

# EXHIBIT 1a

Metra's Organizational Conflicts of Interest Procedure

**METRA ORGANIZATIONAL CONFLICTS OF INTEREST**

**I. PURPOSE**

To describe Metra's policies and procedures in identifying and preventing real or apparent organizational conflicts of interest.

**II. POLICY**

It is the policy of Metra to avoid, eliminate, or neutralize contractor organizational conflicts of interest. It is the contracting officer's duty to work with the User Departments to identify and plan for potential organizational conflicts of interest before solicitation. The contracting officer may obtain the advice of the legal counsel and the assistance of the User Department in evaluating potential organizational conflicts. With the help of the Multi-Departmental Task Force ("MDTF"), the Director of the Audit Department ("Audit Director") makes the final determination (with the approval of the Executive Director) on the existence of any such conflict, such as an actual or potential organizational conflict of interest, that would result from the award of the contract. The Audit Director will be guided by information submitted by the MDTF and by the Audit Director's own judgment.

Organizational conflict of interest determinations cannot be made automatically or routinely. The application of sound judgment on virtually 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 that would serve to identify and resolve all of the organizational conflict of interest situations that might arise. However, examples are provided to guide application of this policy guidance. (See Exhibit I for FTA illustrations.) The ultimate test is as follows: Might the contractor, if awarded the contract, be placed in a position where its judgment may be biased, or where it may have an unfair competitive advantage?

Metra will follow Federal Transit Administration grant requirements that require policies and procedures to identify and prevent real and apparent organizational conflicts of interest. (See FTA Circular 4220.1F, as amended.) All Metra personnel connected with the selection, award, and administration of contracts should be familiar with this procedure and the rules and examples set forth in 48 CFR 9.5 (Organizational Conflicts of Interest, attached as Exhibit II). Any person, whether an employee of Metra or not, is entitled to raise the question of an organizational conflict of interest. All inquiries and issues should be directed to the Audit Director with a copy of the Materials Management Department Head.

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**II. POLICY (Continued)**

A. Criteria for recognizing contractor organizational conflicts of interest.

1. General

a. Two questions will generally be asked in determining whether an actual or potential organizational conflict of interest exists:

- (1) Are there conflicting roles which might bias an offeror's or contractor's judgment in relation to its work for Metra?
- (2) May the offeror or contractor be given an unfair competitive advantage based on the performance of the contract?

b. Metra's ultimate determination that an organizational conflict of interest exists will be made in light of common sense and good business judgment based upon the relevant facts. While it is difficult to identify and to prescribe in advance a specific method for avoiding all of the various situations or relationships that might involve potential organizational conflicts of interest, Metra personnel should pay particular attention to proposed contractual requirements that call for the rendering of advice, consultation, or evaluation activities, or similar activities that directly lay the groundwork for Metra's decisions on regulatory activities, future procurements, and research programs.

2. Situations or relationships. The following situations or relationships may give rise to an organizational conflict of interest, which may require the contracting officer and the User Department to obtain more information:

- a. Where the offeror or contractor evaluates its own products or services, or has been substantially involved in the development or marketing of the products or services of another entity; of
- b. Where the award of a contract would result in placing the offeror or contractor in a conflicting role in which its judgment may be biased in relation to its work for Metra, or would result in an unfair competitive advantage for the offeror or contractor.

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**II. POLICY (Continued)**

3. The contracting officer and the User Department may also request specific information from an offeror or contractor or may require special contract clauses such as provided by the Law Department in the following circumstances:
  - a. Where the offeror or contractor prepares specifications that are to be used in competitive procurements of products or services covered by the specifications;
  - b. Where the offeror or contractor prepares plans for specific approaches or methodologies that are to be incorporated into competitive procurements using the approaches or methodologies;
  - c. Where the offeror or contractor is granted access to information not available to the public concerning Metra plans, policies, or programs that could form the basis for a later procurement action;
  - d. Where the offeror or contractor is granted access to proprietary information of its competitors; or
  - e. Where the award of a contract might result in placing the offeror or contractor in a conflicting role in which its judgment may be biased in relation to its work for Metra or might result in an unfair competitive advantage for the offeror or contractor.
  
4. The contracting officer and User Departments must pay close attention to the following types of services:
  - a. Management support services, including the oversight of other contractors doing work for Metra (e.g., a project management oversight contractor);
  - b. Preparation of plans, designs, or specifications for further work or products to be procured by Metra;
  - c. Contractor assistance in technical evaluations of other contractor proposals;
  - d. Systems engineering and technical work where the contractor has not yet been given overall responsibility for development or production; or
  - e. Legal, accounting and other professional services.

