

VIRGINIA DEPARTMENT OF TRANSPORTATION

# ALTERNATIVE PROJECT DELIVERY DIVISION

## INSTRUCTIONAL AND INFORMATIONAL MEMORANDUM

GENERAL SUBJECT: Organizational Conflict of Interest Guidelines for Design-Build Procurements	NUMBER: IIM-APD-2. 2
SPECIFIC SUBJECT: Framework to Evaluate Potential Organizational Conflicts of Interest for Private Entities Participating in Design Build Programs or Projects	DATE: November 9, 2017
	SUPERSEDES: IIM-APD-2.1
APPROVED:	Shailendra G. Patel, P.E., DBIA State Engineer APD (Alternative Project Delivery Division) Approved November 9, 2017

Changes are shaded.

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### EFFECTIVE DATE

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- This memorandum is effective upon receipt.
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### PURPOSE

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- To establish implementation guidelines for the Virginia Department of Transportation's (VDOT) policy on organizational conflicts of interest (COI), relating to Design-Build projects.
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### OBJECTIVE

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- To develop guidelines that: (i) protect the integrity, fairness and competitive spirit of the procurement process; (ii) avoid circumstances that result in an actual or perceived competitive advantage for potential bidder(s); (iii) protect the public's and VDOT's interests and, in particular, confidential and sensitive project-specific and programmatic information; (iv) inform potential consultants and bidders of VDOT's policy and procedures.

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## BACKGROUND

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- The Commonwealth Transportation Board (the CTB) has authority under §33.2-209 of the Code of Virginia to competitively procure projects using a Design-Build delivery method.
  - VDOT follows the pertinent state and federal Codes regarding potential organizational conflicts of interest. Nothing contained in these Guidelines is intended to limit, modify or otherwise alter the applicability or effect of other relevant (federal, state and local) Codes, rules and regulations (e.g., NEPA rules and regulations pertaining to conflicts of interest and ethical rules pertaining to Legal Services (as defined below)). All of such laws, rules and regulations shall apply in their normal manner irrespective of these Guidelines.
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## PERTINENT LEGAL REQUIREMENTS

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- Section 2.2-4373 of the Code of Virginia prohibits a party who prepared an invitation to bid or an RFP for a public agency to bid on the resulting solicitation. VDOT however, in accordance with the statute, may permit that same party to submit a bid or proposal for that procurement if the agency determines that the exclusion of the party would limit the number of competitive bidders in a manner that is contrary to the best interests of the public.
- Federal law 23 CFR §636.116 identifies specific conflict of interest requirements for procurement of Design-Build contracts. Pertinent sections are excerpted as follows:
  - The federal Design-Build regulations provide that:
    - (1) Consultants and/or sub-consultants who assist the Owner 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 document that will be incorporated into the RFP Documents, and did not include assistance in development of instruction to Offerors or evaluation criteria, or
      - (ii) Where all documents and reports delivered to the agency by the consultant or sub-consultants are made available to all Offerors.
- Additional federal procurement regulations are provided in the 48 CFR §9.5 “Organizational Conflicts of Interest,” also referred to as Federal Acquisition Regulation (FAR) §9.5. The FAR regulations also address organizational conflicts of interest related to situations where a contractor’s performance of a government contract gives the contractor access to non-public information that may give it a competitive advantage.

- VDOT recognizes that the size, scope and complexity of projects administered under the Design-Build program may lead to a significant variance in the potential for conflicts of interest and that its stated preference may not be viable or desirable in all circumstances. Among the factors that may affect conflicts of interests issues include:
  - the type of consulting services at issue,
  - the particular circumstances of each procurement,
  - specialized expertise needed by VDOT, the Alternate Project Delivery Program and the private industry to implement specific innovative technologies or disciplines,
  - the particular VDOT division or district managing the procurement;
  - the past, current or future working relationship between the Consultant, Offeror, Private Entities and VDOT; and
  - the period of time between the potential conflict situation and the initiation of the procurement process.
- VDOT also recognizes that its concern with COI must be balanced against the need to not unnecessarily restrict the pool of potential developers or consultants available to VDOT and private entities competing as part of a team on a Design-Build project. With that, these Guidelines neither purport to address every situation that may arise in the context of VDOT's Design-Build program nor to mandate a particular decision or determination by VDOT when faced with facts similar to those described in these Guidelines.

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## PROCEDURES

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- VDOT will apply the following procedures in accordance with the state and federal Codes and on a project specific basis. The Director of the Alternate Project Delivery **Division** will review potential organizational conflicts of interest related to VDOT procurement of Design-Build contracts. The Director's determination may be appealed to the Chief Engineer.
  - VDOT retains the ultimate and sole discretion to determine on a case-by-case basis whether organizational conflicts of interest exist and what actions may be appropriate to avoid, neutralize or mitigate any actual or potential conflict, or the appearance of any such conflict.
  - Prior to submitting a proposal, response to a Request for Qualifications (RFQ) for two-phase procurements or response to a Request for Proposals (RFP) for single-phase procurements, each Offeror shall conduct an internal review of its current affiliations and shall require its team members to identify potential COI or a real or perceived competitive advantage relative to the anticipated procurement. Offerors are notified that prior, existing and future contractual obligations between an organization and a federal or state agency relative to the proposed procurement or VDOT Design-Build program may present a COI or a competitive advantage.

- If a potential COI or competitive advantage is identified, the organization shall submit in writing the pertinent information to the Project Manager-Alternative Project Delivery Division (PM-APD) for the project so that a determination can be made to the extent of the conflict or competitive advantage. VDOT, in its sole discretion, will make a determination relative to potential organizational COI (including a real or perceived competitive advantage), and its ability to mitigate such a conflict. If VDOT determines that the potential COI cannot be mitigated, the organization determined to have the COI shall not be allowed to participate as a team member in response to the RFQ or RFP solicitation for that Design-Build project. Failure to abide by VDOT's determination in this matter may result in a proposal being declared non-responsive.
- COI and a real or perceived competitive advantage are described in state and federal law as noted above. COI may include, but are not limited to, the following situations:
  - An organization or individual hired by VDOT to provide assistance in development of instructions to Offerors or evaluation criteria for a specific Design-Build project.
  - An organization or individual hired by VDOT to provide assistance in development of instructions to Offerors or evaluation criteria as part of the programmatic guidance or procurement documents for VDOT's Design-Build program, and as a result has a unique competitive advantage relative to a specific Design-Build project.
  - An organization or individual with a present or former contract with VDOT to prepare planning, environmental, engineering, or technical work product for the project, and has a potential competitive advantage because such work product is not available to all potential Offerors in a timely manner prior to the project's procurement process.
  - An organization or individual with a present or former contract with VDOT to provide assistance in Design-Build contract administration for the project.
- VDOT may, in its sole discretion, determine that a COI or a real or perceived competitive advantage may be mitigated by disclosing all or a portion of the work product produced by the organization or individual subject to review under this section. If documents have been designated as proprietary by Virginia law, the owner of the documentation will be given the opportunity to waive this protection from disclosure. If the owner elects not to provide a waiver and subsequently submits a proposal, the proposal may be declared non-responsive.