

Louisville-Southern Indiana Ohio River Bridges Project

Questions and Answers Regarding Organizational Conflicts of Interest Under 23 CFR § 636.116

The Louisville-Southern Indiana Ohio River Bridges Project (“ORBP”) is a federally funded highway transportation project jointly sponsored by the Indiana Department of Transportation and the Kentucky Transportation Cabinet (together, the “State Sponsors”). The State Sponsors, working in partnership with the Federal Highway Administration (“FHWA”), are exploring all potential project delivery methods for expediting the completion of the ORBP. Those methods include the traditional design-bid-build method (in which design and construction are sequential steps in the project development process), as well as the design-build method (in which design and construction are provided by a single contractor or private developer under one agreement). Although the project delivery method for the ORBP has not been determined at this time, the significant attention given to a possible design-build approach has led to numerous questions about the handling of potential consultant conflicts of interest under such an approach. This document seeks to provide answers to some of the more common questions.

FHWA has promulgated administrative regulations that describe the policies and procedures for approving federally-funded design-build projects. The regulations governing design-build contracting are set forth at 23 CFR Part 636 and provide the basic ground rules for any design-build approach that the State Sponsors might pursue for the ORBP. Potential organizational conflicts of interest are specifically addressed at 23 CFR § 636.116, which serves as the basic framework and source for these questions and answers. By its terms, 23 CFR § 636.116 applies to any design-build procurement, as well as any “contract for engineering services, inspection or technical support in the administration of the design-build contract.” Thus, should the State Sponsors ultimately decide to pursue a design-build approach for the ORBP, any potential organizational conflict of interest issues related to contracting for the project should be evaluated in light of the requirements of 23 CFR § 636.116.

With this background in mind, the following sections answer some of the frequently asked questions regarding organizational conflicts of interest in the design-build context. These questions and answers are intended to provide general direction and clarification regarding issues that commonly arise, but are not intended to provide specific answers to individual situations. If the State Sponsors decide to pursue a design-build approach for the ORBP, consultant-specific determinations regarding potential organizational conflicts of interest will be made by the State Sponsors as needed, on a case-by-case basis, based upon the specific factual information provided by such consultants following the procedures described below.

General Conflict of Interest Prohibition

1. What is an organizational conflict of interest under the federal regulations?

According to 23 CFR § 636.103, an “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*.” (emphasis added)

2. What sort of circumstances would constitute an organizational conflict of interest that would prevent a potential consultant or sub-consultant from making a design-build proposal, or participating on a team making such a proposal, for the ORBP?

A potential design-build consultant or sub-consultant will have an organizational conflict of interest with respect to the ORBP if the State Sponsors determine that that person (i) is or may be unable to render impartial assistance or advice to the State Sponsors, (ii) is or may not be able to objectively perform work under a design-build contract, or (iii) would have an unfair competitive advantage.

Determinations of potential organizational conflicts of interest will be made on a case-by-case basis by the State Sponsors, applying the standards in 23 CFR §§ 636.103 and 636.116, after submittal of appropriate information by the consultant or sub-consultant. While most such determinations will be case-specific, consultants will generally be presumed to be prohibited from submitting a design-build proposal, or joining a team submitting a design-build proposal, for the ORBP in the following situations:

- The consultant wishing to submit a proposal is the State Sponsors’ general engineering consultant (“GEC”) for the design-build project. In this case, the consultant would presumably be unable to render impartial assistance or advice to the State Sponsors in its dual role as GEC and design-build proposer/consultant, and as the GEC, would have an unfair competitive advantage over other consultants submitting proposals.
- The consultant has performed design work related to the ORBP, since the issuance of the Record of Decision in September 2003, for other stakeholders, such as entities that have advocated for revisions to the project’s design. As a result of their work related to the ORBP for entities whose interests differ from those of the State Sponsors, consultants in this situation likely would not be able to render impartial assistance or advice to the State Sponsors and would not be able to objectively perform work on the ORBP.
- The consultant is under contract with any other entity or stakeholder to perform oversight, or provide advice, with respect to the project after letting. Again, in light of their contractual obligations to entities with divergent interests, such consultants likely would not be able to render impartial assistance or advice to the State Sponsors or objectively perform work on the ORBP.

3. Are there any circumstances in which a consultant or sub-consultant who has performed previous work on the ORBP would be allowed to submit a design-build proposal or join a team submitting a design-build proposal for the ORBP?

