

WISCONSIN DEPARTMENT OF TRANSPORTATION

DESIGN-BUILD CONFLICT OF INTEREST POLICY

BACKGROUND

The purpose of this policy is to clarify the Wisconsin Department of Transportation's (WisDOT) position on potential conflicts of interest which may arise when consultants or contractors perform work for WisDOT relating to a potential design-build project. This policy provides general guidance only, WisDOT evaluates each potential conflict of interest on a case-by-case basis.

Organizational conflicts of interest can occur when a consultant, sub-consultant, or contractor, sub-contractor (Offeror) is:

- Unable or potentially unable to render impartial assistance to or advise WisDOT,
- Their objectivity in performing the contract work is or might be otherwise impaired, or
- The Offeror has an unfair competitive advantage.

DISCUSSION

State and federal laws and regulations govern organizational conflicts of interest in WisDOT procurements related to design-build projects. WisDOT takes policy adherence very seriously and not only expects staff and consultants to follow policy but also to notify the WisDOT Chief Statewide Consultant Engineer of known violations of stated policies. WisDOT and Offeror staff are expected to act in an ethical manner and hold others to ethical standards.

Follow WisDOT's policy on engineering and design service conflicts of interest in the Wisconsin Department of Transportation Facilities Development Manual (FDM), Chapter 8, Section 5-3.

In addition, The Wisconsin Examining Board of Architects, Landscape Architects, Professional Engineers, Designers, Professional Land Surveyors, and Registered Interior Designers has promulgated a conflict-of-interest rule applicable to professionals licensed by the board (see Wisconsin Administrative Code, A-E-8.05).

The Code of Federal Regulations 23 CFR § 636.116, (CFR Provision) addresses organizational conflicts of interest related to design-build projects financed in whole or in part with federal funds. The CFR Provision supplements, and does not replace, applicable Wisconsin laws and rules.

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

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The CFR Provision 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 Offeror 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 the FDM, Chapter 8, Wisconsin Administrative Code, A-E 8.05, and the 23 CFR § 636.116, the following approach to conflict of interest will apply:

1. Offeror will NOT be allowed to participate as an Offeror or join a design-build team if:
 - a. The Offeror is WisDOT’s General Engineering Consultant (GEC) to the design-build program or project. 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 Offeror has prepared Request for Proposal (RFP) language.
 - c. The Offeror has prepared an approved geometric layout, conducted preliminary bridge design, prepared preliminary bridge plans or participated in bridge type selection.
 - i. Consultants may be allowed to participate as an Offeror or join a design-build team if:
 1. A period of at least one year has occurred following the completion of the final deliverables, or the contract with WisDOT for the work related to the design-build project has expired or terminated; or the project requirements or scope of the project have significantly changed; and
 2. the consultant can demonstrate that there is no longer a competitive advantage.
 - ii. Bridge feasibility or scoping studies which identify viable bridge alternatives without selecting a single preferred bridge type are exempt from this clause.

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- d. The Offeror has developed or had access to the project estimate that includes a detailed breakdown of the estimated quantities.
 - e. The Offeror has performed work related to the design-build project for other key stakeholders.
 - f. The Offeror has a contract with WisDOT which specifically excludes them from participating as an Offeror or joining a design-build team.
 - g. The Offeror is under contract or pursuing a contract with WisDOT or other stakeholders to perform oversight on the design-build project after letting.
2. For Offerors who performed work for WisDOT or other key stakeholders in relation to the design-build project, and wish to join a design-build team must:
- a. Conform to federal and state conflict of interest rules and regulations.
 - b. Provide a Conflict-of-Interest Disclosure statement in the response documents to a design-build RFQ and RFP addressing any situation that may result or could be viewed as an organizational conflict of interest in relation to the design-build project.
 - c. Provides ALL records of work performed to WisDOT so all information can be made available to all potential design-build teams.
 - d. Provide evidence that the Offeror's contract with WisDOT (or other key stakeholders) to perform the services related to the design-build project has expired or has been terminated.

OFFEROR'S RESPONSIBILITIES

It is the responsibility of the Offerors to reasonably and in good faith anticipate, identify, and disclose to WisDOT any actual or potential conflict, fully explaining the conflict or potential conflict and providing any recommendations or protocol to mitigate the conflict as applicable. In addition to complying with the requirements of this Policy, the Offeror must also comply with any other professional responsibilities, ethics code of conduct or law applicable to them.

Offerors must disclose in their Statement of Qualifications (SOQ) and proposal all work performed in relation to the subject project and the WisDOT design-build program. They must also subsequently provide prompt notice to WisDOT when a potential conflict arises or is identified related to their work at any time during procurement, design or construction.

If a potential Offeror is unsure whether an actual conflict does exist or believes that an actual conflict may be mitigated, it may submit a request to WisDOT for review and determination.

Provide WisDOT, at a minimum (as applicable):

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- Disclosure of the conflict or potential conflict
- Reasons the potential team member feels a potential conflict is not a conflict
- Disclosure of any work completed or under contract related to the subject design-build project
- Any work products from such work or contract
- Evidence a potential team member has no access to information that would provide an advantage in the design- build procurement process
- Proposed actions to avoid access to and sharing project-related physical, oral, or digital data
- A proposed protocol to mitigate the conflict

In cases where Offerors on different design-build teams belong to the same parent company, each potential team member must describe how conflicts would be avoided through project procurement.

Upon review of the information provided above, WisDOT will determine, in its sole discretion, if the Offeror has obtained an unfair competitive advantage. Based upon a review of the information submitted, WisDOT will make a written determination of whether the potential Offerors interests create an actual or potential organizational conflict of interest and identify any actions that must be taken to avoid, neutralize, or mitigate such conflict. Include the written determination in the response to the RFQ and RFP.

For other potential conflict of interest cases not mentioned above, (including but not limited to, employees changing companies, merger/acquisitions of firms), Offerors shall disclose and address any conflicts of interest or potential conflicts of interest according to this policy. WisDOT will then determine, in its sole discretion, if a conflict of interest exists.