

## INDOT ALTERNATIVE DELIVERY PROGRAM CONFLICT OF INTEREST POLICY

### A. Introduction, Scope; Definitions

#### 1. *Purpose*

In order to provide guidance to potential Consultants (as defined below) participating in the Indiana Department of Transportation (“INDOT”) Alternative Delivery Program<sup>1</sup> (the “APD Program”), these guidelines (“Guidelines”) address actual or potential conflicts of interest in connection with an APD Program project, as defined in Indiana Code (“IC”) 8-15.5-2-7, 8-15.7-2-14 or IC 8-23-9.5-11 (each a “Project”).

Appendix 1 to these Guidelines sets forth additional guidelines that pertain to Progressive Contracting. Appendix 2 to these Guidelines sets forth additional guidelines that pertain to P3 Projects.

Persons interested in INDOT conflicts of interest policies pertaining to services *other than procurements under the APD program* are directed to the Consultant conflict of Interest Policy (current version 5/20/19), found at [this weblink](#).

#### 2. *Interpretation; Organization of these Guidelines*

Please refer to Exhibit 1 regarding capitalized terms and definitions used in these Guidelines.

Section B sets forth the goals of these Guidelines. Section C describes the categories of services about which these Guidelines offer guidance relating to conflicts of interest for APD Program Projects, and Section D states the policy position and general rules. Section E sets forth specific applications of the Guidelines with respect to service categories. Section F describes a Consultant’s responsibilities relating to conflicts of interest determinations, and Section G describes the procedure, and other considerations, for their evaluation by INDOT<sup>2</sup>.

#### 3. *Guidelines Not Limiting*

These Guidelines are not intended to limit, modify, supersede, or otherwise alter the applicability or effect of other Indiana or other applicable jurisdiction’s constitution, statute, law, code, regulation, ordinance, rule or common law, binding judgment, judicial or administrative order or decree, written directive or other governmental restriction, in each case that is applicable to the Project, the APD Program, INDOT, or any Consultant or Sub-consultant (or any of their

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<sup>1</sup> Project delivery methods: design-build/low-bid (projects procured by INDOT under its general powers under IC 8-23-2-6), design-build/best-value (non-financed projects procured by INDOT under IC 8-15.7), public-private (partnership) (P3) agreements (projects procured under IC 8-15.5 or IC 8-15.7), and Progressive Contracting (projects procured by INDOT under IC 8-23-9.5).

<sup>2</sup> P3 Projects procured by, or with, the Indiana Finance Authority (IFA) would also be subject to these guidelines, as relates to representation of the IFA, and as such, interpretations regarding “INDOT” would be supplanted by “the IFA”.

respective Affiliates), including specifically ethical rules pertaining to legal services, and Indiana laws concerning state employee and consultant ethics.

## **B. Goals of Guidelines**

These Guidelines are intended to accomplish the following goals:

- Promote the integrity, competitiveness, and fairness of Projects delivered by any delivery method through the APD Program's procurement processes and in the implementation of APD Program contracts;
- Prevent Project proposers and Consultants with respect to Projects and the APD Program from obtaining or appearing to obtain an unfair competitive advantage in pursuit of work for or with INDOT;
- Provide guidance to enable Consultants to make informed business decisions concerning participation in the APD Program and its Projects;
- Permit Consultants to compete fairly either to work for INDOT or to participate as part of (or as) a Project proposer;
- Protect INDOT's interests;
- Permit Consultants to work without actual or apparent conflict of interest; and
- Ensure a sufficient number of qualified Consultants are available for both INDOT and potential Project proposers to successfully implement the APD Program and, as relates to a Project, to procure successfully INDOT's contract counterparty for delivery of a Project.

## **C. Scope of Guidelines**

With these Guidelines, INDOT addresses the following categories of Consultant services that may be utilized in the context of a Project:

1. Engineering and architectural services;
2. ROW acquisition services;
3. Procurement Services (including, if separated, Project Oversight Services);
4. Environmental and planning services; and
5. Other consulting services.

The foregoing enumerated services are collectively the "Services." Because of the different considerations and concerns applicable to each of these categories of services, separate guidelines are appropriate. If a Consultant is providing more than one category of Services to

INDOT, and there are differences in the standards, restrictions, and limitations applicable to those categories, then INDOT may, in its sole discretion, apply the more stringent standards, restrictions and limitations.