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**II. POLICY (Continued)**

**B. Contract clauses**

1. General contract clause. The contracting officer will work with the Law Department to assure that all appropriate contract clauses are included to prevent or avoid an organizational conflict of interest.
2. Other special contract clauses. If it is determined from the nature of the proposed contract that an organizational conflict of interest exists, the MDTF may determine that the conflict can be avoided, or, after obtaining a waiver, neutralized through the use of an appropriate special contract clause. If appropriate, the offeror may negotiate the terms and conditions of these clauses, including the extent and time period of any restriction. These clauses include but are not limited to:
  - a. Hardware exclusion clauses which prohibit the acceptance of production contracts following a related non-production contract previously performed by the contractor;
  - b. Software exclusion clauses;
  - c. Clauses which require the contractor (and certain of its key personnel) to avoid certain organizational conflicts of interest; and
  - d. Clauses which provide for protection of confidential data and guard against its unauthorized use.

**C. Evaluation, findings, and contract award.** If it is initially determined by the Materials Management Department Head that a real or apparent organizational conflict of interest may exist, the Materials Management Department Head shall notify the Audit Director who will call together the MDTF. The MDTF shall then evaluate all relevant facts and information. After evaluating this information, the MDTF shall make a recommendation to the Audit Director about whether an organizational conflict of interest exists with respect to a particular offeror. If the Audit Director, after consulting with the Executive Director, determines that a real or potential conflict of interest exists, the Audit Director shall take one of the following steps:

1. Disqualify the offeror from award for being non-responsible;
2. Avoid or eliminate such conflicts by appropriate measures, including but not limited to, putting advance restrictions on future contracts, or partitioning or consolidating the work scope;
3. Award the contract under the waiver provision below;
4. Take any other step(s) that are in Metra's best interests and/or
5. With the assistance of the Law Department, seek whatever remedies are permitted by law or contract.

**II. POLICY (Continued)**

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- D. Conflicts identified after award. If potential organizational conflicts of interest are identified after award with respect to a particular contractor and the Materials Management Department Head determines that such a conflict may exist, the Materials Management Department Head will contact the Audit Director, who will contact the MDTF to take every reasonable action to investigate, avoid, eliminate, or, after obtaining a waiver, neutralize the effects of the identified conflict.
  
- E. Waiver. The Audit Director determines if there is a need or if it is appropriate to seek a waiver for specific contract awards. Upon the recommendation of the MDTF and the Audit Director, and after consultation with legal counsel, the Executive Director may waive the organizational conflict of interest in specific cases if he determines that it is in Metra's best interest to do so. The Executive Director will look to criteria including, but not limited to, the following to determine Metra's best interest:
  - 1. The work to be performed under contract is vital to a Metra program;
  - 2. The work cannot be satisfactorily performed except by a contractor whose interests give rise to a question of conflict of interest; and/or
  - 3. Contractual and/or technical review and surveillance methods can be employed by Metra to neutralize the conflict.
  
- F. Approval. The Executive Director shall have final approval of all decisions and actions with respect to any real or potential organizational conflicts of interest.

**III. DEFINITIONS**

All terms will have these meanings whether or not capitalized:

**Affiliate(s):** Means business concerns which are affiliates of each other when, either directly or indirectly, one concern or individual controls or has the power to control another, or when a third party controls or has the power to control both.

**Bias:** Arises when a contractor is placed in a situation where it may have an incentive to distort its advice or decisions. Whenever Metra is awarding a contract that involves the rendering of advice, the question must always be asked as to whether there exists the potential for an organizational conflict of interest for the contractor rendering the advice.

**Contract:** Means any contractual agreement or other arrangement with Metra.

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**III. DEFINITIONS (Continued)**

**Contractor:** Means any person, firm, unincorporated association, joint venture, co-sponsor, partnership, corporation, affiliates thereof, or their successors in interest, including their chief executives, directors, key personnel (identified in the contract), proposed consultants or subcontractors, which are a party to a contract with Metra.

**Disclosure Statement:** Means any statement that a contractor, who develops environmental impact statements, is required to complete pursuant to any applicable federal funding regulations.

**Evaluation activity(ies):** Means any effort involving the appraisal of a technology, process, product, or policy.

**Offeror:** Means any person, firm, unincorporated association, joint venture, co-sponsor, partnership, corporation, or their affiliates or successors in interest, including their chief executives, directors, key personnel, proposed consultants, or subcontractors, submitting a bid or proposal. solicited or unsolicited, to Metra to obtain a contract (or purchase order).

**Interested party:** Means any person who identifies a potential organizational conflict of interest, including anyone from a User Department and the contracting officer.

