

CALIFORNIA DEPARTMENT OF TRANSPORTATION CONFLICT-OF-INTEREST POLICY COVERING THE DESIGN-BUILD DEMONSTRATION PROGRAM

The purpose of this document is to clarify the California Department of Transportation's (Department) position on potential conflicts of interest which may arise when Consultants or Contractors (Proposers) perform work for local transportation entities or the Department relating to potential design-build projects.

Organizational conflicts of interest can occur when, because of existing or planned activities or because of relationships with other persons, the Proposers is unable or potentially unable to render impartial assistance or advise the Department; the Proposer's objectivity in performing the contract work is or might be otherwise impaired; or the Proposer has an unfair competitive advantage.

The policies and guidelines concerning the organizational conflicts of interest found herein will be specified or referenced in the design-build Request for Qualifications or Request for Proposal documents as well as any contract for the engineering services, inspection, or technical support in the administration of the design-build Program or Projects.

A conflict of interest checklist will be provided to and is to be used by all Proposers, including subconsultants, to assist in screening for potential organizational conflicts of interest. The checklist, which will provide various examples of conflicts, is for the internal use of the Proposers and does not need to be submitted to the Department. The checklist will only serve as a guide, and there may be additional potential conflict situations not covered by the checklist. If a Proposer determines a potential conflict of interest exists that is not covered by the checklist, that potential conflict must still be disclosed.

After review of the checklist, the Proposers must complete the Disclosure of Potential Conflict of Interest and submit it along with the 's proposal. If the Proposer determines a potential conflict of interest exists, it must disclose the potential conflict of interest to the Department; however, such a disclosure will not necessarily disqualify a Proposer from being awarded a contract. The Proposer shall propose measures to avoid, neutralize or mitigate all potential conflicts. To avoid any unfair taint of the selection process, the disclosure form will be provided separate from the bound proposal, and it will not be provided to the selection committee members. The Department's contract management personnel will review the disclosure and the appropriateness of the proposed mitigation measures to determine if the Proposer may be awarded the contract notwithstanding the potential conflict. The Department's contract management personnel may consult with its Legal Division or the Commission. Resolution of the conflict of interest issues is ultimately at the sole discretion of the Department. The Department reserves the right to cancel or amend the resulting contract if the successful Proposer failed to disclose a potential conflict, which it knew or should have known about, or if the Proposer provided information on the disclosure form that is false or misleading.

After award, conflict of interest guidelines and policies shall continue to be monitored and enforced. If an organizational conflict of interest is discovered after award, the Proposer will make an immediate and full written disclosure to the Department that includes a description of the action that the Proposer has taken or proposes to take to avoid or mitigate such conflicts. If an organizational conflict of interest is determined to exist and the Proposer was aware of an organizational conflict of interest prior to award of the contract and did not disclose the conflict, the Department may terminate for default. If the Proposer is terminated, the Department assumes no obligations, responsibilities and liabilities to reimburse all or part of the costs incurred or alleged to have been incurred by the Proposer.

The Department recognizes that the Proposers must maintain business relations with other public and private sector entities in order to continue as viable businesses. The Department will take this reality into account as it evaluates the appropriateness of proposed measures to mitigate potential conflicts. It is not the intent of a Department to disqualify Proposers based merely on the existence of a business relationship with another entity, but rather only when such relationship causes a conflict that potentially impairs the Proposer's ability to provide objective advice to the Department. The Department would seek to disqualify Proposers only in those cases where a potential conflict cannot be adequately mitigated.

A Federal Highway Administration (FHWA) regulation addresses organizational conflicts of interest related to design-build projects financed in whole or in part with federal funds (see 23 CFR 636.116). This regulation provides additional guidance and minimum standards to identify, mitigate or eliminate apparent or actual

organizational conflicts of interest. This regulation also states that to the extent that State-developed organizational conflict of interest standards are more stringent than those contained in the federal regulations, the State standards shall prevail.

The California Board For Professional Engineers And Land Surveyors provide additional guidance and has established conflict of interest rules applicable to those professionals licensed by the Board (see Board Rules 475 and 476). These rules require full disclosure when a licensee has any business association or financial interest that may influence his or her judgement in connection with the performance of professional services and when a licensee provides professional services for two or more clients on a project or related project.

