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## CALIFORNIA TRANSPORTATION COMMISSION

### GUIDELINES FOR ORGANIZATIONAL CONFLICT OF INTEREST POLICY FOR THE DESIGN-BUILD DEMONSTRATION PROGRAM

The Design-Build Demonstration Program was established in Chapter 6.5 (commencing with Section 6800) of Part 1 of Division 2 of the Public Contract Code, as added by Chapter 2 of the Statutes of 2009 (Senate Bill 4, Second Extraordinary Session). The purpose of the program is described in Section 6800: “The design-build method of procurement authorized under this chapter should be evaluated for the purposes of exploring whether the potential exists for reduced project costs, expedited project completion, or design features that are not achievable through the traditional design-bid-build method. A demonstration program will allow for a careful examination of the benefits and challenges of design-build contracting on a limited number of projects. This chapter shall not be deemed to provide a preference for the design-build method over other procurement methodologies.”

The Demonstration Program authorizes use of the design-build method of procurement by local transportation entities for up to five projects and by the Department of Transportation (Department) for up to ten projects, subject to project authorization by the California Transportation Commission. The Demonstration Program requires that projects authorized by the Commission shall vary in size, type, and geographical location, and that the Commission shall also determine whether a transportation entity may award a design-build contract based on lowest responsible bid or best value. In addition to project selection and authorization, the Demonstration Program requires the Commission to: develop guidelines for standard conflict of interest policy, develop a standard form of payment and performance bond, and establish a peer review committee to conduct an evaluation of the 15 projects authorized by the Commission. The policy guidance for project authorization was adopted by the Commission in September 2009. The development of a standard form of payment and performance bond and the establishment of a peer review committee will be addressed separately.

The purpose of these guidelines is to set forth the Commission’s policy and expectations for the development of an organizational conflict of interest policy by the Department or a local transportation entity entering into design-build contracts authorized under this Demonstration Program. Nothing contained in these guidelines is intended to limit, modify, or otherwise alter the applicability or effect of relevant (federal and state) laws, rules, and regulations. All such laws, rules, and regulations shall apply in their normal manner irrespective of these guidelines.

Specific to organizational conflict of interest, Section 6803(e) states: “*The commission shall develop guidelines for a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of a person or entity that performs services for the transportation entity relating to the solicitation of a design-build project, to submit a proposal as a design-build entity, or to join a design-build team. This conflict-of-interest policy shall*

*apply to each transportation entity entering into design-build contracts authorized under this chapter.”*

The integrated nature of design-build procurement 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. Both state and federal laws govern disclosure and management of conflicts of interest in design and construction procurement processes. These guidelines embody the intent of encouraging competition through openness, impartiality, and public disclosure of relevant information. These guidelines will apply to all design-build contracts authorized under this Demonstration Program.

Organizational conflict of interest requirements that apply to design-build procurement for transportation projects, financed in whole or in part with federal funds, are addressed in Title 23 of the Code of Federal Regulations (CFR). The CFR require that state statutes or policies concerning organizational conflict of interest should be specified or referenced in the design-build request for qualifications (RFQ) or proposal (RFP) document as well as any contract for engineering services, inspection or technical support in the administration of the design-build contract, provide guidance and minimum standards to identify, mitigate or eliminate apparent or actual organizational conflicts of interest, and allow state standards to prevail if more stringent than the federal standards (23 CFR 636.116).

The CFR 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 CFR also address conflict of interest standards that apply to individuals who serve as selection team members for the owner (23 CFR 636.117): “State laws and procedures governing improper business practices and personal conflicts of interest will apply to the owner’s selection team members. In the absence of such state provisions, the requirements of 48 CFR Part 3, Improper Business Practices and Personal Conflicts of Interest, will apply to selection team members.”

California laws and regulations establish the conflict of interest policy for state and local government agencies and require that these agencies adopt and promulgate a conflict of interest code, assigning disclosure categories and specifying the types of interests to be reported. In addition, the California Board for Professional Engineers and Land Surveyors provides guidance and has established conflict of interest rules applicable to those professionals licensed by the Board. These rules require full disclosure when a licensee has any business association or financial interest that may influence his or her judgment in connection with the performance of professional services and when a licensee provides professional services for two or more clients on a project or related project.

The responsibility to avoid or neutralize organizational conflict of interest ultimately rests with the person or firm potentially conflicted. Nevertheless, a contracting agency retains the sole discretion to determine on a case-by-case basis whether a conflict exists and whether actions

may be appropriate to avoid or neutralize such conflict. The determination regarding the existence of an actual or potential conflict or whether the conflict may be avoided or neutralized must be based on facts made available at the time the determination is made. Unknown facts or a change in the facts over time may necessitate a re-evaluation of the original conclusion. The contracting agency's concern with conflict must be balanced against the need to promote competition in the design-build procurement process. With that, these guidelines neither purport to address every situation that may arise in the context of a project nor to mandate a particular decision or determination by a contracting agency when faced with facts similar to those described herein.

In order to promote fairness and impartiality, conflict of interest policies and procedures by a contracting agency should address the following. The RFQ and/or RFP should also include standardized checklists or forms in order to collect and evaluate pertinent information.

- A. State statutes or policies concerning organizational conflict of interest should be specified or referenced in the design-build RFQ or RFP document as well as any contract for engineering services, inspection or technical support in the administration of the design-build contract.
  - 1) Consultants and/or sub-consultants who assist a contracting agency in the preparation of an RFQ or 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 to offerors 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.
  - 2) All solicitations for design-build contracts, including related contracts for inspection, administration or auditing services, must include a provision which:
    - i. Directs offerors attention to the contracting agency's conflict of interest policies;
    - ii. States the nature of the potential conflict as seen by the contracting agency;
    - iii. States the nature of the proposed restraint or restrictions (and duration) upon future contracting activities, if appropriate;
    - iv. Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation; and
    - v. Requires offerors to provide information concerning potential organizational conflicts of interest in their proposals. The apparent successful offerors must disclose all relevant facts concerning any past, present or currently planned interests which may present an organizational conflict of interest. Such firms must state how their interests, or those of their chief executives, directors, key

project personnel, or any proposed consultant, contractor or subcontractor may result, or could be viewed as, an organizational conflict of interest. The information may be in the form of a disclosure statement or a certification.

- 3) Based upon a review of the information submitted, the contracting agency should make a written determination of whether the offeror's 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. The contracting agency should award the contract to the apparent successful offeror unless an organizational conflict of interest is determined to exist that cannot be avoided, neutralized, or mitigated.
- B. The organizational conflict of interest provisions in this subpart provide minimum standards for a contracting agency to identify, mitigate, or eliminate apparent or actual organizational conflicts of interest. To the extent that State-developed organizational conflict of interest standards are more stringent than that contained in this subpart, the State standards prevail.
  - C. If the environmental process (federal or state) has been completed prior to issuing the RFP, the contracting agency may allow a consultant or sub-consultant who prepared the environmental document to submit a proposal in response to the RFP.
  - D. If the environmental process (federal or state) has not been completed prior to issuing the RFP, the contracting agency may allow a sub-consultant to the preparer of the environmental document to participate as an offeror or join a team submitting a proposal in response to the RFP only if the contracting agency releases such sub-consultant from further responsibilities with respect to the preparation of the environmental document.