**Organizational conflict of interest:** Means that a relationship exists whereby a contractor or offeror has present or planned interests related to the work to be performed under a Metra contract which:

- A. May diminish its capacity to give impartial, technically sound, objective assistance and advice, or may otherwise result in a biased work product; or
- B. May result in its being given an unfair competitive advantage.

**Potential conflict of interest:** Means that a factual situation exists that suggests that an actual conflict of interest may arise from award of a proposed contract. The term "potential conflict of interest" is used to signify those situations that: (a) merit investigation before contract award to ascertain whether award would give rise to an actual conflict; or (b) must be reported to the contracting officer for investigation if they arise during contract performance.

**Research:** Means any scientific or technical work involving theoretical analysis, exploration, or experimentation.

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**III. DEFINITIONS (Continued)**

**Subcontractor**: Means any subcontractor of any tier who performs work under a contract with Metra.

**Technical consulting and management support services**: Means assistance to Metra in Metra's formulation or administration of its programs, projects, or policies. These services may normally require that the contractor be given access to proprietary information or to information that has not been made available to the public. These services typically include assistance in the preparation of program plans, preliminary designs, specifications, or statements of work.

**Unfair competitive advantage**: Occurs most often when a contractor is developing specifications or statements of work that will be used in a future competitive solicitation. The problem most often causing unfair advantage is that of a contractor writing specifications or statements of work around its own corporate competitive strengths or products, and then bidding on those specifications or statements of work. The unfair advantage can be overcome by placing reasonable restrictions on the contractor's involvement in the procurement that will utilize the specifications. Some form of advance restriction (limitation on future contracting) must be agreed to with the contractor as a provision within its consulting contract.

**IV. RESPONSIBILITIES**

A. Requisitioner/User Department. The Requisitioner/User has the following responsibilities:

- Assists the contracting officer in applying criteria for recognizing contractor organizational conflicts of interest prior to soliciting for services;
- Reviews situations or relationships that may give rise to an organizational conflict of interest and provides expertise to the contracting officer and MDTF;
- Requests specific information from an offeror or contractor, as requested; and
- Participates in the MDTF.

B. Materials Management Department. The Materials Management Department (and the contracting officer) have the following responsibilities:

- Reviews the RFP package and User Department information, if any, prior to the solicitation, and applies criteria for recognizing contractor organizational conflicts of interest;
- Independently reviews situations or relationships that may give rise to an organizational conflict of interest;

**IV. RESPONSIBILITIES (Continued)**

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- Reviews specific information obtained from an offeror or contractor;
- Works with the MDTF and the Law Department to assure that all appropriate contract clauses are included to prevent or avoid an organizational conflict of interest;
- After receiving approval from Audit Director, informs offerors of potential conflict of interest and whether there are any remedies that can be taken to avoid or waive such a conflict;
- Reviews the contracting officer's and the Materials Management Department Head's concern that an organizational conflict of interest may exist;
- Notifies the Audit Director of any potential organizational conflict of interest; and
- Drafts the MDTF report for MDTF members to review.

C. Multi-Departmental Task Force. The MDTF has the following responsibilities:

- Evaluates all relevant facts and information submitted to it to determine whether a real, apparent, or potential organizational conflict of interest exists or should be prevented;
- After evaluating information against the criteria above, makes a written conclusion on whether a real, apparent, or potential organizational conflict of interest exists with respect to a particular offeror, contractor, or solicitation;
- Recommends to the Audit Director what additional steps should be taken; and
- Works with the Audit Director, Law Department, Technical Services Division, Engineering Department, and other relevant departments and divisions.

D. Audit Director. The Audit Director has the following responsibilities:

- Schedules all necessary meetings;
- Participates with the MDTF and notifies the appropriate parties;
- Reviews MDTF's final report and recommendation;
- Informs the Executive Director of MDTF's conclusions and recommendations; and
- Makes a determination if there is a real or potential conflict of interest and what additional steps should be taken if such a conflict exists.

E. Executive Director. The Executive Director has the following responsibilities:

- Reviews findings and recommendations from the Audit Director and the MDTF;
- Approves or denies the findings and recommendations; and
- Approves steps or directs alternatives to prevent, avoid, waive, neutralize, or remedy any organizational conflict of interest.

**IV. RESPONSIBILITIES (Continued)**

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F. Office of General Counsel. The General Counsel has the following responsibilities:

- Provides legal counsel; and
- When appropriate, develops contract clauses to be included in contracts to prevent or avoid an organizational conflict of interest.

