought to the immediate attention of supervisors for resolution, which could consist of disqualification,

² 18 U.S.C. §208.

³ 5 C.F.R. §2635.

⁴ 5 C.F.R. §2635.402(b) (1).

⁵ 18 U.S.C. §208(a).

⁶ 5 C.F.R. §2635.502(a).

⁷ 5 C.F.R. §2635.502(b) (1).

⁸ 5 C.F.R. §2635.101.

divestiture, waiver, or other appropriate measures.

Illustration

An employee serves without compensation on the board of directors of a nonprofit child care organization. The employee must disqualify himself from participating in the review of a grant application submitted by the organization, even though his personal financial interests will not be affected. Award or denial of the grant will affect the financial interests of the nonprofit organization, and its financial interest are imputed to the employee as a member of the board of directors.

B. Review Panel Process

Use of review panels is a common practice among Federal financial assistance programs. For example, Department of Commerce Department Administrative Order (DAO) 203-26 requires that each application for financial assistance receive an independent, objective review by one or more review panels qualified to evaluate the applications. The DAO provides that there must be at least three persons on the review panel, and that the panel may include one or more persons who are not employees of the Federal Government.⁹

Unlike in the case of Federal employees there are no Federal statutes or regulations which directly address conflict of interest by review panel members who are not Federal employees. However, in order to ensure the integrity of the review and evaluation process, it is essential that review panels

⁹ Department Administrative Order 203-26, §4.02h(1) (c), (d).

conduct their reviews without either the appearance or the actuality of a conflict of interest.

As a practical matter, the standards used to determine the existence of a conflict by Federal employees are useful in determining whether a review panel member has a conflict of interest. A conflict may be determined to be present when the reviewer has either a financial interest or an organization conflict of interest with an application that is under review. A financial interest would include such things as stock ownership, partnership, trustee relationship, employment, potential employment or a business relationship with an applicant. It is important to note that such interests held by a reviewer's spouse, parent, minor child or business partner are imputed to the reviewed. An organization conflict of interest would exist where, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government.¹⁰

The significance of identifying a potential conflict of interest on the part of reviewers should not be underestimated. The Comptroller General generally does not consider protests of an agency's financial assistance activities, but may conduct a review if there is a showing that a conflict or the appearance of a conflict of interest exists.¹¹ For example, the Comptroller General has held that the composition of peer review panels is a

¹⁰ *J&E Associates, Inc.*, Comp. Gen. Dec. B-278771 (March 12, 1998).

¹¹ *Burgos & Associates, Inc.* 59 Comp. Gen. 273 (1980); *Management Development Group*, 64 Comp. Gen. 669 (1985).

matter within the discretion of the agency which will not be subject to review absent a showing of possible abuse of discretion in light of a conflict of interest or bias by a panel member.¹² If a conflict of interest by a review panel member is alleged, review is usually limited to determining whether the individuals involved improperly exerted prejudice or bias on behalf of one of the applicants.¹³ A determination that an agency ignored or failed to resolve an actual conflict of interest or bias on the part of a reviewer may result in a finding that the agency abused its discretion. Thus, it is in the interest of the Agency to uncover and resolve potential conflicts, and otherwise take measures intended to prevent the improper exercise of bias or prejudice by review panel members.

In order to discover the existence of a conflict of interest, program officials should provide reviewers with a checklist or certification form which sets forth the standards for determining the existence of conflicts, and requires the reviewer to notify the program official of any potential or actual conflicts with applications. This document should be provided to reviewers as early in the review process as possible so that any

¹² *University Research Corporation*, Comp. Gen. Dec. B-253725.4 (October 26, 1993). It should be noted that although some of the cited Comptroller General decisions are procurement-related, the general principles regarding conflicts of interest are equally applicable in the financial assistance arena.

¹³ *Southwest Regional Laboratory*, Comp. Gen. Dec. B-219985 (December 16, 1985); *Harry Kahn Associates*, Comp. Gen. Dec. B-216306.2 (June 28, 1985); *DRI/McGraw Hill*, Comp. Gen. Dec. 261181 (August 21, 1995).

potential conflict situations can be identified and resolved.¹⁴

Illustration

The spouse of a review panel member owns a significant amount of stock in a company that is proposed as a major subcontractor in a grant application. The spouse's financial interest in the subcontractor constitutes a financial interest in the application. The financial interests of the spouse would be imputed to the reviewer, and thus create a conflict of interest. The review panel member should advise the appropriate program official of this conflict of interest.