#### **D. General Policy Position; General Application**

##### *1. General Rule*

**Consultants may *not* Participate on a Project proposer team on, or have a Financial or Other Interest in, any Project in which they are *currently performing or have performed services to INDOT* (i.e., are listed among the “restricted firms” in the solicitation documents for the Project) *except in the limited circumstances described in these Guidelines.***

Consultants that have worked or are working on projects involving other agencies of the State of Indiana that touch or concern an INDOT APD Project are not automatically precluded, under these Guidelines, from Participating on the Project.

##### *2. General Exceptions to the Rule; Discretion*

INDOT recognizes that, given the complexity of the APD Program and duration, complexity, challenges, and generally higher public profile of Projects let under the APD Program, **strict application of these Guidelines may not further the goals set forth above.** In certain situations where there is a potential or actual conflict of interest, **INDOT may nevertheless, when legally permissible, and in its sole discretion, elect to balance the following factors to determine whether a Consultant may nevertheless be eligible to perform services for INDOT or as part of a Project proposer:**

- Type of consulting services required for the Project;
- Nature, quality, and frequency of a Consultant’s access to INDOT personnel or decision-making with respect to the Project;
- Nature, quality, and frequency of a Consultant’s access to INDOT personnel or decision-making with respect to the APD Program;
- Nature, quality, and frequency of a Consultant’s access to INDOT personnel or decision-making with respect to other concurrent or overlapping Projects;
- Frequency and proximity of Projects being let under the APD Program;
- Geographic locations and delivery method of Projects;
- Other circumstances of the Project;
- INDOT’s level of coordination or cooperation with other agencies of the State of Indiana
- INDOT’s need for specialized expertise to implement the Project;

- INDOT's past, or anticipated and procured or contracted current working relationship with the Consultant;
- Time between the genesis of the potential or actual conflict of interest situation and the relevant development of the Project; and
- Whether the Project or APD Program involves federal funds or is imputed with federal participation or jurisdiction (see Section G (2)).

INDOT may, in its sole discretion, impose restrictions, prohibitions, qualifications, or other constraints qualifications on participation, should INDOT's application of these Guidelines result in the weighing of the foregoing factors and result in permission, in part, to participate in the Project.

### 3. *Application of Guidelines to Individuals Employed by the Consultant*

If INDOT determines the performance of the Services raises a potential or actual Conflict of Interest for a Consultant, such Conflict of Interest shall *apply individually and independently* to any *employee* of such Consultant that has participated in a material way in the performance of the Services on a specific Project. If such individual leaves the Consultant's employment, then the potential or actual Conflict of Interest shall continue to apply to such individual in the same manner as it applies to the Consultant for Projects in which the individual was materially involved while employed by Consultant.

The potential or actual Conflict of Interest and prohibition with respect to the individual employee will not apply to the individual's *new* employer. In such an instance, if the new employer is otherwise eligible to perform certain Consultant services under these Guidelines, then such new employer will remain eligible despite the employment of such individual, provided that, the employee will be subject to the limitations described in Section E below. INDOT may require evidence of an "ethics wall" to preclude participation of such employee in the Project.

### 4. *Permissive Interpretation/Extrapolation in Application by INDOT*

These Guidelines do not attempt to address every conflict situation that may arise in the context of the APD Program. These Guidelines do not mandate INDOT to make a particular decision or determination when facts like those given as examples in these Guidelines occur during a Project. INDOT has the authority in its sole discretion, to determine on a case-by-case basis whether a potential or actual conflict of interest exists, and if any such conflict exists, whether it is material, what are the best interests of INDOT, the specific Project and the APD Program generally, and what actions INDOT elects to take as it determines may be appropriate. This includes INDOT's authority to extend restrictions, prohibitions, qualifications, or other constraints on the participation of any individual or Consultant on a Proposer team or as an entity to provide any Services to INDOT.