**V. INSTRUCTIONS**

**Responsibility**

**Action**

User Department

1. Prior to solicitation, review prior contracts related in work scope to determine if any potential offeror may have an organizational conflict of interest and submit such information to the contracting officer.
2. Assist the contracting officer in determining if a potential organizational conflict of interest might be created and suggest how to best avoid it.
3. Prepare the disclosure statement required for contractors consulting on environmental impact statements, if required by federal funding regulations.

Contracting Officer

4. Receive information from the User Department and review it with the Materials Management Department Head.

Materials Management Department Head

5. Determine if there may be a potential conflict of interest question and inform the Audit Director if one exists.

Interested Party

6. Inform the Audit Director and the Materials Management Department Head of a potential conflict of interest.

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**V. INSTRUCTIONS (Continued)**

**Responsibility**

**Action**

Audit Director

- 7. Receive notice of a potential organizational conflict of interest from an interested party or the Materials Management Department Head.
- 8. Immediately notify the General Development Department Head, Technical Services Director, Engineering Department, and any other departments/divisions.
- 9. Obtain all files connected with the request for proposals from the requisite division of Materials Management. If appropriate, notify interested offerors or contractors, and schedule a meeting with Metra Departments, representing a task force, to investigate the notice.

Multi-Departmental Task Force

- 10. Investigate the situation and gather facts to determine the validity of the potential organizational conflict of interest.
- 11. Draft a report that describes the MDTF's findings. The report will address at least the following three sections: a) Background; b) Analysis; c) Conclusions; and d) Recommendations.

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**V. INSTRUCTIONS (Continued)**

**Responsibility**

**Action**

- 12. Conclusions and recommendations may include, but are not limited to, the following:
  - a. Determining whether this is or is not an organizational conflict of interest;
  - b. Disqualifying the offeror from award for being non-responsible;
  - c. Avoiding or eliminating such conflicts by appropriate measures, including but not limited to, advance restrictions on future contracts or partitioning or consolidating work scope;
  - d. Awarding the contract under the waiver provision;
  - e. Taking any other steps in Metra's best interests; and/or
  - f. With the assistance of the Law Department, seeking whatever remedies are permitted by law or contract for any breach.
  
- 13. If a waiver is recommended, provide written documentation.
  
- 14. Approve the report and obtain concurrence from the Law Department, Technical Services Division, Engineering Department, and other relevant departments and divisions.
  
- 15. After obtaining all necessary concurrence, send the report to the Audit Director for final approval.
  
- Audit Director
  
- 16. Receive the final report from the MDTF and inform the Executive Director of the MDTF's conclusions and recommendations.

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**V. INSTRUCTIONS (Continued)**

**Responsibility**

**Action**

- |                                      |  |
|--------------------------------------|--|
| Executive Director                   | 17. Receive conclusions and recommendations from the Audit Director and the MDTF, and approve or direct other action with respect to the organizational conflict of interest issue(s).   |
| Audit Director                       | 18. Inform the Materials Management Department Head of the course of action to be taken.   |
| Materials Management Department Head | 19. Notify the interested party(s), offerors, and contractors, if the situation warrants.<br><br>20. Initiate and oversee action, if any, required to implement Metra's decision.<br><br>21. File reports and action taken with the acquisition documents. |

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**EXHIBIT I**

**ILLUSTRATION OF FTA EXAMPLES AND POSSIBLE REMEDIES**

The following FTA examples and remedies are illustrative only and are not intended to identify and resolve all contractor organizational conflict of interest situations or provide an exhaustive list of remedies.

- (1) An agency's contractor was tasked to participate on an evaluation panel to evaluate competitive proposals. The contractor's employee who was assigned to the panel had a 401(k) retirement plan with one of the bidders. This represented a personal conflict of interest for the employee that affected his objectivity.  
Remedy: Agencies should not use consultants as voting members of evaluation panels for competitive contract awards. Consultants should only be used as advisors, and if they are so used, they should always be required to sign financial disclosure statements. These statements must disclose their employment and financial interests, as well as those of immediate family members, so that persons with conflicts are prevented from positions which might adversely affect a grantee's program or the public's perception of the agency's fairness in conducting its business.
  
