

Approach to Managing Organizational Conflicts of Interest
MnDOT Design-Build Program
January 18, 2018ⁱ

APPLICATION

This approach applies to firms wishing to be part of a design-build team, as well as to firms interested in working for MnDOT to provide engineering services, inspection, or technical support in the administration of the design-build contract.ⁱⁱ This document provides general guidance only – MnDOT evaluates each potential conflict of interest on a case-by-case basis. MnDOT has provided this approach so that potential design-build team members may (1) understand the obligation to disclose potential conflicts, and (2) have general information about potential conflicts that will or may affect a firm’s ability to be part of a design-build team or to work for MnDOT on a design-build project.

DEFINITION

State and federal laws define “Organizational Conflict of Interest”.

- Minnesota lawⁱⁱⁱ says 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.”
- Federal Law^{iv} says 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 advice or assistance 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.”

STATUTORY REQUIREMENTS

State and federal laws govern how MnDOT must deal with organizational conflicts of interest related to design-build procurements. The federal law sets minimum standards; state law may be stricter than the federal law.

- State law^v requires a contracting agency to avoid, mitigate, or neutralize organizational conflicts of interest.
- Federal law^{vi} states that “The owner should award the [design-build] contract to the apparent successful offeror unless an organizational conflict of interest is determined to exist that cannot be avoided, neutralized, or mitigated.” Federal design-build regulations^{vii} state “Consultants and/or sub-consultants who assist the owner in in the preparation of an RFP document 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 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 provision of preliminary design, reports, or similar “low-level” documents that will be incorporated into the RFP and did not include assistance in development of instructions or offeror or evaluation criteria, or (ii) where all documents and reports delivered to the agency by the consultant or sub-consultant are made available to all offerors.
- Additional State rules^{viii} apply to professionals licensed by the Board of Engineering. Those rules provide “A licensee shall avoid accepting a commission where duty to the client or the public would conflict with the personal interest of the licensee or the interest of another client. Prior

to accepting such employment the licensee shall disclose to a prospective client such facts as may give rise to a conflict of interest.”

DISCUSSION

MnDOT will evaluate potential organizational conflicts of interest on a case-by-case basis. MnDOT will also decide whether to “avoid, mitigate, or neutralize” conflicts of interest on a case-by-case basis. MnDOT seeks to balance consultant’s business need to accept work from many clients with the public expectation that public dollars are not used for a private benefit. MnDOT seeks to mitigate or neutralize conflicts where possible, but some conflicts must be completely avoided. If MnDOT’s guidance in this document is more stringent than the federal regulations, MnDOT’s standards will prevail. MnDOT’s Contract Management Section, in consultation with the MnDOT Project Manager and Design-Build Program Manager, will provide the evaluation and determination of potential organizational conflicts of interest and whether there is a possibility of mitigating or neutralizing a conflict.

APPROACH

1. Notice of potential design-build project. Whenever possible, MnDOT should indicate to firms proposing on engineering and related services contracts that a project is planned to be, or may be, a design-build project. MnDOT also should post a list of projects with a strong potential to be programmed for design-build delivery.
2. Participating as an offeror or design-build team member.
 - A firm will be precluded from participating as an offeror or design-build team member where the firm:
 - i. Is prohibited from participating by 23 CFR §636.116;
 - ii. Is MnDOT’s design-build program “General Engineering Consultant” (GEC);
 - iii. Is a subconsultant to the GEC and has performed work on the RFP or project other than “low level”^{ix} work;
 - iv. Has prepared RFP language or recommended evaluation criteria for the project;
 - v. Has performed work, either as a prime consultant or as a subconsultant, other than “low level” work, on the preliminary design, including preparing the staff-approved layout, preparing preliminary plans, or preparing environmental documents (see notes 1 & 2);
 - vi. Has participated in bridge type selection (see notes 1, 2, and 3);
 - vii. Has performed or is performing related work for a project stakeholder (such as local government) within the last three years and that work is incompatible with being an offeror or team member (see note 4);
 - viii. Has a contract with MnDOT that prohibits the firm from participating as an offeror or joining a design-build team;
 - ix. Is under contract with MnDOT or other stakeholders to perform oversight on the project after letting.
 - A firm which has performed project-related work for MnDOT or another key stakeholder may participate as an offeror or design-build team member where (1) MnDOT determines this will not give the firm a competitive advantage, and (2) the firm does all of the following:
 - i. Conforms to state and federal conflict of interest laws and regulations;
 - ii. Discloses the project-related work in the response to the Request for Qualifications and/or Request for Proposals as required by those documents;