## **E. Specific Applications of Conflict of Interest Guidelines**

1. Without limiting the other clauses of this Section E, a Consultant (or a Sub-consultant to a Consultant) providing any Services or that has previously provided Services to INDOT with respect to a Project, may be a Proposer or participate as an equity owner, team member, and consultant or sub-consultant of, or to, a Proposer or have a Financial or Other Interest in any of the foregoing entities (“Participate”) with respect to that Project; provided that INDOT determines that:

a. The Consultant (or Sub-consultant, as applicable) will not, or in the case of past performance of Services did not, have access to or obtain knowledge of confidential or sensitive information, data, procedures, policies, and processes that could provide an unfair competitive advantage with respect to the procurement for that Project;

b. The data and information provided to the Consultant (or Sub-consultant, as applicable) in the performance of the Services is either: (1) irrelevant to the procurement for the Project; or (2)(A) available to all Proposers at the time of letting, on a reliance basis (*i.e.*, INDOT stands behind the data and information), and (B) is not the product of professional judgment (*e.g.*, the “information” is not an engineering opinion, in whole or part);

c. The work product of the Consultant (or Sub-consultant, as applicable) incorporated into or relevant to the procurement for that Project is available to all Proposers, so long as the work product is either: (1) irrelevant to the procurement for the Project; or (2)(A) available to all Proposers at the time of letting, not on a reliance basis (*i.e.*, INDOT does not stand behind the work product), and (B) is not the product of professional judgment (*e.g.*, the “information” is not an engineering opinion, in whole or part); and

d. The Services did not and do not consist in any engineering or architectural services.

*Ex. 1<sup>3</sup> Company A is hired by Company B to perform certain geotechnical investigative professional engineering services, providing the data for, but not the engineering judgements under, a geotechnical report for INDOT with respect to Project X. Company B is engaged by INDOT to provide the geotechnical report itself. Company A is approached by Company C to be its designer on its proposer team in response to INDOT’s DBBV solicitation. Company A may join the Company C proposer team if its geotechnical data collection is delivered, no further geotechnical work is expected, and if expected, declined, and INDOT provides the geotechnical data to all other would-be proposers.*

*Ex. 2 Company A performs certain geotechnical investigative professional engineering services, including geotechnical data collection and drafting a geotechnical report, which involves use of engineering judgements, for INDOT with respect to Project X. The geotechnical report is completed, provided to INDOT, and published to would-be proposers in connection*

<sup>3</sup> References to APD delivery approaches/methods within examples is not to imply that the example ~~only~~ applies only to such APD delivery approach/method.

*with the DBBV solicitation. Company A is approached by Company B to provide professional services on its proposer team in response to INDOT's DBBV solicitation. Company A likely may not join the Company B proposer team, regardless as to the completion of the geotechnical report and its availability to all other would-be proposers.*

2. Consultants (or Sub-consultants, as applicable) performing Services for INDOT on a Project may Participate on a different Project, so long as the different Project is not, in INDOT's sole judgment, related to or affected by the Project.

3. A Consultant (or Sub-consultant, as applicable) providing Procurement Services or that has previously provided Procurement Services to INDOT for the APD Program or for any APD Program Project may Participate on a Project if, after notification from INDOT the Consultant (or Sub-consultant, as applicable): (a) abstains from technical advisory team coordination related to the Project prior to alternative delivery screening with respect to the Project; or (b) sufficient time transpires between alternative delivery screening and the Project is thereafter programmed for procurement, as determined in INDOT's sole judgment, and in either case, the Consultant (or Sub-consultant, as applicable) notifies INDOT of its intent to abstain from further technical advisory team coordination related to the Project sufficiently in advance, in INDOT's sole judgment, of the sharing of any Project information that would, also in INDOT's sole judgment, provide the Consultant (or Sub-consultant) a competitive advantage in the procurement of the Project.

*Ex. 1 Company A is engaged by INDOT to support the procurement and evaluation of bidders for Project X, in predevelopment and slotted for screening by INDOT for Progressive Contracting. Person P worked for Company A, leaves, and joins Company B. Company B is pursuing Progressive Contracts with INDOT. Person P's activities while with Company A involved developing the screening process and criteria, but did not involve advising on the screening of Project X, which occurred after Person P joined Company B. Company A would be precluded from Participating in Project X. Company B would not be precluded from Participating in the Project, nor would Person P, despite Person P's pre-screening efforts on behalf of INDOT so long as Company B disclosed Person P's employment and prior involvement with INDOT.*

4. A Consultant (or Sub-consultant, as applicable) retained to provide Project Oversight Services in connection with, or as, a Consultant (or Sub-consultant, as applicable) that provides or that has previously provided Procurement Services to INDOT for the APD Program or for any APD Program Project may not Participate on that Project.

