

Below are some questions, and answers, that will aid in a better understanding of the requirement in Section B.13 of the FOA

B.13 PROJECT MANAGEMENT AND SELECTION OF CONTRACTOR

The following statement was taken from Federal Regulations 42 CFR 12.943 – Competition

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror or whose bids or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

Emphasis was added to the third sentence of this citation in the FOA to identify the primary principle that underlies this limitation and affects the response to questions that have been posed.

Question 1: Many of the canal and ditch companies have material and equipment suppliers as managers, board members, or water owners. Does Section B.13 exclude those persons from providing bids of materials for an FOA funded project? If so, are other options such as conflict of interest disclosures possible?

Answer 1: *Though B.13 specifically addresses outside contractors, that same restriction would apply to members of water boards who also provide materials related to your proposed project(s). Their positions within the water organizations inherently create a high potential for conflicts of interest. If those board members participated in developing and drafting specifications, requirements, statements of work, invitations for bids or requests for proposals they are in a position of having an unfair competitive advantage against other suppliers or contractors. Even if they didn't participate directly, but because of their positions on the boards or within their business organizations they have access to the information during the development process, they could then have an unfair advantage against their business competitors.*

Questions 2: Many companies have both an engineering division and a materials supply division. Many of the ditch companies and project owners have direct purchased their materials, in particular those that self-perform much of the work. Are companies that can provide both the professional engineering and materials now excluded from direct bidding on materials for an FOA funded project if they perform the engineering?

Answer 2: *The company is considered as a whole, not as two separate divisions. Thus, both performing the engineering and bidding on the work is specifically excluded by B.13. Even if it were not specifically precluded by the provisions of the FOA, the distribution of information within their organization exists, whether willful or inadvertent. Thus, as in the answer to the previous question an unfair advantage against materials competitors could easily arise.*

Question 3: If the answer to question 2 is yes, i.e. "direct bidding and engineering" are not allowed, can such companies as described in number 2 bid indirectly through contractors, where material decisions are separated at an "arm's length" from the ditch companies?

Answer 3: *It appears that whatever the arrangement may exist with the other contractors, the designing company, is still competing for the actual construction. The potential for transfer of proprietary information within an organization still exists, as does the possibility of it then being transferred to the third party to whom information or quotes is being provided*

Question 4: If the answer to question 2 is no, is there a procurement process or set of standards that the BOR can provide to help ensure fair and open competition?

Answer 4: *The provisions of B.13 have been included because of the inability to assure fair and open competition if the designing organization is also allowed to compete on the supply or installation of the resulting project.*