- (2) A transit agency awarded a substantial engineering consultant contract to a firm that specialized in rail safety management. This firm was to serve as the independent safety assessor in a signal modernization project. An initial task was to advise the agency on the merits of competitive proposals being submitted by signal suppliers to design, install, test, and commission the high technology signal system for the transit agency. Beyond this initial role, the consultant would oversee the design, installation, and test contract for the agency. During the competition for the contract (i.e., the proposal evaluation phase), the safety consultant was acquired by one of the bidders. This caused a conflict of interest with several dimensions. First, the consultant would no longer be objective in its evaluation and advice to the agency concerning the proposals that it was tasked to evaluate. This was a classic case of potential bias. A second aspect of the problem was an unfair competitive advantage resulting from the consultant's access to the proprietary technology of its competitors and the potential transference of this technology to the new corporate parent. Still another problem would have arisen if the consultant's new parent company had been selected for award – the consultant could not have been objective in its evaluation of the parent company's work for the transit agency. This too would have been a classic case of a bias problem causing a lack of objectivity.  
Remedy: The basic form of the remedy in a case like this would have to involve the termination for convenience of the consulting firm's contract and a new contract award to a firm with no conflict of interest problem. In this case the transit agency issued a "stop work" order to the consultant, removing the firm from further involvement with the proposal evaluation and negotiation process. In this case there was a major subcontractor that was

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available to assume the primary role of the safety consultant, and the contract was eventually "assigned" to this subcontractor after a new but restricted competitive evaluation of firms known to have rail safety expertise from the previous competitive solicitation. But the final outcome was to terminate the original consultant's role because of a conflict of interest problem.

- (3) An engineering task order contract was awarded by a transit agency to a large multi-dimensional construction/engineering firm. A task was subsequently issued to this firm to develop user requirements that would eventually be used in a competitive design-build solicitation for a construction project. When the task was issued to the consultant by the agency, the consultant was informed in writing before it submitted its cost proposal that it would be ineligible to compete on the resulting design-build contract. This is a case of unfair competitive advantage where the consultant may have access to information that other firms do not. It also gives rise to a potential bias problem in that the consultant may be influenced to develop the user requirements around the consultant's corporate strengths in order to give it a competitive advantage instead of developing the requirements in the most economical way to meet the best interests of the agency.  
Remedy: Agency officials who are assigning tasks to consultants on task order contracts must exercise constant vigilance concerning the potential for conflicts of interest. When conflicts are perceived, the consultant must be informed and it should be asked to agree in writing that it would not be eligible to compete for work that it helps to define for a subsequent competitive solicitation. The initial engineering/consulting contract should contain a clear provision to the effect that tasks may be assigned that will preclude the contractor from bidding on the subsequent construction work and the contractor must be willing to do the engineering/design work on the basis.
  
- (4) A company doing preliminary engineering work as a subcontractor on an agency contract was asked to prepare a budget for the permanent project management services contract that would eventually be competed. This subcontractor subsequently bid on the project management contract, and the individual who was assigned the job of developing the project budget on the subcontract was also the company's person who prepared the company's price proposal when the project was completed. This company won the contract award and the determining factor between the competing proposals in winning the award was price, not relative technical strengths. The losing company filed a protest alleging unfair competitive advantage because the winning company had access to budget information that its competitors did not. This situation was indeed one in which the company gained an unfair competitive advantage by virtue of its work that gave it access to important information that was not publicly disclosed.  
Remedy: The agency eventually had to terminate the project management services contract because of the unfair competitive advantage of the winning contractor. The agency could have prevented this by taking steps early to "wall off" the subcontractor employee who had access to the budget data. "Walling off" means that the employee

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cannot pass information to his company that is not being disclosed by the agency to the public. In this case it would mean that this person could not participate in his company's later proposal effort, nor disclose non-public budgetary information to his company. The way to dot his would have been to require the employee to sign a non-disclosure statement agreeing not to disclose the non-public information and also for the company to sign a statement that it would not allow this employee to participate in its proposal effort. Another preventive measure would have been not to assign this sensitive task to a contractor that was a likely bidder on the work being defined and budgeted.

- (5) A contractor was performing project management services for an agency, and those services included an oversight role of the agency's construction contractors. In the course of time this project management contractor decided to acquire a company that was performing a design-build contract for the same agency, and which the project management contractor was tasked to oversee for the agency. This acquisition created an organizational conflict of interest in that the project manager could no longer be objective in its oversight role with respect to the design-build contract.

Remedy: This agency was forced to make a decision that would remove the contractor from one of its roles since it could not perform both roles simultaneously. The decision was reached with the contractor's cooperation. There is nothing an agency can do to prevent a merger or acquisition that gives rise to a conflict of interest, and the alternatives would seem to be limited to a termination for convenience – either a partial termination of a specific task or a complete termination of the entire contract.

- (6) A company is hired by an agency to evaluate alternatives and make recommendations concerning a river crossing. The alternatives are a bridge or ferries. This company has a subsidiary whose major line of business is designing and building bridges. This is a clear conflict of interest situation where its business interests may impair the company's objectivity.