5. A Consultant (or Sub-consultant, as applicable) retained to provide Project Oversight Services in connection with, or as, a Consultant (or Sub-consultant, as applicable) that provides or that has previously provided Procurement Services to INDOT for the APD Program or for any APD Program Project may Participate on a different Project if, after notification from INDOT the Consultant (or Sub-consultant, as applicable): (a) abstains from technical advisory team coordination related to the APD Program and all APD Program Projects prior to alternative delivery screening with

respect to the different Project; or (b) sufficient time transpires between alternative-delivery screening and the different Project is thereafter programmed for procurement, as determined in INDOT's sole judgment, and in either case, the Consultant (or Sub-consultant, as applicable) notifies INDOT of its intent to abstain from further technical advisory team coordination related to the different Project sufficiently in advance, in INDOT's sole judgment, of the sharing of any APD Program or APD Program Project information that would, also in INDOT's sole judgment, provide the Consultant (or Sub-consultant) a competitive advantage in the procurement of the different Project.

## 6. Other Services

Without limiting the specific, delivery approach-dependent applications of these Guidelines under Appendices 1, 2, and 3, generally, professional engineering and related, and other consulting services (e.g., financial (but not Financial Advisory Services), insurance-related) utilized from time to time by INDOT with respect to a Project that do not fall within any of the categories described above will be analyzed by INDOT on a case-by-case basis, applying the principles and goals set forth with respect to the Services most analogous to such services these Guidelines.

Law firms (and lawyers) advising INDOT and prospective proposers on INDOT projects will be evaluated for conflicts of interest under INDOT engagement terms and conditions and applicable rules of professional conduct for the State of Indiana and relevant judicial bars.

## F. Consultant Responsibilities

The Consultant (and any Sub-consultant) shall reasonably and in good faith anticipate, identify, and disclose to INDOT in writing any actual or potential Conflict of Interest (via email to [ContractsRFP@indot.in.gov](mailto:ContractsRFP@indot.in.gov)), fully explaining the actual or potential Conflict of Interest.

## G. INDOT Procedure for Evaluation of Conflicts of Interest; Federal Rules

### 1. General Process

a. Without limiting Section G (2), INDOT's Consultant Selection Review Committee ("Committee") will consider the Consultant's or Sub-consultant's notification of an actual or potential Conflict of Interest under these Guidelines in consultation with INDOT's Project manager, Alternative Delivery Program lead, the agency Ethics Officer, and such other individual persons as INDOT may elect, in its sole discretion. INDOT will endeavor to respond to Conflict of Interest notifications within ten business days.

b. If determined to be an actual or potential Conflict of Interest, the Committee will make a further determination under these Guidelines as to the disposition thereof. The Committee will make a recommendation to the INDOT Commissioner on whether to respond to the Consultant or Sub-consultant:

(1) precluding participation of one or more individual persons or entities from the procurement of the Project,

(2) acknowledging but waiving the actual or potential Conflict of Interest,

(3) conditioning waiver upon completion of certain actions to remove or sufficiently sequester the actual or potential Conflict of Interest, or

(4) conditioning waiver subject to such other restrictions, prohibitions, qualifications, or other constraints on participation.

c. After receiving the recommendation of the Committee, the INDOT Commissioner or the Commissioner's designee, in his or her sole discretion, may accept or modify the recommendation of the Committee as a condition of INDOT:

(1) allowing the Consultant or Sub-consultant to continue participation in the Project procurement in the role identified, and if applicable, under such recommended or modified conditions to waiver of the actual or potential Conflict of Interest;

(2) awarding or continuing any Project agreement, or

(3) executing any amendment to, extension or supplement of, or additional work under any Project agreement.

d. For avoidance of doubt, the Commissioner's, or his or her designee's, decision is final, not subject to appeal.