C. Recipient Employee Standards of Conduct.

Financial assistance recipients are required to certify, through the execution of SF-424B, "Assurances – Non-Construction Programs," Paragraph 3, that they will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.¹⁵ The underlying policy for this assurance is to avoid any conflict of interest, or the appearance of a conflict of interest that might arise between a recipient's personal financial or other interests and their duties and responsibilities under a financial assistance award. Although the general language of the assurance does not

¹⁴ A sample Conflict of Interest Statement for Panel Reviewers is included as an attachment.

¹⁵ Standard Form SF-424B "Assurances – Non-Construction Programs," Paragraph 3. Standard Form 424D "Assurances – Construction Programs," Paragraph 7, contains an identical requirement.

provide much guidance, the intent is to require recipients to establish policies and procedures requiring employees to provide notice of conflicts and for the recipient to take appropriate measures to address any conflicts.

When a violation of Paragraph 3 of Standard Form 424B occurs, it is possible that related costs may be disallowed. For example, although a particular agreement might not expressly state that costs incurred in violation of Paragraph 3 of SF 424B are unallowable, costs must be reasonable and allocable to the award in order to be allowable.¹⁶ In determining reasonableness, consideration must be given to the restraints imposed by the terms and conditions of the financial agreement.¹⁷ In addition, costs must conform to any limitations or exclusions set forth in the applicable cost principles or in the award as to types or amount of cost items.¹⁸ Costs incurred in violation of the conflict of interest limitations contained in Paragraph 3 of SF-424B may be determined to be neither reasonable nor in conformance with the applicable cost limitations, and, hence, unallowable under the principles of Circular A-122.

Illustration

An organization receives financial assistance to operate a management and technical assistance center. Under the terms of the financial assistance agreement, services are to be provided on a fee-for-service basis and the

recipient is required to assist a certain minimum number of clients. During the course of the award, the recipient provides assistance to several companies in which the recipient's project director has a financial interest. This situation constitutes a conflict of interest. Substantial questions could be raised as to whether there was favoritism towards the companies in which the project director had a financial interest, and whether those companies had a legitimate need for the management and technical assistance that was provided.

D. Procurements and Subgrants under Grants

OMB Circular A-110 and 15 C.F.R. Part 24 mandate several procurement standards intended to prevent financial assistance recipients from becoming involved in procurement-related conflicts of interest. Both require a financial assistance recipient to maintain written standards of conduct governing the performance of employees engaged in the award and administration of contracts.¹⁹ These standards prohibit employees, officers, and agents from participating in the selection, award or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved.²⁰ The purpose of requiring the establishment of standards of conduct for grantees' procurements is to ensure the integrity of all of the processes which result in the selection, award and administration of Federal funds. A conflict may be determined to be present if the employee, officer, agent or any

¹⁶ Office of Management and Budget Circular A-122, Attachment A, Paragraph A.2.a.

¹⁷ Office of Management and Budget Circular A-122, Attachment A, Paragraph A.3.b.

¹⁸ *Id.* At Paragraph A.2.b.

¹⁹ Office of Management and Budget Circular A-110, Subpart C Paragraph 42; 24 C.F.R. 24 §36(b) (3).

²⁰ *Id.*

member of his immediate family, partner or any organization that employs or is about to employ prohibited categories of persons, has a financial or other interest in the company selected for an award. In addition, officers, employees and agents of the recipient are prohibited from soliciting or accepting gratuities, favors or anything of monetary value from contractors or parties to subagreements, with exceptions possible for situations in which the financial interest is not significant or the gift is an unsolicited item of nominal value. The standards of conduct are required to provide for disciplinary action to be applied for violations of the standards by officers, employees or agents of the recipient.²¹ These prohibitions are also equally applicable to subgrants under financial assistance awards.²²

Illustration

A Federal Grant recipient's employee assists the grantee in the development of specifications for a subcontract to be awarded under the grant. A company which employs a partner of the employee on a part-time basis then submits a bid to perform the work required by the subcontract. A conflict of interest is present because the financial and other interests of the employee's partner are imputed to the employee, and the employee has participated in the recipient's subcontract selection process.