Remedy: Agencies must be aware of potential conflict of interest situations when they contract with a consultant to advise them about competing alternatives. Care must be taken to preclude contractors from doing studies when the contractor has a financial interest in the outcome of the study. The RFP soliciting proposals should require offerors to identify any financial or organizational interests in the field of technology to be studied. The agency must also notify prospective offerors that they will be evaluated for potential conflicts of interest, and that contractors having such conflicts will be precluded from consideration for award.

- (7) A firm that is under contract with an agency to design a course curriculum is permitted to submit a proposal to teach the course when the agency competitively advertises the teaching contract. There appears to be a conflict of interest situation in that the company that designed the curriculum might have an unfair competitive advantage due to its possession of information that other competitors do not have.

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Remedy: The unfair competitive advantage would be mitigated if all potential offerors had access to any major work products and information developed by the firm that designed the curriculum. This information needs to be released for a reasonable time prior to the proposal due date. The issue in this case is full disclosure of all relevant information, and if this can be attained by the agency, then there would be no impropriety.

- (8) An agency award a task-order contract for construction design services for a number of construction projects to company A. Company A is a subsidiary within a large multi-faceted corporation that also does construction work. Another one of the large corporation's subsidiary companies (Company B) informs the grantee that it is interested in bidding on one of the projects being designed by Company A. Should the grantee disqualify Company B from bidding because of a conflict of interest?

Remedy: The grantee must carefully evaluate this situation and use judgment as to whether an unfair competitive advantage can be avoided. The grantee might conclude that a conflict can be avoided if (1) the subsidiaries are separate profit centers, (2) the subsidiaries have separate organizational authorities (no common corporate manager), and (3) a "wall" can be established between the two companies so that non-public information is not passed from the designing company to the construction subsidiary. This "wall" would require a written agreement between the grantee and the two companies that no information would be passed from the designer to the construction company. It would also be important for the grantee to publicly disclose its decision to the potential bidders on the construction project so as to avoid the appearance of a conflict of interest.

(a) Other considerations:

- (1) The fact that Metra can identify and later avoid, eliminate, or neutralize any potential organizational conflicts arising from the performance of a contract is not relevant to a determination of the existence of conflicts prior to the award of a contract.
- (2) It is not relevant that the contractor has the professional reputation of being able to resist temptations which arise from organizational conflicts of interest, or that a follow-on procurement is not involved, or that a contract is awarded on a competitive or a sole source basis.

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EXHIBIT II

**Subpart 9.5 Organizational and Consultant Conflicts of Interest**

**9.500 Scope of subpart**

This subpart:

- (a) Prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest;
- (b) Provides examples to assist contracting officers in applying these rules and procedures to individual contracting situations; and
- (c) Implements section 8141 of the 1989 Department of Defense Appropriation Act, Pub. L. 100-463, 102 Stat. 2270-47 (1988).

**9.501 Definition**

"Marketing consultant," as used in this subpart, means any independent contractor who furnishes advice, information, direction, or assistance to an offeror or any other contractor in support of the preparation or submission of an offer for a Government contract by that offeror. An independent contractor is not a marketing consultant when rendering:

- (1) Services excluded in Subpart 37.2;
- (2) Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);
- (3) Routine legal, actuarial, auditing, and accounting services; and
- (4) Training services.

**9.502 Applicability**

- (a) This subpart applies to contracts with either profit or nonprofit organizations, including nonprofit organizations created largely or wholly with Government funds.
- (b) The applicability of this subpart is not limited to any particular kind of acquisition. However, organizational conflicts of interest are more likely to occur in contracts involving:

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- (1) Management support services;
  - (2) Consultant or other professional services;
  - (3) Contractor performance of or assistance in technical evaluations; or
  - (4) Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.
- (c) An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required.
- (d) Acquisitions subject to unique agency organizational conflicts of interest statutes are excluded from the requirements of this subpart.

**9.503 Waiver**

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity.

**9.504 Contracting Officer Responsibility**

- (a) Using the general rules, procedures, and examples in this subpart, contracting officers shall analyze planned acquisitions in order to:
- (1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and
  - (2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.
- (b) Contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses (see 9.506).

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- (c) Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting officer shall recommend to the head of the contracting activity a course of action for resolving the conflict (see 9.506).
- (d) In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The contracting officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.
- (e) The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interests considerations, the contracting officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond. If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with 9.503. The waiver request and decision shall be included in the contract file.