## 2. *Federal Rules*

For federally-funded or otherwise federalized DBLB and DBBV Projects, INDOT must comply with the Federal Highway Administration's ("FHWA") organizational conflict of interest rules found at 23 C.F.R. § 636.116, 48 C.F.R. § 9.5, and all other applicable federal laws and regulations (e.g., National Environmental Policy Act ("NEPA") rules and regulations) (collectively, "Federal Rules").

INDOT will also examine each situation with respect to actual or potential Conflicts of Interest under the INDOT Guidelines and under applicable definitions and provisions within the Federal Rules to ensure compliance with the Federal Rules. Nothing in these Guidelines is intended to limit, modify, supersede, or otherwise alter the effect of the Federal Rules.

This notwithstanding, pursuant to 23 C.F.R. § 636.116(b) and as relates to DBLB, DBBV, and PDB in particular, it is INDOT's intent that these Guidelines exceed, in particular, the organizational conflict of interest rules found at 23 C.F.R. § 636.116. By virtue of reference in INDOT procurement documents and agreements solicited under INDOT's APD Program, these Guidelines are likewise intended to satisfy the requirements of 23 C.F.R. § 636.116(b)(2).



## EXHIBIT A

### INDOT CONFLICT OF INTEREST POLICY

#### DEFINITIONS

In addition to those terms defined elsewhere in these Guidelines, the following capitalized terms shall have the meanings ascribed below:

1. “Affiliate” means any entity which directly or indirectly controls, or is controlled by, or is under common control, with the business entity.
2. “Alternative Delivery” means Project delivery under the following methods: (A) design-build/low-bid (DBLB); (B) design-build/best-value (DBBV); (C) construction manager general contractor (CM/GC); or progressive design-build (PDB).
3. “Committee” has the meaning given in Section G (1) (a) of these Guidelines.
4. “Conflict of Interest” or “Organizational Conflict of Interest” means an actual or potential circumstance arising out of a Consultant’s existing or past activities, business or other financial interests (including real property interests), personal interests, contractual or other relationships, or organizational structure (*i.e.*, parent entities, subsidiaries, Affiliates, *etc.*) wherein the Consultant: (a) directly or indirectly has a pecuniary interest in, or derives a profit from (apart from legitimate contractual profit in the engagement with INDOT) or otherwise has a Financial or Other Interest in or by virtue of, the Project agreement being procured;; or (b)(i) is otherwise, or may be, unable to render impartial assistance or advice to INDOT; (ii) the Consultant’s objectivity is, or may be, impaired in performing the scope of work INDOT desires; (iii) the Consultant has an unfair competitive advantage; (iv) the Consultant’s services to INDOT may create or actually creates an unfair competitive advantage to a third party; or (v) there is a perception or appearance of impropriety or unfair competitive advantage benefiting the Consultant or a third party as a result of Consultant’s participation in a Project. Conflicts of Interest exist if a Consultant employs or includes as among the Proposer team any “restricted firm” as identified in the solicitation documents.
5. “Consultant” means any person or business entity (including any division of such entity and any Affiliate of such entity) retained by INDOT to provide professional consulting services including, without limitation, architectural and engineering, right-of-way acquisition, procurement, environmental and planning, project oversight services, and insurance- advisory services in connection with the APD Program or a Project, including Sub-consultants.
6. “Design-build/best-value” or “DBBV” means Project delivery under a public-private agreement, as defined under IC 8-15.7-2-15, that does **not** delegate some or all of the obligation to fund or finance (or both) the Project to the Operator, and does **not** obligate the Operator to operate or maintain the Project. This notwithstanding, DBBV contracts may, and often do, obligate maintenance activities during construction. Generally, DBBV is a design-build contract, procured under a “best value” selection process.

7. “Design-build/low-bid” or “DBLB” means Project delivery following INDOT’s traditional bidding process, by reference to the INDOT Standard Specifications, requiring the selected contractor to subcontract final design using prequalified professional services engineering consultants. Generally, DBLB is a design-build contract, procured by INDOT under its general powers under IC 8-23-2-6.

8. “Financial or Other Interest” means any known benefit other than enhancement of professional reputation and includes a promise of future work on a Project as well as any indirect benefit of which a Consultant is aware.

