DRAFT POLICY

CONFLICT OF INTEREST GUIDELINES AND DISCLOSURE PROCESS

Oregon Department of Transportation Conflict Of Interest Guidelines And Disclosure Process

Background

The integrated nature of Design-Build creates the potential for conflicts of interest. Disclosure, evaluation, and management of these conflicts and of the appearance of conflicts, require attention to state and federal laws, in the contracting process. The Oregon Department of Transportation (ODOT) has crafted Conflict of Interest Guidelines (COI Guidelines) and a Disclosure Process. The COI Guidelines are intended to summarize the key governing standards of federal and state laws, include definitions of key terms, and describe the COI Disclosure Process.

Governing Standards

Both Oregon and federal laws govern disclosure and management of conflicts of interest in highway contracting processes.

Oregon State Standards

The current Oregon statutory framework addresses conflicts of interest in public contracting in a general way---by emphasizing the need for open and impartial procurement methods, or by narrowly prohibiting certain conflicts of interest involving public officials. No Oregon statute or rule comprehensively addresses conflicts of interest in the public contracting arena.

Two statutes establish Oregon's general policies that apply to public contracts that are not public improvement contracts (such as contracts for architecture and engineering services or personal services).

> ORS 279.005 "encourage[s] public contracting competition that supports openness and impartiality to the maximum extent possible," while recognizing that the nature of effective and meaningful competition depends upon the service being procured.
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> ORS 279.007 requires such contracts to be "made under conditions that foster competition among a sufficient number of potential suppliers that offer a wide spectrum of products and services and that represent a broad marketplace," including "[t]he way information on contracting opportunities is provided to suppliers."
>
> ORS chapter 244 prohibits conflicts of interest of public officials. Among the prohibitions are offering a public employee a pledge of future employment based on an understanding that the offer would influence the public employee's official action or judgment.

ODOT's COI Guidelines embody the intent of encouraging competition through openness, impartiality, and public disclosure of relevant information as described in ORS 279.005, ORS 279.007, and ORS Chapter 244.

Federal Standards—Procurements Related To Design-Build and Design-Bid-Build Transactions

Pursuant to 23 USC § 112(b)(3), the Federal Highway Administration (FHWA) has promulgated administrative rules effective January 9, 2003, that affect federally funded Design-Build procurements and related procurements. These rules, which are in 23 Code of Federal Regulations (CFR) Parts 635 and 636, are used as the basis for ODOT's guidelines on the subject and are summarized below. These rules specifically regulate both organizational and individual conflicts of interest. The federal rules define "organizational conflict of interest" as follows:

"*Organizational conflict of interest* means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the owner, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."[1]

The ODOT COI Guidelines define "actual or potential organizational conflict of interest" for contracting firms as follows:

> "An *actual or potential organizational conflict of interest* means that because of other activities or relationships with other persons, including associates of the firm, a firm…
>
> - is unable or potentially unable to render impartial assistance or advice to ODOT,
> - is or might be otherwise impaired in its objectivity in performing the contract work, or
> - has or potentially has an unfair competitive advantage."

The ODOT COI Guidelines define "associate" of the firm as follows:

> "An *associate* of the firm is an employee, executive, director, key project personnel, or proposed consultant, contractor or subcontractor, or any immediate family member of the foregoing."

The main rule on organizational conflicts of interest in Design-Build transactions is 23 CFR § 636.116. This rule affects not only Design-Build procurements, but also "any contract for engineering services, inspection or technical support in the administration of the Design-Build contract." ODOT will apply this rule to all future Design-Build procurements. Following is a summary of this federal rule:

> Generally, a consultant who assists the state in preparing an RFP document may not, subsequently, propose in response to the RFP. However, the state may determine that the consultant does not have a conflict of interest for a subsequent procurement, if the consultant furnished only "low-level" documents that were incorporated into the RFP and made available to all proposers, and did not assist the state in the development of instructions to proposers or evaluation criteria for the RFP.

ODOT's COI Guidelines apply this summary to design-bid-build activities as well. *"Low-level" documents* are defined as program or project related documents, which provide a basic understanding of a specific aspect of the program or project. "Low-level" documents include any engineering or technical work completed prior to the environmental clearance in the National Environmental Policy Act (NEPA) process for Class 1 projects or the Design Approval stage in ODOT's project delivery process for Class 2 & 3 projects, both milestones can reach up to the 30% design level. All work completed prior to these two milestones is considered preliminary design by FHWA and ODOT standards.

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[1] 23 CFR § 636.103.

Illustrative examples of "low-level" documents include, but are not limited to: Engineering Baseline Reports, Environmental Baseline Reports, Environmental Impact Statements, Location Surveys, or Traffic Impact Studies.