- iii. Provides all records of work performed to MnDOT so that MnDOT can make all relevant information available to all potential teams;
- iv. Ends any contract involving project-related work before the SOQ is submitted (by completing the work, having the contract terminated, or being released from the contract).

3. Participating in Oversight, Verification, and Testing Contracts.

- A firm which is part of the design-build team will be precluded from performing design verification, construction oversight, inspection, or QA/QC testing for MnDOT or other stakeholders on the project.
 - A firm participating as part of a design-build team may provide “low level” services^x as a subconsultant to a design or construction oversight consultant where MnDOT determines the relationship will not impair the subcontractor’s objectivity in performing the work, and where the subconsultant provides a mitigation plan accepted by MnDOT. The mitigation plan must provide, at a minimum: (1) separation of personnel working for the contractor -vs- MnDOT, (2) steps to avoid access to and sharing of project-related data, whether physical or digital, (3) escalation of project issues to senior executives of the subconsultant and prime consultant, and (4) a requirement to provide prompt notice to MnDOT when the subconsultant recognizes a potential conflict may exist related to the subconsultant’s work.
4. Any potential or perceived conflict not covered by this approach must be disclosed to MnDOT at the earliest opportunity.
5. A firm may disclose a potential conflict of interest at any time, and is encouraged to do so before the SOQ is submitted. MnDOT will review all pertinent information in accordance with applicable laws and this approach paper, and will provide a determination to the firm. A firm must promptly provide all information requested by MnDOT. A firm will be under a continuing obligation to update its disclosure if there is any material change in the facts or circumstances of the potential conflict.

NOTES:

(1) Consultants may join a project team *after the project letting*.

(2) Consultants will be allowed to participate as an offeror or join a design-build team if the consultant can demonstrate to MnDOT’s satisfaction that there will be no competitive advantage and: (a) the consultant completed the contract work one year prior to submission of an SOQ and is under no further material obligation under the contract, or (b) project scope or requirements have significantly changed since the consultant completed its work. Consultants must have provided all records of work performed to MnDOT so that MnDOT can make all relevant information available to all potential teams. MnDOT will not cancel or terminate contracts early in order to accommodate a consultant’s desire to meet the one-year exclusion period.

(3) Bridge feasibility or scoping studies which identify viable bridge alternatives without selecting a single preferred bridge type are exempt from this clause. Consultant work on bridge visual quality process/manual will be evaluated on a case-basis to ensure there is no competitive advantage.

(4) Work that would be considered “incompatible” includes, but is not limited to, attempting to influence selection of alignment or bridge type on behalf of a stakeholder,

ⁱ Replaces “Approach to Conflict Management, dated May 13, 2008

ⁱⁱ 23 CFR §636.116 (a) (2016)

ⁱⁱⁱ Minnesota Statutes §16C.02, subd. 10a (2014)

^{iv} 23 CFR §636.103

^v Minnesota Statutes §16C.04, subd. 3 (2014)

^{vi} 23 CFR §636.116 (a)(3)

^{vii} 23 CFR §636.116 (a)(1)

^{viii} Minnesota Rules Part 1805.0300

^{ix} “low level work” for this section 2. “Approach” includes, but is not limited to, such work as: surveying, traffic field work, utility identification, or drilling and testing associated with geotechnical or environmental investigations where the firm is merely providing the results of the investigation. Consultants must provide all records from the low level work performed to MnDOT so that MnDOT can make all relevant information available to all potential teams.

^x “low- level services” for this section includes, but is not limited to, such work as: utility identification, construction staking surveys, ground water monitoring, or other drilling and testing associated with geotechnical or environmental monitoring.