9. “Operator” means, for purposes of DBBV, a person or business entity that has entered into a public-private agreement with INDOT for the development, design, construction, operation, maintenance, planning or financing, or any combination thereof, under IC 8-15.7 or IC 8-15.5-2-5, of a Project.

10. “P3” means Project delivery under a public-private agreement, as defined under IC 8-15.7-2-15 or IC 8-15.5-2-8, that either or both: (a) delegates some or all of the obligation to fund or finance (or both) the Project to the Operator; and (b) obligates the Operator to operate or maintain the Project (beyond mere maintenance during construction).

11. “Participate” has the meaning given in Section E (1) of these Guidelines.

12. “Procurement Services” means technical procurement advisory services (*e.g.*, programmatic advisory services, Project-specific procurement and technical advisory services (including participation in development of technical requirements).

13. “Progressive Contract” or “Progressive Contracting” means CM/GC or PDB.

14. “Project Oversight Services” means any, some, or all of the following Services performed by a Consultant (or Sub-consultant):

- a. Design review;
- b. Construction oversight and inspections;
- c. Quality control and quality assurance;
- d. Project management and overview;
- e. Contract administration;
- f. Claims management; or
- g. Public relations and community outreach.

15. “Proposer” means any person or business entity (including any division of such entity and any Affiliate of such entity) that submits a statement of qualifications, solicited proposal (including following submission of an unsolicited proposal), or other submission in order to

participate in the Project for the development, design, or construction, or any combination thereof, under the P3 statutory authorities of INDOT under IC 8-15.7 (for DBBV), general statutory authorities of INDOT under IC 8-23-2-6 (for DBLB), Progressive Contracting authorities of INDOT under IC 8-23-9.5, or P3 authorities of INDOT or IFA under IC 8-15.7 or IC 8-15.5, respectively, and as applicable.

16. “Sub-consultant” includes those that have performed or will perform work on behalf of a Consultant to INDOT in the performance of the consultant’s work for INDOT.

Capitalized terms that are not defined in these Guidelines shall have the meanings provided in either the Federal Rules, the INDOT Alternative Delivery Manual, IC 8-15.7-2 (as to DBBV Projects), IC 8-23-2-6 and the INDOT Standard Specifications (for DBLB Projects), IC 8-23-9.5 (as to Progressive Contracting Projects), or IC 8-15.7 or IC 8-15.5 (as to P3 Projects).

## ATTACHMENT 1

### INDOT CONFLICT OF INTEREST POLICY

#### PROGRESSIVE CONTRACTING

##### A. Applicability

These additional guidelines apply to all Progressive Contracts related to Projects. These additional guidelines also apply to the individual entities that make up a joint venture in the same manner as they apply to the joint venture. Parent and subsidiary entities shall be considered the same entity for the purposes of these guidelines.

##### B. Federal Rules

For federally funded or otherwise federalized Progressive Contracting Projects, INDOT must comply with the Federal Rules, *excepting* those applicable only to DBBV contracts.

##### C. Additional/Modified Definitions

1. For purposes of Progressive Contracts, the term “Services” includes ICE Services, and the term “Consultant” includes a person or entity performing ICE Services, in each case, in connection with the APD Program or a P3 Project, including Sub-consultants.
2. ICE Services consist in any, some, or all of the following services provided to INDOT with respect to a Project, as a Consultant or a Sub-consultant:
  - a. independent estimating services, including cost estimation (including production-based cost estimation) and risk evaluation;
  - b. estimating auditing services;
  - c. scheduling services (including cost-loading); and
  - d. schedule auditing services (including cost-loading).

##### D. Progressive Contracting Guidelines

1. A Consultant providing ICE Services with respect to a Project may not Participate with respect to that Project or have a Financial or Other Interest in the Project at or after the time that the Consultant is providing the services identified in Section C (2).
2. A Consultant performing ICE Services on behalf of INDOT for a Project may Participate with respect to a different Project. However, INDOT reserves the right to restrict the ability of a Consultant to Participate in such manner on a different Project if, in INDOT’s judgment, the

Consultant has, in the course of performing ICE Services for INDOT, obtained access to or knowledge of confidential or sensitive information, data, procedures, policies, and processes that could provide ~~for~~ an unfair competitive advantage with respect to the procurement of that different Project or otherwise has a Conflict of Interest.