APPROACH

Based upon the guidance of State and Federal laws, codes, regulations and policies, the following approach to conflict of interest will apply:

1. Consultants will NOT be allowed to participate as a Proposer or to join a design-build team if, including but not limited to:
 - A. The Consultant is the Department's general engineering consultant (GEC) to the design-build program. Subconsultants to the GEC that have not yet performed work on the contract to provide services for design-build program may participate as a Proposer or join a design-build team.
 - B. The Consultant has assisted the Department in managing or assisting in the management of this design-build project, including the preparation of Request for Proposal (RFP) language or evaluation criteria.
 - C. The Consultant has conducted preliminary design services for the design-build project such as geometric layouts, bridge-type selection, preliminary bridge design, etc.
 - D. The Consultant performed design work related to the design-build project for other stakeholders.
 - E. The Consultant has performed work on a previous contract that specifically excludes them from participating as a Proposer or joining a design-build team.
 - F. The Consultant is under contract with any other entity or stakeholder to perform oversight on the project after letting.
 - G. The Consultant has obtained any advice from, or discussed any aspect relating to the project or procurement of the project with any person or entity with an organizational conflict of interest, including but not limited to the Consultants of any entity who have provided technical support on the design-build project or program.
2. Consultants who may have potential conflicts of interest in relation to the design-build program or project and wish to participate as a Proposer or join a design-build team must:
 - A. Conform to federal and state conflict of interest rules and regulations.
 - B. Disclose all relevant facts relating to past, present or planned interest(s) of the Proposer's team (including the Proposer, Proposer's proposed consultants, and subconsultants and or subcontractors and their respective chief executives, directors and key personnel) which may result, or could be viewed as an organizational conflict of interest in connection with any design-build procurement, including present or planned contractual or employment relationships with any current employee of the Department.
 - C. Disclose in the response documents to a design-build Request for Qualifications (RFQ) and RFP, all of the work performed in relation to the design-build program and project.
 - D. Provide ALL records of such work performed for the Department so that all information can be evaluated and made available to all potential design-build teams, if necessary.
 - E. Ensure that the Consultant's contract with any related entity to perform services related to the design build project or program has expired or has been terminated.
 - F. In cases where Consultants on different Consultant teams belong to the same parent company, each Consultant describe how the Subconsultants and or subcontractors would avoid conflicts through the qualification bid phases of the project.

Upon review of the information provided above, the Department will determine, in its sole discretion, if the consultant has obtained an unfair competitive advantage.

3. For other potential conflicts of interest not mentioned above, (e.g. employee changing companies, merger/acquisitions of firms, property ownership, business arrangements, financial interest) Consultants shall disclose and address any conflicts of interest or potential conflicts of interest when participating as a Prime or joining a design-build team. The Department will then determine if a conflict of interest exists.
4. The successful Proposer or firms affiliated with this Proposer are prohibited from competing on any agreement to provide construction inspection services for the design-build project. An affiliated firm is one, which is subject to the control of the same persons, through joint ownership or otherwise. Except for subconsultants whose services are limited to providing surveying or material testing information, no subconsultants who provided design services in connection with the design-build project shall be eligible to compete for any agreement to provide construction inspection services for the design-build project.

Notes – The forgoing is provided by way of example, and shall not constitute a limitation on the disclosure obligations.

Unless otherwise stated, “Consultant” or “Proposers” shall mean prime consultant or prime contractor and subconsultants and subcontractors performing services for the prime.

CONFLICT OF INTEREST CHECKLIST INSTRUCTIONS AND DISCLOSURE FORM

Purpose of the checklist. A conflict of interest checklist will be provided to and is to be used by all Proposers to assist in screening for potential organizational conflicts of interest. The checklist is for the internal use of the Proposers and does not need to be submitted to the Department of Transportation (Department).

Definition of "Proposer." As used herein, the word "Proposer" includes both the Prime Contractor/Consultant and all proposed subcontractors/subconsultants.

Checklist is not Exclusive. Please note that this checklist serves as a guide only, and that there may be additional potential conflict situations not covered by this checklist. If a Proposer determines a potential conflict of interest exists that is not covered by this checklist, that potential conflict must still be disclosed.

Use of the Disclosure Form. After review of the checklist, the Proposers must complete the Disclosure of Potential Conflict of Interest and submit it along with the Proposer's proposal. If the Proposer determines a potential conflict of interest exists, it must disclose the potential conflict of interest to the Department; however, such a disclosure will not necessarily disqualify a Proposer from being awarded a contract. To avoid any unfair taint of the selection process, the disclosure form will be provided separate from the bound proposal, and it will not be provided to the selection committee members. The Department's contract management personnel will review the disclosure and the appropriateness of the proposed mitigation measures to determine if the Proposer may be awarded the contract not withstanding the potential conflict. The Department's contract management personnel may consult with its Legal Division. Resolution of the conflict of interest issues is ultimately at the sole discretion of the Department.

Material Representation. The Proposer is required to submit the attached disclosure form either declaring, to the best of its knowledge and belief, that no potential conflict exists, or identifying potential conflicts and proposing remedial measures to mitigate such conflicts. The Proposer is also responsible to update conflict information if such information changes after the submission of the proposal. Information provided on this form will constitute a material representation as to the award of this contract. The Department reserves the right to cancel or amend the resulting contract if the successful Proposer failed to disclose a potential conflict, which it knew or should have known about, or if the Proposer provided information on the disclosure form that is false or misleading.