Yes, it is possible for a consultant or sub-consultant who has previously worked on the ORBP to participate on a design-build team; however, that person's eligibility will depend on a case-specific evaluation of their prior involvement with the project to determine whether an organizational conflict of interest exists. That evaluation will be performed by the State Sponsors based on information submitted by the proposer, as well as any reliable information otherwise available to the State Sponsors. Specific exceptions governing potential conflicts of interest arising from a consultant's prior work on the ORBP are address in the following questions and answers.

Conflict of Interest Exceptions

4. Would a consultant or sub-consultant who assists the State Sponsors in the preparation of a Request for Proposals ("RFP") document for the ORBP be prohibited from making a design-build proposal, or participating on a team making such a proposal, for the ORBP?

The federal regulations provide that any consultant or sub-consultant who assists the State Sponsors in the preparation of an RFP document for a design-build project will not be allowed to submit a proposal or join a team submitting a proposal in response to the RFP. (23 CFR § 636.116(a)(1)) "Assistance in preparation of the RFP" would include preparing the RFP document itself, developing evaluation criteria, or developing methods for applying those criteria to individual proposals.

Despite this general prohibition, the federal regulations provide that the State Sponsors may nevertheless determine that there is no organizational conflict of interest for a consultant or sub-consultant who assisted in the preparation of the RFP document where:

either

(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) all documents and reports delivered to the agency by the consultant or sub-consultant are made available to all offerors. (23 CFR § 636.116(a)(1))

5. What sort of “low-level” documents may a consultant or sub-consultant provide for incorporation into the RFP without creating an organizational conflict of interest under 23 CFR § 636.116(a)(1)?

Provided the consultant or sub-consultant did not provide assistance to the State Sponsors in the development of instructions to offerors or evaluation criteria for a design-build RFP for the ORBP, such consultant or sub-consultant may submit a proposal or join a team submitting a proposal on the ORBP if its role was limited to providing certain “low-level” documents for incorporation into the RFP. The federal regulation states that “low-level” documents include “preliminary design.”

According to 23 CFR § 636.103,

Preliminary design defines the general project location and design concepts. It includes, but is not limited to, preliminary engineering and other activities and analyses, such as environmental assessments, topographic surveys, metes and bounds surveys, geotechnical investigations, hydrologic analysis, hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, general estimates of the types and quantities of materials, and other work needed to establish parameters for final design. Prior to completion of the NEPA review process, any such preliminary engineering and other activities and analyses must not materially affect the objective consideration of alternatives in the NEPA review process.

Thus, the State Sponsors may determine that a consultant or sub-consultant who has provided only the foregoing types of documents for incorporation into an RFP for the ORBP, and has not provided assistance in the development of instruction to offerors or evaluation criteria for such an RFP, does not have an organizational conflict of interest for the ORBP.

6. If a consultant or sub-consultant has a potential organizational conflict of interest under 23 CFR § 636.116(a)(1)(i) (*i.e.*, provided more than “low-level” documents for an RFP), may that consultant or sub-consultant nevertheless be deemed not to have an organizational conflict of interest?

Yes. According to 23 CFR § 636.116(a)(1)(ii), a consultant or sub-consultant that fails to qualify for the “low-level” documents exception of 23 CFR § 636.116(a)(1)(i) may nevertheless be deemed not to have an organizational conflict of interest if “all documents and reports delivered to the agency by the consultant or sub-consultant are made available to all offerors.”

7. Would a consultant or sub-consultant who assisted in the preparation of the NEPA document(s) for the ORBP be prohibited from submitting a proposal in response to a design-build RFP for the project?

The federal regulations state that if the NEPA process has been completed prior to the issuance of the RFP, the State Sponsors *may* allow a consultant or sub-consultant who prepared the NEPA document to submit a proposal in response to a design-build RFP. (23 CFR § 636.116(c))

However, if the NEPA process has not been completed prior to the issuance of a design-build RFP, the State Sponsors may allow a *sub-consultant* to the preparer of the NEPA document to submit a proposal or participate on a team submitting a proposal *only if* the State Sponsors release the sub-consultant from further responsibility with respect to the preparation of the NEPA document. (23 CFR § 636.116(d)) The primary preparer of the NEPA document, or any sub-consultant that retains responsibility for any aspect of the NEPA document, would not be eligible to submit a design-build proposal or participate on a team submitting a design-build proposal until the NEPA process has been completed. (23 CFR § 636.116(c))

NOTE: A sub-consultant who assisted in the preparation of the NEPA documents for the ORBP concluding with the September 2003 Record of Decision, and who does not have any responsibility for any ongoing NEPA activities, would qualify under 23 CFR § 636.116(d) and would be eligible to submit a proposal or join a team submitting a proposal on a design-build RFP for the ORBP.