3. A Consultant participating with respect to a Project as a Proposer or Operator or as an equity owner, team member, consultant, or sub-consultant of or to a Proposer or Operator or having a Financial or Other Interest in any of the foregoing entities, is eligible to pursue ICE Services work from INDOT for another Project (provided that, once such Consultant is retained to perform ICE Services for INDOT, Sections B and C above shall apply thereafter).
4. A Consultant providing ICE Services to INDOT or to a Progressive Contractor cannot be a prequalified contractor in the State of Indiana.
5. A Consultant providing ICE Services to INDOT must prequalify as a professional- services provider in the State of Indiana.

## ATTACHMENT 2

### INDOT CONFLICT OF INTEREST POLICY

#### PUBLIC-PRIVATE PARTNERSHIP CONTRACTING

##### A. Applicability

These additional guidelines apply to all P3 Projects. These additional guidelines also apply to the individual entities that make up a joint venture in the same manner as they apply to the joint venture. Parent and subsidiary entities shall be considered the same entity for the purposes of these guidelines.

##### B. Federal Rules

For federally-funded or otherwise federalized P3 Projects, INDOT must comply with the Federal Rules.

##### C. Additional/Modified Definitions

1. For purposes of P3 Projects, the term “Services” includes T&R Services, and Financial Advisory Services, and the term “Consultant” includes a person or entity performing T&R Services or Financial Advisory Services, in each case, in connection with the APD Program or a P3 Project, including Sub-consultants.
2. “T&R Services” consists of any, some, or all of the following services, provided to INDOT:
  - a. Conducting draft and investment- grade traffic and revenue studies, toll- elasticity studies, toll- feasibility studies, toll- pricing studies, origin and destination surveys and studies, or studies or analyses of a similar nature, including "peer review" studies;
  - b. Data mining and preparation of reports, analyses, and projections in connection with the traffic and projected revenues; or
  - c. Other traffic and revenue projection and related services, whether connected with any toll- revenue financing.
3. “Financial Advisory Services” consists of any, some, or all of the following services, provided to INDOT:
  - a. Acting in the capacity of financial advisor to INDOT or any other agency of the State of Indiana by providing advice on finance-related issues, including development of short-term or long-term finance strategy and plans of finance for a Project, and the development of

financial aspects of the solicitation documents and any public-private agreement;

- b. Identifying and pursuing sources of funds;
  - c. Acting as underwriter (either lead or co-lead) for a revenue- bond issuance, a TIFIA instrument, private- activity- bond issuance on a Project, or other capital markets transaction;
  - d. Financial model and model auditing services; or
  - e. Other financial advisory and banking or underwriting services.
4. Capitalized terms that are not defined in this Attachment 2 to these Guidelines shall have the meanings provided in either the Federal Rules, the INDOT Alternative Delivery Manual, IC 8-15.7-2, IC 8-15.5-2, IC 8-23-2-6 and the INDOT Standard Specifications.

#### D. P3 Contracting Guidelines

##### 1. Traffic and Revenue Services

- a. Consultant (or Sub-consultants, as applicable) performing T&R Services for INDOT or any agency of the State of Indiana on a Project may not Participate with respect to that Project.
- b. Consultants (or Sub-consultants, as applicable) previously engaged to provide T&R Services to INDOT or any agency of the State of Indiana with respect to a Project and that has completed such services may be a Proposer or Participate with respect to that Project; provided that INDOT is satisfied that:
  - i. The Consultant did not have access to or obtain knowledge of confidential or sensitive information, procedures, policies, and processes that could provide an unfair competitive advantage with respect to the procurement for that Project;
  - ii. The data and information provided to the Consultant in the performance of the T&R Services is either: (1) irrelevant to the procurement for that Project; or (2)(A) available to all Proposers at the time of letting on a reliance basis (*i.e.*, INDOT stands behind the data and information), and (B) not the product of professional judgment, in whole or part;
  - iii. The work product of the Consultant incorporated into or relevant to the procurement for that Project is available to all Proposers, so long as the work product is either: (1) irrelevant to the procurement for the Project; or (2)(A) available to all Proposers

at the time of letting, not on a reliance basis (*i.e.*, INDOT does not stand behind the work product), and (B) is not the product of professional judgment, in whole or part; and

