



FIDIC Policy Statement

INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS

Background

The term "conflict of interest" is widely used in commercial and legal transactions, and is acknowledged in the codes of ethics of professional bodies, including engineering associations, to identify behaviour that may be unacceptable.

Despite international use of the term, a great deal of confusion and serious problems, both real and perceived, have materialized because there is no universally accepted definition of conflict of interest. The problem is amplified by the globalisation of the consulting engineering industry leading to confusion, with different interpretations of what constitutes conflict in different countries and even within countries.

There has been a number of major ethical breaches involving different industries in various countries. These have been of such a magnitude that domestic as well as international regulators are taking action that can have a profound effect. FIDIC is concerned that international actions may be applied across the board to all industries, with suppliers of consulting engineering services being drawn in and maybe forced to comply with a series of actions ill suited to the efficient conduct of their business.

FIDIC is strongly committed to the avoidance of conflict of interest in the consulting engineering industry, and to the concept that clear, transparent and internationally accepted principles should be applied.

The FIDIC Policy Statement *Conflict of Interest* was approved by the FIDIC Executive Committee in May 2004. Printed copies can be obtained from the FIDIC Bookshop, either individually or as inserts in the binder *FIDIC Policy Statements*. Electronic versions are available from www.fidic.org/policies. Reproduction is permitted provided the source is acknowledged.

Actions by others

EFCA

The European Federation of Engineering Consultancy Associations (EFCA) has been involved in negotiations with the European Commission on the conflict of interest issue with respect to the procurement of consulting services. To date, the Commission is maintaining a very strict interpretation of conflict of interest contrary to the position of the consulting engineering industry.

EFCA believes that cases of conflict of interest should be restricted to very well defined circumstances, such as:

- conflict between consulting activities and the procurement of goods or works;
- certain conflicts within consulting assignments, for example the preparation of terms of reference and participation in the resulting tenders;
- the execution of a project or study execution and the evaluation of the same project or study;
- the design of a project and the study of its impact on the environment;
- advice given to both government and buyer in, for example, privatization;
- a conflict arising from family or other personal relationships.

EFCA further states that the fact that a consultant has participated in a previous phase of a project, other than the preparation of the terms of reference, is not *per se* a conflict of interest as long as all preliminary investigation documents are made available to all participants to ensure fair and transparent procurement.

OECD

The OECD has had an initiative since the late 1990's dealing with the *Principles for managing ethics in the public service* [2]. While this work is not directly applicable to the case of consulting engineering, there is common ground on several of the principles, and with the general objective of improving morality in public service. The OECD work is instructive for consulting engineering industry concerns as evidenced by the following approved principles:

- Ethical standards should be clear and reflected in the legal framework (Principles 1 and 2).
- The decision-making process should be transparent and open to scrutiny (Principle 6).
- There should be clear guidelines for interaction between the public and private sectors (Principle 7).
- Adequate accountability mechanisms should be in place (Principle 11).
- Appropriate procedures and sanctions should exist to deal with misconduct (Principle 12).

International finance institutions

The various international finance institutions (IFIs) have the conflict of interest issue among their concerns, and ongoing consultation takes place at several levels. For instance, comments were received by FIDIC from several IFIs during the FIDIC 2003 Annual Conference in Paris, and during various meetings with officials in Washington and other locations. The conflict of interest issue was also raised at the 1999 *Biennial Meeting of the International Lending Agencies with the Consulting Industry* (BIMILACI) and addressed by the British Consultants Bureau (BCB), now the British Consultants and Engineering Bureau (BCEB), in the 1998 briefing paper *World Bank conflict of interest study* [3]. This brief reviewed the background and also the practice of how to deal with conflict of interest at several IFIs and in other industries. The brief concluded by offering several recommendations.

Conflict of interest was subsequently addressed at other BIMILACI meetings. In 2003, Françoise Bentchikou presented a paper outlining the World Bank position and gave a classification of the types of conflict of interest, as seen by the Bank [4].

