

**STANDARD INSTRUCTIONS SUBSECTION 33.4 FORMS TO BE SUBMITTED BY
SUCCESSFUL PROPOSER**

**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 (“Agency”) has crafted *Conflict of Interest Guidelines* (“COI Guidelines”) and a Disclosure Process. The COI Guidelines are intended to summarize the key governing Standards of State and federal Laws, include definitions of key terms, and describe the COI Disclosure Process.

Governing Standards

Both State and federal Laws govern disclosure and management of conflicts of interest in Highway contracting processes. ODOT also has a Code of Conduct Policy for conflicts of interest regarding the employment of former ODOT employees, which is explained below.

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.

Oregon’s general policy of establishing a sound and responsive public contracting system is articulated in ORS 279A, and among the elements listed, includes the following:

ORS 279A.015(2): “Instill public confidence through ethical and fair dealing, honesty and good faith on the part of government officials and those who do business with the government.”

ORS 279A.015(5): “Allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement.”

ORS chapter 244 articulates a general policy of prohibiting 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.

These COI Guidelines embody the intent of encouraging competition through openness, impartiality, and public disclosure of relevant information as described in ORS 279A.015 and ORS Chapter 244.

State Code of Conduct Regarding Former ODOT Employees

When an ODOT employee has performed functions for ODOT in any phase or stage of a procurement, including but not limited to drafting specifications, reviewing or scoring bids or proposals, authorizing services or assigning work, or awarding a contract, and the employee leaves ODOT and is employed by an Entity that has a contract with ODOT or is a bidder or proposer on a procurement with the intent of signing a contract with ODOT, Entity shall be subject to specific restrictions described below for a two-year period from the date the ODOT employee last performed the functions cited above.

This two-year prohibition applies to work performed under any such contract and failure to disclose such relationship or to remedy such potential violation shall result in the rejection of Entity's bid or proposal or cancellation of the contract with ODOT at any time. It would also constitute grounds for cancellation of an Entity's prequalification with ODOT and for a determination of Entity not being a responsible contractor for future procurements.

Entity shall declare if a former ODOT employee works for Entity, the job the employee previously performed for ODOT, and the role the employee now serves for Entity. Use of the former ODOT employee by Entity in any role relating to the same or substantially similar ODOT procurement or contract for which the employee participated while employed by ODOT is prohibited. This prohibition applies to an employee for only the two-year period immediately following the date the employee left ODOT employment. Each such declaration by an Entity shall include a signed statement by the former ODOT employee describing the proposed role of the employee in the particular procurement or contract.

Federal Standards

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 the Agency'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." (23 CFR § 636.103)

The COI Guidelines define "actual or potential organizational conflict of interest" for contracting Entities 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 Entity, an

Entity:

- is unable or potentially unable to render impartial assistance or advice to the Agency
- is or might be otherwise impaired in its objectivity in performing the Contract Work
- has or potentially has an unfair competitive advantage”

The COI Guidelines define “Associate” of the Entity as follows:

“An Associate of the Entity 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.” The Agency 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.

“*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 the Agency’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.

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 Agency’s Proposal Evaluation 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 Agency’s Evaluation 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 Entity 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.” 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, 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 Agency 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 the Agency and the private sector. It requires both parties to work together in an atmosphere of candor and accountability. As the owner, the Agency makes the final determination as to the adequacy of any COI management plan offered by the private sector.

The Agency'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 Agency 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 an Entity producing them from a potential COI situation. The ultimate determination will take into account the other factors described above.

FORM COI

Proposer/Major Subcontractor Conflict of Interest Disclosure

Project Name: _____

Key Number: _____

Proposer: If Proposer’s organization has changed or additional potential conflicts of interest have developed since Proposer’s submittal of Form COI at the Request for Qualifications (“RFQ”) stage, Proposer shall submit this Form COI with its Proposal, completing Parts 1 and 2 and making a full disclosure of all potential 23 CFR 636 organizational conflicts of interest other than those already disclosed in the Form COI submitted at the RFQ stage. If Proposer’s organization has not changed and no additional potential conflicts of interest have developed since initial submittal of Proposer’s Form COI, Proposer may, in lieu of submitting a new Form COI, submit a statement described in Part 1-A, A17.1, that no organizational conflicts currently exist other than those already disclosed in Proposer’s initial Form COI included with Proposer’s Statement of Qualifications (“SOQ”).

Major Subcontractor: Proposer shall include in its Proposal a completed Form COI from each Major Subcontractor for whom Proposer did not submit a Form COI at the RFQ stage. For each Major Subcontractor for whom Proposer did submit a Form COI at the RFQ stage, but whose organization has changed or additional potential conflicts of interest have developed since initial submittal, Proposer shall require each such Major Subcontractor to complete Parts 1 and 2 of a new Form COI, making a full disclosure of all potential 23 CFR 636 organizational conflicts of interest other than those already disclosed in the Form COI submitted at the RFQ stage, and Proposer shall include each such new Form COI and disclosure with its Proposal. If a Major Subcontractor’s organization has not changed and no additional potential conflicts of interest have developed since initial submittal of Form COI for each such Major Subcontractor, Proposer may, in lieu of submitting a new Form COI from each such Major Subcontractor, obtain from each such Major Subcontractor and include in its Proposal a statement described in Part 1-A, A17.2, that no organizational conflicts currently exist other than those already disclosed by such Major Subcontractor and included in Proposer’s SOQ.

PART 1: PROPOSER’S/MAJOR SUBCONTRACTOR’S DECLARATION

1. Is any Associate of this firm (see definition in the COI Guidelines) a former employee or family member of an employee of the Agency? Yes____ No____
2. Does any associate of the firm have a conflict of interest with regard to any member of the Proposal Evaluation Team? Yes____ No____
3. Did this firm, or any Associate of 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? Yes____ No____
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 the COI Guidelines) with respect to performing the Work for the

Agency under the present RFP? Yes____ No____

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," attached to this Declaration 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 below 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:

1. This firm has no business or personal relationships with any other companies or persons that could be considered a conflict of interest or potential conflict of interest to the Agency, and
2. 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 a conflict of interest or a potential conflict of interest to the Agency,

pertaining to any and all Work or services to be performed as a result of this request and any resulting contract with the Agency, except as disclosed on the present form.

PART 2: SIGNATURE AND FIRM INFORMATION

I hereby certify that I am authorized to sign as a Representative for the Firm regarding the foregoing affirmations and attached representations.

Complete Legal Name of Firm:

Address:

Fed ID No.:

Signature:

Name (type/print):

Title:

Telephone No.:

Fax No.:

Date:

ATTACH ALL NECESSARY DISCLOSURES AND EXPLANATIONS TO THIS FORM COI.