8. Would a sub-consultant who has performed services for the GEC be prohibited from submitting a design-build proposal or participating on a design-build team?

Not necessarily. If the sub-consultant's prior work fits within one of the exceptions set forth in the answers to Questions 4-7 above, the sub-consultant may be able to withdraw from the GEC's team and submit a design-build proposal or participate in a design-build team.

9. What conflict of interest standards apply to a consultant or sub-consultant who has provided documents for incorporation into the RFP for the design-build project and has assisted in the preparation of the NEPA documents for the project?

If a company wears multiple hats (e.g., as an advisor on the RFP, as a design consultant, and as a NEPA consultant), that company must satisfy the requirements of both 23 CFR § 636.116(a)(1) (concerning assistance on the RFP) (see Questions 4-6 above) and 23 CFR § 636.116(c) and (d) (concerning NEPA consultants) (see Question 7 above).

10. If a consultant or sub-consultant hires an employee who was formerly employed by another consultant or sub-consultant with an organizational conflict of interest with respect to the ORBP, will the employee's current employer be deemed to have an organizational conflict of interests by imputation?

Maybe. Depending on the former employee's roles and responsibilities (if any) with respect to the ORBP at his or her former employer, the new employer may be deemed to have an imputed conflict of interest that would prevent it from submitting a design-build proposal or joining a team submitting a design-build proposal for the ORBP. In any instance in which a consultant or sub-consultant hires an employee from a firm that has or may have an organizational conflict of interest with respect to a design-build RFP for the ORBP, that consultant or sub-consultant should carefully evaluate the standards set forth 23 CFR § 636.116 and these Questions and Answers to assess (1) whether the former employer had an organizational conflict of interest and (2) whether that conflict of interest may be imputed to the new employer. The consultant or sub-

consultant may seek a written determination from the State Sponsors as to whether the former employer's conflict-of-interest will be imputed to the new employer.

Evaluation of Potential Conflicts

11. If a potential design-build consultant or sub-consultant wishes to determine whether it has an organizational conflict of interest with respect to the ORBP, how can it seek such a determination from the State Sponsors?

Pursuant to FHWA's design-build regulations, any solicitation for a design-build contract for the ORBP would be required to include a requirement that any consultant submitting a proposal must provide information concerning potential organizational conflicts of interest in its proposal. The submittal must include "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 proposal 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." (23 CFR § 636.116(a)(2)(v)) Based on a review of this information, and any other reliable information available to the State Sponsors, the State Sponsors would determine whether an actual or potential organizational conflict of interest exists prior to awarding a contract.

The State Sponsors understand that some potential design-build consultants or sub-consultants may desire to clarify whether a potential organizational conflict of interest exists prior to the time the consultant or sub-consultant submits or participates in a proposal in response to a design-build RFP for the ORBP, and possibly prior to the time at which an RFP has even been issued. In such circumstances, the consultant or sub-consultant may provide the detailed information identified in 23 CFR § 636.116(a)(2)(v) to the State Sponsors, along with a description of the services that the interested consultant or sub-consultant anticipates providing under a design-build contract. The consultant or sub-consultant may provide additional information, as discussed in the answer to Question 12. Such information should be presented in writing and with sufficient detail to allow the State Sponsors to evaluate any potential organizational conflict of interest. (This information will be treated as confidential by the State Sponsors to the maximum extent permitted by law.) The State Sponsors will then provide a written determination, if possible, to the consultant or sub-consultant concerning whether, based on the facts presented and the information available to the State Sponsors, an actual or potential organizational conflict of interest exists. Such a determination will not serve as a binding commitment from the State Sponsors that they intend to pursue a design-build approach for the ORBP, or that the submitting consultant or sub-consultant will be selected pursuant to any subsequent RFP process. Such a determination also will not be considered binding on the State Sponsors if any of the material facts regarding the consultant's or sub-consultant's past, present or current interests change, or if its proposed role in the design-build project changes in any material manner.

Decisions of the State Sponsors will generally fall within three categories: (1) there is no organizational conflict of interest; (2) there is an organizational conflict of interest, but it can

potentially be mitigated; or (3) there is an organizational conflict of interest and it cannot be mitigated. In the case of a decision that falls within the second category, the submitting consultant or sub-consultant will be given an opportunity to identify for the State Sponsors the measures it will take to avoid, neutralize, or mitigate the identified conflict(s). See answer to Question 15.