These Design-Build regulations also apply to "improper business practices and personal conflicts of interest" of the Owner's selection team members. 23 CFR § 636.117 indicates that Federal Acquisition Regulations (the "FARs"---specifically 48 CFR Part 3, Improper Business Practices and Personal Conflicts of Interest) will apply to the state's selection team members in the absence of relevant state laws and procedures. These regulations require government business to be "above reproach," conducted "with complete impartiality and with preferential treatment for none" and with "the highest degree of public trust and an impeccable standard of conduct" to avoid "even the appearance of a conflict of interest."

In design-bid-build transactions, where engineering services are procured separately from the construction services, ordinarily the consulting firm providing the engineering services is not eligible to bid on the construction work for the project. This understanding is based upon fairly broad provisions set forth in Section 1.33 of Title 23 of the Code of Federal Regulations. The relevant portions of the regulation provide as follows:

> "...No engineer, attorney, appraiser, inspector or other person performing services for a State or a governmental instrumentality in connection with a project shall have, directly or indirectly, a financial or other personal interest, other than his employment or retention by a State or other governmental instrumentality, in any contract or subcontract in connection with such project."

For purposes of this provision, the term "project" is defined as "An undertaking by a State highway department for highway construction, including preliminary engineering, acquisition of rights-of-way and actual construction, or for highway planning and research, or for any other work or activity to carry out the provisions of the Federal laws for the administration of Federal aid for highways."[2] While the terms "engineer" and "engineering" are not defined in this regulation, the Brooks Act (governing the procurement of architectural and engineering services for federal projects) defines "architectural and engineering services" or A&E Services as follows:

> "(A) professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;
>
> "(B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
>
> "(C) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering,

[2] 23 CFR § 1.2.

drawing reviews, preparation of operating and maintenance manuals, and other related services." 40 USC § 1101(2).

Public disclosure of A&E Services or products is an important consideration in determining if an organizational conflict of interest exists. The ODOT definition for *"public disclosure"* is as follows: the A&E product or service is available for public review and analysis for a reasonable amount of time, typically at least thirty (30) calendar days.

COI Disclosure Process

The identification, assessment, and management of real or potential conflicts of interest is a joint task between ODOT and the private sector. It requires both parties to work together in an atmosphere of candor and accountability. As the owner, ODOT makes the final determination as to the adequacy of any COI management plan offered by the private sector.

ODOT's COI determination is based on a number of factors such as:

- ✓ Situational Facts – description of the situation and all known facts specific to the actual or perceived COI
- ✓ Type of Work - specific product or service and contract(s) involved
- ✓ A&E Services - specific skill set applied
- ✓ Relationship to Management - specific interactions with ODOT decision-makers
- ✓ Public Disclosure - timing and availability of product or service

It is important to understand that the specific facts disclosed in any COI situation will be unique to that situation. Therefore, the decisions and conclusions reached in one situation may or may not be directly applicable to another. For example, the definition of ***"low-level" documents*** *does not isolate a firm producing them from a potential COI situation. The ultimate determination will take into account the other factors described above.*

Exhibit A: Proposer's Declaration - Conflict of Interest

Failure of Proposer to submit this form as part of the final proposal document will designate Proposer as Non-Responsive to this solicitation.

1. Is any Associate of this firm (see definition in ODOT COI Guidelines) a former employee or family member of an employee of ODOT?

2. Does any associate of the firm have a conflict of interest with regard to any member of the RFP selection team?

3. Did this firm, or any Associate or this firm, participate in preparing any part of the RFP or any documents or reports to which the RFP refers, including environmental baseline data and available engineering reports?

4. Does this firm, or any Associate of this firm, have any past, present or currently planned interests which are an actual or potential organizational conflict of interest (as defined in ODOT's COI Guidelines), with respect to performing the work for the ODOT under the present RFP?

If the answer to any of the above questions is "no," I have so stated. If the answer to any of the above questions is "yes," I have (a) furnished all relevant facts and (b) identified any actions that must be taken to avoid, neutralize, or mitigate such conflict of interest (e.g. communications barriers, restraint or restriction upon future contracting activities, or other precaution).

My signature certifies that, to the best of my knowledge, information and belief, and after thorough review of the firm's books and records and after reasonable inquiry with knowledgeable persons within the firm, this firm has no business or personal relationships with any other companies or persons that could be considered as a conflict of interest or potential conflict of interest to the ODOT, and that there are no principals, officers, agents, employees, or representatives of this firm that have any business or personal relationships with any other companies or persons that could be considered as a conflict of interest or a potential conflict of interest to the ODOT, pertaining to any and all work or services to be performed as a result of this request and any resulting contract with the ODOT, except as disclosed on the present form.

I hereby certify that I am authorized to sign as a Representative for the Firm:

Complete Legal Name of Firm: _____

Order from Address: _____

Remit to Address: _____

Fed ID No.: _____

Signature: _____

Name (type/print): _____

Title: _____

Telephone: (____)_____ **Fax No.:** (____)_____

Date: _____

To receive consideration for award, this signature sheet must be returned to Purchasing & Contract Management along with, but physically not bound to, your proposal.