**9.505 General Rules**

The general rules in 9.505-1 through 9.505-4 prescribe limitations on contracting as the means of avoiding, neutralizing, or mitigation organizational conflicts of interest that might otherwise exist in the stated situations. Some illustrative examples are provided in 9.508. Conflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508. 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 judgement; and
- (b) Preventing unfair competitive advantage. In addition to the other situations described in this subpart, an unfair competitive advantage exists where a contractor competing for award of any Federal contract possess:

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- (1) Proprietary information that was obtained from a Government official without proper authorization; or
- (2) Proprietary selection information (as defined in 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

**9.505-1 Providing Systems Engineering and Technical Direction**

- (a) A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly and checkout, or its production shall not:
  - (1) Be awarded a contract to supply the system or any of its major components; or
  - (2) Be a subcontractor or consultant to a supplier of the system or any of its major components.
- (b) 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. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their executive by other contractors. Therefore this contractor should not be in a position to make decisions favoring its own products or capabilities.

**9.505-2 Preparing specifications or work statements**

- (a)(1) If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract. This rule shall not apply to:
  - (i) Contractors that furnish at Government request specifications or data regarding a product they provide, even though the specifications or data may have been paid for separately or in the price of the product; or

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- (ii) Situations in which contractors, acting as industry representatives, help Government agencies prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Government representatives.
- (2) If a single contractor drafts complete specifications for nondevelopmental equipment, it should be eliminated for a reasonable time from competition for production based on the specifications. This should be done in order to avoid a situation in which the contractor could draft specifications favoring its own products or capabilities. In this way the Government can be assured of getting unbiased advice as to the content of the specifications and can avoid allegations of favoritism in the award of production contracts.
- (3) 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. 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 Government. In many instances the Government may have financed the development. 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.
- (b)(1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring 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 unless:
  - (i) It is the sole source;
  - (ii) It has participated in the development and design work; or
  - (iii) More than one contractor has been involved in preparing the work statement.
- (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 excepted in paragraph (b)(1) of this section.

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- (3) For the reasons given in 9.505-2(a)(3), no prohibitions are imposed on development and design contractors.

**9.505-3 Providing evaluation services**

Contracts for the evaluation of offers for products or services shall not be awarded to a contractor that will evaluate its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests.

**9.505-4 Obtaining access to proprietary information.**

- (a) When a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information.
  - (1) Furnished voluntarily without limitations on its use; or
  - (2) Available to the Government or contractor from other sources without restriction.

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- (b) A contractor that gains access to proprietary information of other companies in performing advisory and assistance services for the Government must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it was furnished. The contracting officer shall obtain copies of these agreements and ensure that they are properly executed.
- (c) Contractors also obtain proprietary and source selection information by acquiring the services of marketing consultants which, if used in connection with an acquisition, may give the contractor an unfair competitive advantage. Contractors should make inquiries of marketing consultants to ensure that the marketing consultant has provided no unfair competitive advantage.

**9.506 Procedures**

- (a) If information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, contracting officers first should seek the information from within the Government or from other readily available sources. Government sources include the files and the knowledge of personnel within the contracting office, other contracting offices, the cognizant contract administration and audit activities and offices concerned with contract financing. Non-Government sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers.
- (b) If the contracting officer decides that a particular acquisition involves a significant potential organizational conflict of interest, the contracting officer shall, before issuing the solicitation, submit for approval to the chief of the contracting office (unless a higher level official is designated by the agency)-
  - (1) A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in 9.505 or on another basis not expressly stated in that section;
  - (2) A draft solicitation provision (see 9.507-1); and
  - (3) If appropriate, a proposed contract clause (see 9.507-2).

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- (1) Review the contracting officer's analysis and recommended course of action, including the draft provision and any proposed clause;
  - (2) Consider the benefits and detriments to the Government and prospective contractors; and
  - (3) Approve, modify, or reject the recommendations in writing.
- (d) The contracting officer shall-
- (1) Include the approved provision(s) and any approved clause(s) in the solicitation or the contract, or both;
  - (2) Consider additional information provided by prospective contractors in response to the solicitation or during negotiations; and
  - (3) Before awarding the contract, resolve the conflict or the potential conflict in a manner consistent with the approval or other direction by the head of the contracting activity.
- (e) If, during the effective period of any restriction (see 9.507), a contracting office transfers acquisition responsibility for the item or system involved, it shall notify the successor contracting office of the restriction, and send a copy of the contract under which the restriction was imposed.

**9.507 Solicitation provisions and contract clause**

**9.507-1 Solicitation provisions**

As indicated in the general rules in 9.505, significant potential organizational conflicts of interest are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts. Therefore, affected solicitations shall contain a provision that-

- (a) Invites offerors' attention to this subpart;
- (b) States the nature of the potential conflict as seen by the contracting officer;
- (c) States the nature of the proposed restraint upon future contractor activities; and

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- (d) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation.