The World Bank has also issued its *Consulting Services Manual* [5]. Chapter Four of this document, entitled "Conflict of Interest", sets out clearly the categories of conflict, giving examples of each and proposing actions to mitigate conflict of interest in the

various cases. The document provides excellent guidance for both borrower and consultants.

In preparing this Policy Statement, input was received from individual specialists and from members of the Conflict of Interest Task Group that formed part of the FIDIC Business Practices Committee. All input is gratefully acknowledged. Needless to say, a great deal of information is published, although it is difficult to make direct links to the issue as it affects the consulting engineering industry.

Definitions

The focus of this Policy Statement is Section 1.9 of the *Guidelines: selection and employment of consultants by World Bank Borrowers* [6]. Other IFIs may or may not have similar guidelines, and a review of these various procedures can be found in the task group work undertaken by EFCA [1].

A good definition of the concept of conflict of interest is found in the opening paragraph of Chapter Four of the World Bank's *Consulting Services Manual* [5]:

A consultant conflict of interest (COI) is a situation in which a consultant provides biased professional advice to a Borrower in order to obtain from that Borrower an undue benefit for himself, herself or affiliates. Although COI is an easily understood concept, to identify it and address its consequences, that is, the potential or actual prejudice to the Borrower's interests, requires in practice particular attention and expertise. COI is a concern when the consultant is in a situation in which its own or its affiliates' interests could prevail over the interest of the client.

A slightly simplified version that can serve as FIDIC's definition of conflict of interest is as follows:

A consultant conflict of interest (COI) is a situation in which a consultant provides biased professional advice to a client in order to obtain from that client an undue benefit for himself, herself or an affiliate and in so doing, places the consultant in a position where its own interests could prevail over the interests of the client.

Problems often arise in the details. For example, they arise in defining "affiliates" and in attempting to distinguish actual as opposed to perceived conflict of interest.

As advocated in FIDIC publications dealing with Business Integrity Management [7], transparency is

an essential element and this requires full disclosure by the consultant at one or more points in the project formulation and delivery process. It also requires that the client also practices full disclosure in the process, particularly in the terms of reference and in the instructions to the bidders.

There must also be clear measures outlined for transgressions. Many potential problems in the procurement process related to unfair or competitive disadvantage can be avoided if the client states clearly in the terms of reference the preferences regarding:

- follow-on work;
- the extent of the assignment;
- preferences based upon special expertise or knowledge.

As long as these provisions are not in themselves anticompetitive and are approved by the client, then all potential service providers can make commercial decisions.

In defining “affiliates”, there must be some rational limit to the potential relationship. This is important because the consulting industry responds to the pressures from globalization, with firms growing in size, geographic distribution and scope of disciplinary capabilities. The operative issue is control. When minority ownership interests arise and management control is strongly vested in the larger firm, with no overlap in a firm’s Board or other policy body, then the relationship can be described as minor and may not cause a problem that cannot be addressed by full, prior disclosure and mutually acceptable mitigation measures.

FIDIC policy on conflict of interest

FIDIC’s policy on conflict of interest requires that consultants provide professional, objective and impartial advice, and at all times hold the client’s interests paramount, without any consideration for future work and strictly avoiding conflicts with other assignments or their own corporate interests.

Consultants shall not be selected for any assignment that would a) be in conflict with their prior or current obligations to other clients, or b) may place them in a position of not being able to carry out the assignment in the best interest of the client. Without limitation on the generality of this rule, consultants shall not be engaged under the circumstances set out below:

a Conflict between consulting activities and procurement of goods, works or services

A firm that has been engaged by a borrower to provide goods, works or services for a project and any of its affiliates, shall be disqualified from providing consulting services related to those goods, works or services, unless the potential conflict arising from this situation has been identified and resolved in a manner acceptable to the client throughout the selection process and the execution of the contract.

Conversely, a firm engaged to provide consulting services for the preparation or implementation of a project, and any of its affiliates, shall be disqualified from subsequently providing goods or works or services resulting from or directly related to the firm’s earlier consulting services, unless the potential conflict arising from this situation has been identified and resolved in a manner acceptable to the client throughout the selection process and the execution of the contract.

b Conflict among consulting assignments

Consultants, including their personnel and sub-consultants, or any of their affiliates shall not be engaged for any assignment that, by its nature, may be in conflict with another assignment of the consultants unless the potential conflict arising from this situation has been identified and resolved in a manner acceptable to the client throughout the procurement and execution phases of the project.