Conclusion

²¹ *Id.*

²² Office of Management and Budget Circular A-110, Subpart A, Section 5; 15 CFR §24.37.

The early identification and resolution of conflicts of interest is important for several reasons.

- From the perspective of the awarding agency it is important that even the appearance of conflict of interest be avoided to preserve legitimate agency discretion in the financial assistance review and selection process. The Comptroller General generally does not consider protests concerning the award of cooperative agreements, unless there is either some showing that the agency is using a cooperative agreement where a contract is required, or that a conflict of interest exists. Consequently, if a substantial showing of an unresolved conflict of interest is made, the Comptroller General may undertake a review of an agency's financial assistance activities that are typically not subject to such review.
- From the perspective of the individual Federal officials involved in the financial assistance review process, awareness of potential conflicts will help prevent employees from running afoul of the prohibitions contained in the Standards of Conduct and 18 USC §208.
- From the perspective of financial assistance award recipients, the importance of avoiding conflicts of interest is clear. Violation of the conflict of interest requirements can result in disallowed costs or even the suspension or

termination of an award, if it is determined that the applicable cost principles or the terms and conditions of an award have been violated.

Undiscovered or unresolved conflicts have the potential to undermine the integrity of the financial assistance process. All individuals involved in the financial assistance process have a responsibility to be aware of the potential for conflict of interest issues. Program officials must not only be cognizant of their own potential for

conflicts, but should also ensure that review panel members and recipients are aware of and adhere to the applicable conflict of interest requirements. When actual or potential conflicts are identified they must be brought to the attention of the appropriate program officials for resolution. Officials responsible for handling financial assistance conflict of interest issues may obtain advice from the Financial Assistance Law Division at (202) 482-8035.

Attachment

Attachment

**CONFLICT OF INTEREST/CONFIDENTIALITY CERTIFICATION FOR
NON-GOVERNMENTAL PEER REVIEWERS**

Confidentiality of Documents and Restriction on Contact

I agree that applications for _____ awards are made available to reviewers solely for the purpose of reviewing those applications against the criteria of the financial assistance program.

I also agree not to discuss the content of the applications outside the Department during or after the review process, and to discuss the proposals within the Department only with the other reviewers and Department staff members and in the context of, and under the procedures for, application review. I agree to follow the written instructions provided by the Department for the completion of review forms. I also agree to retain no copies of documents or parts of documents related to this review.

I agree not to contact the originators of applications being reviewed concerning any aspect of their contents. I also agree not to use any information obtained as a result of my participation as a panel member for personal or private gain.

Conflict of Interest

I hereby certify that, to the best of my knowledge, I do not have a conflict of interest and that my particular circumstances are not likely to raise the appearance of a conflict of interest or impropriety with respect to any applications I am asked to review or comment on.

For purposes of this agreement, I understand that a financial interest may include employment, stock ownership, a creditor or debtor relationship, or prospective employment with an applicant. I also recognize that I will be considered to have a financial or other interest, and therefore a conflict of interest, if any of the following has a financial or other interest in a financial assistance application I am asked to review or comment on:

- (1) I, my spouse, minor child, or general partner;
- (2) A profit or non-profit organization in which I serve as an officer, director, trustee, general partner, or employee; or
- (3) Any person or organization with which I am negotiating or have an arrangement concerning employment, including consultantship, or a past employer (within the last year).

I recognize that this certification is a continuing representation. I acknowledge that it is in effect at all times until I have completed all of the work performed by me under this agreement.

If I discover that I might have a conflict of interest, or might present a conflict of interest, with any application within the completion, I will immediately inform the appropriate program official and refrain from further work as a reviewer until authorized to continue.

Application of Freedom of Information Act and Privacy Act

I understand under the Freedom of Information Act (FOIA) and the Privacy Act the Department may be required to release my reviews verbatim to the public. However, I understand that the Department will attempt to protect this information from disclosure to the extent permitted by the FOIA and the Privacy Act. I also understand that a list of those serving as reviewers may be released upon appropriate request. I understand further that a summary of all comments, including mine, may be provided to applicants upon request and that such a summary will not be attributed to any reviewer by name.

Name (print)

signature

date