**9.507-2 Contract clause**

- (a) If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor must agree to some other restraint, the solicitation shall contain a proposed clause that specifies both the nature and duration of the proposed restraint.

The contracting officer shall include the clause in the contract, first negotiating the clause's final terms with the successful offeror, if it is appropriate to do so (see 9.506(d) of this subsection).

- (b) 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. This period varies. It might end, for example, when the first 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. In every case, the restriction shall specify termination by a specific date or upon the occurrence of an identifiable event.

**9.508 Examples**

The examples in paragraphs (a) through (i) following illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all inclusive, but are intended to help. The contracting officer apply the general rules in 9.505 to individual contract situations.

- (a) Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (i.e., turbines, drive shafts, propellers, etc.). Company A should not be allowed to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant (e.g., fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying components is limited to those for the system only.

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- (b) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A may supply system Y or its components.
- (c) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.
- (d) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under Government supervision and control to refine specifications or to clarify the requirements of a specific acquisition. These companies may supply the item.
- (e) Before an acquisition for information technology is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A should be excluded from the initial follow-on information technology hardware acquisition.
- (f) Company A receives a contract to define the detailed performance characteristics an agency will require for purchasing rocket fuels. Company A has not developed the particular fuels. When the definition contract is awarded, it is clear to both parties that the agency will use the performance characteristics arrived at to choose competitively a contractor to develop or produce the fuels. Company A may not be awarded this follow-on contract.
- (g) Company A receives a contract to prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a curriculum that the agency endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training.
- (h) Company A is selected to study the use of lasers in communications. The agency intends to ask that firms doing research in the field make proprietary information available to Company A. The contract must require Company A to-

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- (1) Enter into agreements with these firms to protect any proprietary information they provide; and
- (2) Refrain from using the information in supplying lasers to the Government or for any purpose other than that for which it was intended.
  - (i) An agency that regulates an industry wishes to develop a system for evaluating and processing license applications. Contractor X helps develop the system and process the applications. Contractor X should be prohibited from acting as a consultant to any of the applicants during its period of performance and for a reasonable period thereafter.

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# EXHIBIT 1b

Metra's Nepotism Policy and Form

**DATE:** September 17, 2010

**TO:** All Employees

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## **Nepotism Policy**

### **Purpose**

Metra is committed to ensuring that all job opportunities are based solely on individual merit and qualifications. Employees and applicants for employment shall not be denied employment or advancement opportunities because of their status as a family or household member of another employee. However, the relatives of employees must not receive any preferential treatment in the employment process. Relatives must follow the same employment procedures as other candidates and will only be considered if they meet the job qualifications of the position for which they are applying, or when being considered for promotion, reclassification, etc. Relatives must not be hired, promoted, or transferred to a permanent position or department where they would be the immediate supervisor or receive direct supervision from a related person, unless the circumstances are extenuating and approval is secured from the Executive Director and the Board. Examples of such circumstances are: the requirement for a special or unique skill that the relative has acquired, lack of other available or appropriate supervisory personnel, union labor agreements that guarantee job placements based upon seniority, and other extraordinary situations.

In such cases, the Executive Director will re-assign the reporting relationship and the Human Resources Department will monitor all employment actions involving these employees in order to avoid favoritism or the appearance of same.

No relatives of the Board of Directors, Executive Director or any employee that has received the level of Senior Director and above will be hired without the consent of the Executive Director and the Board.

### **Definitions**

Relatives are defined as: spouses, domestic partners, co-habitants, children, step-children, brothers, sisters, parents, step-parents, grandparents, grandchildren, nieces, nephews, in-laws (husband, wife, brother, sister, mother, father), guardians and wards, fiancés, any other member of the immediate household, whether or not related by blood, any other relatives not defined, or persons involved in dating relationship. In the case of an “other” relative or “person involved in a dating relationship” to be considered for a position, the Human Resources Department will determine if the relationship is distant enough to be excluded from this definition.

### **Notification to Executive Director**

Any supervisor, manager, director, department head, or superintendent, etc., who becomes involved in a relationship covered by this policy must notify the Human

Resources Department immediately. The Human Resources Department will secure the appropriate approvals and facilitate the handling of the matter.

**Failure to Report Relationship**

Any employee who knowingly violates this policy will be subject to discipline in accordance with Metra policies, up to and including termination.

**Effective Date**

The provisions of this policy shall become effective immediately, and current situations involving relatives will be addressed by the Human Resources Department in accordance with this Policy on a case-by-case basis.

