

Approach to Conflict Management

Mn/DOT Design-Build Program

May 13, 2008

BACKGROUND

The purpose of this memo is to clarify Mn/DOT's position on potential conflicts of interest which may arise when consultants or contractors perform work for Mn/DOT relating to a potential design-build project.

DISCUSSION

State and federal laws and regulations govern organizational conflicts of interest in Mn/DOT procurements related to design-build projects.

Minnesota Statutes §16C.04 (subd. 3) applies to all state procurements, and requires that reasonable efforts be made to avoid, mitigate, or neutralize organizational conflicts of interest. Minnesota Statutes §16C.02 (subd. 10a) states "Organizational conflict of interest means that because of existing or planned activities or because of relationships with other persons: (1) the vendor is unable or potentially unable to render impartial assistance or advice to the state; (2) the vendor's objectivity in performing the contract work is or might be otherwise impaired; or (3) the vendor has an unfair advantage".

In addition, the Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design (AELSLAGID) has promulgated a conflict of interest rule applicable to professionals licensed by the board (see Minnesota Rules part 1805.0300)

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, hereinafter the "Regulation"). The Regulation supplements, and does not replace, applicable Minnesota laws and rules.

In general, the Regulation specifies that state statutes or policies concerning organizational conflict of interest should be specified or referenced in the design-build RFQ or RFP documents as well as any contract for engineering services, inspection, or technical support.

The Regulation also states that consultants and/or sub-consultants who assist the owner in the preparation of RFP documents will not be allowed to participate as an offeror or join a team submitting a proposal in response to the RFP. However, a contracting agency may determine that there is not an organizational conflict of interest for a consultant or sub-consultant where:

- i. The role of the consultant or sub-consultant was limited to providing preliminary design, reports, or similar "low-level" documents that will be incorporated into the RFP, and did not include assistance in the development of instructions to offerors or evaluation criteria, or
- ii. All documents and reports delivered to the agency by the consultants or sub-consultants are made available to all offerors

APPROACH

Based upon the guidance of state law and the Regulation, the following approach to conflict of interest will apply:

1. Consultants will NOT be allowed to participate as an offeror or to join a design-build team if:
 - a. The Consultant is Mn/DOT's General Engineering Consultant (GEC) to the design-build program. Sub-consultants to the GEC that do not perform work on the design-build project may participate as an offeror or join a design-build team.
 - b. The Consultant has prepared Request for Proposal (RFP) language or a staff approved geometric layout. (See note 2).
 - c. The Consultant has conducted preliminary bridge design, prepared preliminary bridge plans or participated in bridge type selection. (See notes 1, 2 & 3)
 - d. Consultant's who perform work related to the design-build project for other key stakeholders.
 - e. The Consultant has a contract with Mn/DOT which specifically excludes them from participating as an offeror or joining a design-build team.
 - f. The Consultant is under contract with Mn/DOT or other stakeholders to perform oversight on the project after letting.
2. For Consultants and sub-consultants who performed work for Mn/DOT or other key stakeholders in relation to the project, and wish to participate as an offeror or join a design-build team must:
 - a. Conform to federal and state conflict of interest rules and regulations.
 - b. Disclose in the response documents to a design-build Request for Qualification (RFQ) and RFP all the work performed in relation to the project.
 - c. Provides ALL records of work performed to Mn/DOT so that all information can be made available to all potential design-build teams.
 - d. The Consultant's contract with Mn/DOT (or other key stakeholders) to perform the services related to the design-build project has expired or has been terminated.

Upon review of the information provided above, Mn/DOT will determine, in its sole discretion, if the Consultant has obtained an unfair competitive advantage.
3. For other potential conflict of interest cases not mentioned above, (e.g. employees changing companies, merger/acquisitions of firms), Consultants shall disclose and address any conflicts of interests or potential conflicts of interest when participating as an offeror or joining a design-build team. Mn/DOT will then determine if a conflict of interest exists.

General Notes - Unless otherwise stated, "Consultant" shall mean prime Consultants and Sub-Consultants performing services for the prime consultant.

Note (1) - Consultants may join a design-build team after the project letting (subject to 1d and 1e)

Note (2) - Consultants will be allowed to participate as an offeror or join a design-build team if:
a) a period of at least five year as occurred following the completion of the final deliverables, or expiration/termination of the contract with Mn/DOT for the work related to the design-build project has occurred, or, b) the project requirements or scope of the project have significantly

changed, and c) the consultant and can demonstrate that there is no longer a competitive advantage.

Note (3) – Bridge feasibility or scoping studies which identify viable bridge alternatives without selecting a single preferred bridge type are exempt from this clause. Consultants work on bridge visual quality manuals and the visual quality process will be evaluated on a project-specific basis.