

Approach to Consultant Conflict Management

NMDOT Design-Build Program

August 4, 2021

BACKGROUND

The purpose of this memo is to outline NMDOT's position on managing potential conflicts of interest which may arise when consultants perform work for NMDOT relating to a potential design-build project. Additional details concerning the conflict of interest policies for individual projects, as well as procedures to request NMDOT's review and consideration of a potential conflict, may be provided in the procurement documents for the specific project.

DISCUSSION

State and federal laws and regulations govern organizational conflicts of interest for NMDOT procurements related to design-build projects.

The New Mexico Revised Statutes, §§ 13-1-28 through 13-1-199 (the "Procurement Code") apply to design build procurements and impose penalties for taking advantage of organizational conflicts of interest that could adversely impact the competitive procurement process. Among other measures, the Procurement Code prohibits using confidential information for private gain, limits participation in the procurement when an employee or family member may have a financial interest in the outcome, prohibits bribes, kickbacks, or gratuities, and prohibits other conflicts that may impact a participant's neutrality or otherwise confer an unfair advantage.

The New Mexico Governmental Conduct Act, NMSA Chapter 10, Article 16, provides guidance regarding potential conflicts contractors or consultants may have with staff who were previously employed by the State of New Mexico.

In addition, the New Mexico Board of Licensure for Professional Engineering & Professional Surveyors has promulgated a code of professional conduct for Engineering and Surveying. See Administrative Code Title 16, Chapter 39, Part 8 at:

https://www.sblpes.state.nm.us/wp-content/uploads/2020/08/NMAC_2017_Book_1.pdf

A Federal Highway Administration (FHWA) regulation addresses organizational conflicts of interest related to design-build projects financed in whole or in part with federal funds (see 23 CFR §636.116 (Attachment A), hereinafter the "Regulation"). The Regulation supplements, and does not replace, applicable New Mexico laws and rules.

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

The Regulation 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 study phase, preliminary design, reports, or similar “low-level” documents that will be incorporated into the RFP, and did not include assistance in the development of RFQ or RFP instructions to offerors 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 state law and the Regulation, the following approach to conflict of interest will apply on NMDOT DB projects:

1. Except as specifically provided below, and subject to NMDOT’s sole discretion, Consultants will NOT be allowed to participate as an offeror or join a design-build team if:
 - a. The Consultant is working as NMDOT’s General Engineering Consultant (GEC) for a specific design-build project. In certain situations, sub-consultants to the GEC that do not perform work on the design-build project, at NMDOT’s sole discretion, may participate as an offeror or join a design-build team.
 - b. The Consultant has prepared RFQ or RFP language or conceptual design plans. However, this prohibition may be waived in NMDOT’s sole discretion if (1) a substantial duration has passed between completion of the Consultant’s work and the release of the RFQ for a specific project; or (2) (i) the project requirements or scope of the project have changed such that the Consultant no longer possesses information or knowledge that confers an unfair competitive advantage, and (ii) the Consultant demonstrates to NMDOT (subject to its sole discretion) that the Consultant does not possess a competitive advantage due to its prior work.
 - c. The Consultant has conducted preliminary bridge design, prepared preliminary bridge plans or participated in a bridge type selection report. This restriction may be waived, subject to NMDOT’s sole discretion, for bridge feasibility or scoping studies that identify viable bridge alternatives without selecting a single preferred bridge type, or where the Consultant’s work is limited to aesthetic recommendations and processes.
 - d. The Consultant performs work related to the design-build project for other key stakeholders as determined at NMDOT’s sole discretion.
 - e. The Consultant has a contract with NMDOT which specifically excludes them from participating as an offeror or joining a design-build team.
 - f. The Consultant is under contract with NMDOT or other stakeholders to perform oversight on the project after letting.
 - g. The Consultant has performed work related to the project or has staff with individual or family relationships related to the project, and through such work or relationships has gained access to non-public information or has influence that would confer an unfair advantage in the procurement process.
2. Consultants and sub-consultants who may fall under one of the restrictions or exceptions in Section (1), above, may request that NMDOT review the circumstances of the

Consultant's and/or subconsultant's work and determine whether the Consultant or sub-consultant is eligible or ineligible to participate as an offeror or be part of a design-build team. Such request must be in writing and must include the following information:

- a. An explanation that details: (1) how the Consultant's proposed participation conforms to federal and state conflict of interest rules and regulations and (2) how the Consultant does not have an unfair competitive advantage due to its work.
- b. Disclosure of all the work performed in relation to the project.
- c. Provide copies of all deliverables submitted to NMDOT so that all information can be made available to all potential design-build teams.
- d. Provide the date on which all services related to the design-build project under the Consultant's contract with NMDOT (or other key stakeholders) expired or were terminated or will expire or be terminated.
- e. Provide any further information specified in the procurement documents for a specific project.
- f. Provide any further information requested by NMDOT to facilitate its assessment.

Upon review of the information provided above, NMDOT will determine, in its sole discretion, if the Consultant is prohibited from participation in a project due to a conflict of interest.

3. For other potential conflict of interest cases not mentioned above, (e.g., employees changing companies, merger/acquisitions of firms), Consultants shall disclose and address any conflicts of interests or potential conflicts of interest when participating as an offeror or joining a design-build team. NMDOT will then determine if a conflict of interest exists. Additional procedures for providing this information will be included in the procurement documents for a specific project.

General Notes

Unless otherwise stated, "Consultant" shall mean prime Consultants and Sub-Consultants performing services for the prime consultant.

Inquires and requests for conflict of interest reviews and responses related to these guidelines should be submitted to:

Margo Gomez
Procurement Specialist
NMDOT
Email: Margo.Gomez@state.nm.us



23 CFR § 636.116 What organizational conflict of interest requirements apply to design-build projects?

(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. All design-build solicitations should address the following situations as appropriate:

(1) Consultants and/or sub-consultants who assist the owner in the preparation of a 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 this subpart;

(ii) States the nature of the potential conflict as seen by the owner;

(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 owner 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 owner 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 STDs 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 NEPA process has been completed prior to issuing the RFP, the contracting agency may allow a consultant or subconsultant who prepared the NEPA document to submit a proposal in response to the RFP.

(d) If the NEPA process has not been completed prior to issuing the RFP, the contracting agency may allow a subconsultant to the preparer of the NEPA 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 subconsultant from further responsibilities with respect to the preparation of the NEPA document.