As an example, consultants engaged to prepare engineering design for an infrastructure project shall not be engaged to prepare an independent environmental assessment for the same project, and consultants assisting a client in the privatization of public assets shall not purchase, nor advise purchasers of such assets. Similarly, consultants hired to prepare terms of reference for an assignment shall not be engaged for the assignment in question.

c Relationship with the client’s staff

Consultants, including their personnel and sub-consultants, that have a business or family relationship with a member of the client’s staff or of the project implementing agency’s staff may not be awarded a contract, unless the conflict stemming from this relationship has been resolved in a manner acceptable to the client throughout the procurement process and the execution of the contract.

CONFLICT OF INTEREST

References and resources

- 1 *Conflict of Interest statements*, EFCA, 2002, 2003: www1.fidic.org/resources/bimilaci/2003/VanderPutten_Concerns%20withIFIs_EFCA.doc
www.fidic.ch/internal/Documents/BPC/COITG/efca_coi_statement_brussels_sep03.doc
- 2 *Principles for managing ethics in the public service*, OECD, 1998: www1.oecd.org/puma/ethics/pubs/rec98/rec98.htm
- 3 *World Bank Conflict of Interest study*, British Consultants Bureau, 1998, BIMILACI'99: www1.fidic.org/resources/bimilaci/1999/bcb.html
- 4 F. Bentchikou, *World Bank position and a classification of the types of conflict of interest as seen by the World Bank*, BIMILACI'03, May 2003: www1.fidic.org/resources/bimilaci/2003/Bentchikou_COINewGuidProvisions_IBRD.doc
- 5 *World Bank Consulting Services Manual*, 2001: siteresources.worldbank.org/PROCUREMENT/Resources/csm-final-ev3.pdf
- 6 *Guidelines: selection and employment of consultants by World Bank borrowers*, World Bank, revised 2002, revised 2004: siteresources.worldbank.org/PROCUREMENT/Resources/conguid-ev4.doc
- 7 *Guidelines for Business Integrity Management in the consulting industry*, Test Ed 2001

Resources are available at www.fidic.org/policies/coi

Implementation guidelines

The statements given above recognize that there is often subjectivity involved in matters of conflict of interest, where the all-important “question of degree” must be addressed.

Methods for avoiding or preventing conflict of interest as outlined in Chapter Four of the World Bank’s manual for consulting services [5] are reasonable steps in the whole process. Several key principles are also considered to be essential:

Prior disclosure

A firm has an obligation to fully disclose any potential or real conflict of interest at the earliest opportunity, and to continuously monitor developments in the firm to ensure that subsequent events do not affect their previously stated position.

Transparency

A firm must at all times be able to provide evidence that it follows a recognized code of ethics and that the practice is universal throughout the firm. The firm must be able to defend its actions, or lack thereof, with documented evidence of conformity to the conditions of engagement and the conduct of its contractual obligations.

Independence

A firm must at all times maintain its independence from external influences that may affect

the ability of the firm to hold the interests of the client paramount, while not overlooking the interests of other parties identified in the code of ethics.

There have been cases where consultants acted in ways that would be, under normal circumstances and in light of the above policies, clearly in a conflict of interest situation. However, in these cases either the client had special requirements that were clearly spelled out at the onset of the project delivery process, or the client and consultant negotiated a procedure that offered a satisfactory mitigation methodology.

In any event, the nature of assignments, special requirements and client needs, and other factors necessitate the adoption of fair and reasonable processes and guidance for their application. The risk of becoming involved in a serious conflict of interest position and losing a firm’s long-developed reputation and standing is too great to gamble with. Full disclosure, full transparency, independence and adherence to a strong code of ethics should be by far the preferred choices for FIDIC members. The test should always be: Is it fair and reasonable? Is there full and prior disclosure and full transparency?

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