



Facts about National Environmental Policy Act (NEPA) Third-Party Contracting

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What is NEPA third-party contracting?

Under a NEPA third-party contract, the federal lead agency, project applicant, and environmental consultant enter into an agreement about how a NEPA document such as an EIS will be prepared. The applicant pays for the consultant's services, but the federal lead agency ("third party") is responsible for independently reviewing, analyzing and judging all information in the EIS. Under NEPA regulations, the lead agency is responsible for guiding and participating in EIS preparation, independently evaluating the EIS prior to its approval, and taking responsibility for the EIS scope and contents. 40 CFR 1506.4(c).

Why do contractors often prepare EISs instead of lead agencies?

Third-party EIS contracting is commonly used, across the nation, for applicant projects requiring lead agency approvals. Many lead agencies rely on the experience and expertise of environmental consultants to assist in EIS preparation. Contractors are often used because lead agencies do not have the staff expertise, staff resources or time to conduct the technical analysis necessary to comply with NEPA. Contractors can provide valuable assistance in NEPA process management, as well as technical study preparation.

How are third-party contractors selected?

NEPA regulations provide that the lead agency, not the applicant, is ultimately responsible for selecting the environmental contractor to prepare an EIS. 40 CFR 1506.5(c). The lead agency may use applicant input to make this selection. Federal procurement requirements (such as competitive bidding) do not apply because the lead agency incurs no obligations or costs under the contract, nor does it procure anything

under the contract. Council of Environmental Quality (CEQ) “40 Questions” Guidance, Question 16.

How are conflicts of interest avoided?

In addition to the lead agency being responsible for contractor selection, the NEPA regulations provide another important safeguard. EIS contractors must execute a disclosure statement, prepared by the lead agency, specifying that the contractor has no “financial or other interest in the outcome of the project.” 40 CFR 1506.5(c). This term is interpreted broadly to cover any known benefits other than general enhancement of professional reputation.

When a consulting firm has been involved in developing initial data and plans for a project but does not have a financial or other interest in project decision, the firm is not disqualified from preparing the EIS,. The EIS should clearly state the extent of the firm’s prior involvement to demonstrate conflicts of interest do not exist. CEQ “40 Questions” Guidance, Question 17.

What other safeguards prevent bias in an EIS prepared by a third-party contractor?

To expedite permit processing, it is in the applicant’s interest that the EIS comply with all NEPA requirements. The EIS is required to be an objective, good faith attempt at full disclosure, and could be invalidated in court if it is found to be biased. Cases of third-party NEPA contractor bias are extremely rare; the only sustainable business practice for third-party NEPA contractors is to produce objective, scientifically accurate NEPA documents.

Furthermore, the scoping and Draft EIS comment period provide an opportunity for the public to present any concerns about perceived bias in the information presented. The lead agency is then required to address these concerns prior to completion of the EIS and approval of the permit.