- iv. There will be no impact on that Project's plan of finance, including the ability to obtain and close funding and potential sources of funding.
- c. Consultants (or Sub-consultants, as applicable) performing T&R Services for INDOT on a Project may Participate on a different Project.
- d. Consultants (or Sub-consultants, as applicable) performing T&R Services may Participate on a different Project so long as the different Project is not, in INDOT's sole judgment, related to or affected by the Project (*e.g.*, the project ~~are~~ is not in a series or program of related projects under one corridor, or affected by the performance of proximate or future projects). INDOT also reserves the right to restrict the ability of a Consultant to Participate in such manner on any different Project if, in INDOT's judgment, the Consultant has, in the course of performing the T&R Services for INDOT, obtained access to or knowledge of confidential or sensitive information, procedures, policies, and processes that could provide an unfair competitive advantage with respect to the procurement of that different Project or otherwise has a Conflict of Interest.
- e. A Consultant (or Sub-consultants, as applicable) Participating with respect to a Project as a Proposer or Operator or otherwise is eligible to pursue T&R Services work from INDOT, or any agency of the State of Indiana, for another Project, subject then and thereafter to the constraints regarding conflicts described above.

## 2. Financial Advisory Services

- a. A Consultant (or Sub-consultants, as applicable) performing Financial Advisory Services to INDOT, or to any agency of the State of Indiana, on a Project may not Participate nor serve as a financial Consultant, financial Sub-consultant, banker, or underwriter (in particular), or provide other financial, funding, or financing services for a Proposer with respect to the Project.
- b. A Consultant (or Sub-consultants, as applicable) performing Financial Advisory Services to INDOT, or to any agency of the State of Indiana, on a program of P3 Projects may not Participate nor serve as a financial Consultant, financial Sub-consultant, banker, or underwriter (in particular), or provide other financial, funding, or financing



services for a Proposer with respect to any P3 Project within the program of P3 Projects.

- c. A Consultant (or Sub-consultant, as applicable) providing Financial Advisory Services or that has previously provided Financial Advisory Services to INDOT, or to any agency of the State of Indiana, as among other Consultants for a P3 Project or a program of P3 Projects may Participate on a Project if, after notification from INDOT the Consultant (or Sub-consultant, as applicable): (a) abstains from further work with other Consultants advising INDOT, or such other agency, with respect to the P3 Project or program of P3 Projects prior to any formal action by INDOT to “screen” any Project as a P3 Project; or (b) sufficient time transpires between such screening and the P3 Project is thereafter programmed for procurement, as determined in INDOT’s sole judgement, and in either case, the Consultant (or Sub-consultant, as applicable) notifies INDOT of its intent to abstain from further work related to the P3 Project or program of P3 Projects sufficiently in advance, in INDOT’s sole judgement, of the sharing of any P3 Project information that would, also in INDOT’s sole judgment, provide the Consultant (or Sub-consultant) a competitive advantage in the procurement of any P3 Project.
- d. A Consultant (or Sub-consultant, as applicable) previously engaged to provide Financial Advisory Services to INDOT, or to any agency of the State of Indiana, on a Project and which has completed such services may be a Proposer or may Participate for another Project; provided that INDOT is satisfied that the Consultant (or Sub-consultant, as applicable) did not have access to or obtain knowledge of confidential or sensitive information, procedures, policies, and processes that could provide an unfair competitive advantage with respect to the procurement for that Project;
- e. A Consultant (or Sub-consultant, as applicable) Participating with respect to a P3 Project that is not among a program of P3 Projects for which the Consultant was a Consultant (or Sub-consultant) to INDOT, or any agency of the State of Indiana, as a Proposer or Operator, is eligible to pursue Financial Advisory Services work from INDOT, or any agency of the State of Indiana, for another P3 Project that is not among a program of P3 Projects for which the Consultant was a Consultant (or Sub-consultant) to INDOT, or any agency of the State of Indiana, subject then to the constraints regarding conflicts described above.