The State Sponsors may provide a form for use in disclosing information needed to evaluate potential organizational conflicts of interest related to the ORBP. Potential consultants and sub-consultants should inquire with the State Sponsors prior to submitting such information in writing to determine the proper format and procedure for any such submittal.

All requests for a written determination from the State Sponsors concerning potential organizational conflicts of interest related to the ORBP, including all supporting information, should be addressed to the Commissioner of the Indiana Department of Transportation (INDOT) and the Secretary of the Kentucky Transportation Cabinet (KYTC). Such requests should be clearly denoted as "REQUEST FOR CONFLICT OF INTEREST DETERMINATION, LOUISVILLE-SOUTHERN INDIANA OHIO RIVER BRIDGES PROJECT." Written determinations will be provided to the requesting party by the Office of the Commissioner and the Office of the Secretary.

Requests for a written determination should be addressed to the Commissioner of INDOT and the Secretary of KYTC and sent to the following addresses:

Indiana Department of Transportation
Attention: Jenny Ziemer
IGCN, Room N755
100 North Senate Avenue
Indianapolis, IN 46204

Kentucky Transportation Cabinet
Attention: Angela Criscillis
Office of the Secretary
200 Mero Street
Frankfort, KY 40622

12. What kind of information should a consultant or sub-consultant submit in order to determine whether an organizational conflict of interest may exist?

Information relevant to potential conflicts of interest may include:

- All relevant facts relating to past, present and/or planned interests of the consultant's team which could result in, or be viewed as, an organizational conflict of interest in connection with a design-build approach for the ORBP (i.e., preventing the team from rendering impartial advice, impairing its objectivity, providing an unfair competitive advantage, etc.).
- Present or planned contractual or employment relationships with any current employee of the State Sponsors.
- A description of all work performed previously with respect to the ORBP.
- Any other circumstances that might be considered to create a financial interest in the outcome of the project, other than the compensation to be paid under a potential design-build contract.

The State Sponsors also may consider any other information available to them related to potential organizational conflicts of interest.

13. If a consultant or sub-consultant has performed previous work on the ORBP, should that person seek a determination from the State Sponsors regarding potential organizational conflicts of interest prior to submitting a design-build proposal or joining a design-build team, even if the consultant or sub-consultant believes that no organizational conflict of interest exists?

It will generally be advisable for any consultant or sub-consultant who has previously performed work on the ORBP to seek a determination from the State Sponsors prior to submitting a design-build proposal or joining a design-build team.

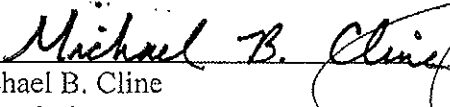
Conflict of Interest Determination

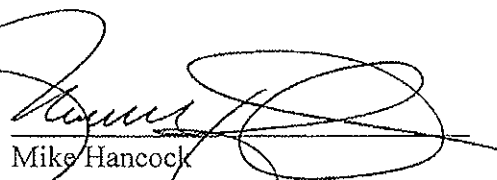
14. How will a consultant know if an actual or potential conflict of interest exists?

Based on the information provided pursuant to 23 CFR § 636.116(a)(2)(v) and any additional information provided (see answer to Question 12), the State Sponsors, through the Commissioner of INDOT and the Secretary of KYTC, would make a written determination of whether the offeror's interests create an actual or potential conflict of interest and would identify any actions that must be taken to avoid, neutralize, or mitigate such conflict. (23 CFR § 636.116(a)(3)) That written determination would be provided to the submitting consultant.

15. If the State Sponsors determine that an organizational conflict of interest exists, does that serve as an absolute prohibition on the participation of the subject consultant or sub-consultant in the design-build project?

No, the federal regulations contemplate that measures may be taken to avoid, neutralize, or mitigate a conflict of interest in order to allow a successful offeror to enter into a design-build contract. (23 CFR § 636.116(a)(3)) If the State Sponsors determine that an organizational conflict of interest exists, participation by the consultant or sub-consultant in the design-build project would only be prohibited if the State Sponsors were to determine that there is no way to avoid, neutralize, or mitigate the identified conflict(s). If a potential organizational conflict of interest is identified, the submitting consultant or sub-consultant will have to, as a condition of participation, effectively identify the measures it will take to avoid, neutralize, or mitigate the identified conflict(s). All determinations regarding such measures will be made by the State Sponsors, in their discretion, on a case-by-case basis.


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