Approach to Reviewing Potential Conflicts. The Department recognizes that the Proposers must maintain business relations with other public and private sector entities in order to continue as viable businesses. The Transportation Entity will take this reality into account as it evaluates the appropriateness of proposed measures to mitigate potential conflicts. It is not the intent of a Department to disqualify Proposers based merely on the existence of a business relationship with another entity, but rather only when such relationship causes a conflict that potentially impairs the Proposer's ability to provide objective advice to the Department. The Department would seek to disqualify Proposers only in those cases where a potential conflict cannot be adequately mitigated.

Additional Guidance for Professionals Licensed by the California Board For Professional Engineers and Land Surveyors. The California Board For Professional Engineers And Land Surveyors provide additional guidance and has established conflict of interest rules applicable to those professionals licensed by the Board (see Board Rules 475 and 476). These rules require full disclosure when a licensee has any business association or financial interest that may influence his or her judgement in connection with the performance of professional services and when a licensee provides professional services for two or more clients on a project or related project.

CONFLICT OF INTEREST CHECKLIST

An organizational conflict of interest may exist in any of the following cases:

- The Proposer, or its principals, own real property in a location where there may be a positive or adverse impact on the value of such property based on the recommendations, designs or other deliverable required by this contract.
- The Proposer is providing services to another governmental or private entity and the Proposer knows or has reason to believe, that the entity's interest are, or may be, adverse to the state's interest with respect to the specific project covered by this contract. **Comment:** the mere existence of a business relationship with another entity would not ordinarily need to be disclosed. Rather, this focuses on the nature of services commissioned by the other entity. For example, it would not be appropriated to propose on a Department of Transportation (Department) project if a local government has also retained the Proposer for the purposes of persuading the Department to stop or alter the project plans.
- The Proposer is providing design services to a private entity, including but not limited to developers, whom the Proposer knows or has good reason to believe, own or are planning to purchase property affected by the project covered by this contract, when the value or potential uses of such property may be affected by the Proposer's performance of work pursuant to this contract. "Property affected by the project" includes property that is in, adjacent to, or in reasonable proximity to the current or potential right-of-way for a project. The value or potential uses of the private entity's property may be affected by the Proposer's work pursuant to the contract when such work involves providing recommendations for right-of-way acquisition, access control and the design or location of frontage roads and interchanges. **Comment:** this provision does not presume Proposers know nor have a duty to inquire as to all of the business objectives of their clients. Rather, it seeks the disclosure of information regarding cases where the Proposer has a reason to believe that its performance of work under this contract may materially affect the value or viability of a project it is performing for the other entity.
- The Proposer has a business arrangement with a Department employee or immediate family member of such employee, including promised future employment of such person, or a subcontracting arrangement with such person, when such arrangement is contingent on the Proposer being awarded this contract. This item does not apply to pre-existing employment of current or former Department employees, or their immediate family members. **Comment:** this provision is not intended to supercede any statutes or policies applicable to its own employees accepting outside employment. This provision is intended to focus on identifying situations where promises of employment have been made contingent on the outcome of this particular procurement. It is intended to avoid a situation where a Proposer may have unfair access to "inside" information.
- The Proposer has, in previous work for any Transportation Entity, provided design services and such professional services that potentially provides the Proposer with an unfair advantage in preparing a proposal for this project. **Comment:** this provision will not, for example, necessarily disqualify a Proposer who provided surveying or material testing services for this project, however such work must be disclosed and all work products must be provided.
- The Proposer has, in previous work for the Department, been given access to "data" relevant to this procurement or this project that is classified as "private" or "nonpublic" under the California Public Records Act (see GC 6250-6270), and such data potentially provides the Proposer with an unfair advantage in preparing a proposal for this project. **Comment:** this provision is intended to avoid a situation where a Proposer has been provided information that cannot be provided to other Proposers.
- The Proposer has, in previous work for the Department, managed or assisted in the management of the Department's design-build program, performing such work as: helping to create the ground rules for this solicitation, writing this solicitation, or preparing evaluation criteria or evaluation guides for this solicitation.
- The Proposer, or any of its principals, because of any current or planned business arrangement, investment interest, or ownership interest in any other business, may be unable to provide objective advice to the Department.

DISCLOSURE OF POTENTIAL CONFLICT OF INTEREST FORM

Having had the opportunity to review Organizational Conflict of Interest Checklist, the Proposer hereby indicates that it has, to the best of its knowledge and belief:

_____ Determined that no potential organizational conflict of interest exists.

_____ Determined a potential organizational conflict of interest as follows:

Attach additional sheets as necessary.

Describe nature of the potential conflict(s):

Describe measures proposed to mitigate the potential conflict(s):

Signature

Date

If a potential conflict has been identified, please provide name and phone number for a contact person authorized to discuss this disclosure form with Department of Transportation contract personnel.

Name

Phone