

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
INNOVATIVE PROJECT DELIVERY
DIVISION MEMORANDUM

GENERAL SUBJECT:	Organizational Conflicts of Interest Guidelines for PPTA and Design Build procurements	NUMBER:	<u>IPD 07-02.0</u>
		DATE:	<u>August 1, 2007</u>
SPECIFIC SUBJECT:	Framework to evaluate potential organizational conflicts of interest for private entities participating in VDOT PPTA and Design Build programs or projects	SUPERSEDES:	<u>N/A</u>
		SUNSET/ EXPIRES:	<u>In effect until superseded</u>

Original Signature on File

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PURPOSE: To establish implementation guidelines for the Virginia Department of Transportation's (VDOT) policy on organizational conflicts of interest (COI), relating to projects developed in accordance with §56.556-574 (the Public Private Transportation Act or PPTA) and §33.1-12 (Design Build -DB) programs.

OBJECTIVE: 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.

BACKGROUND: The Virginia Transportation Commissioner has authority under the PPTA to enter into contracts for VDOT as a responsible public entity (RPE), for the development of qualifying transportation facilities. VDOT's PPTA procurement process is detailed in its implementation guidelines.

The Commonwealth Transportation Board (the CTB) has authority under §33.1-12 of the Code of Virginia to competitively procure projects using a design-build delivery method.

VDOT follows the pertinent state and federal laws 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) law, 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.

Pertinent Legal Requirements

Section 2.2-4373 of the Code of Virginia prohibits a party who prepared an invitation to bid or an RFP/SFP 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, 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 magnitude of projects administered under the programs 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 (i) the type of consulting services at issue, (ii) the particular circumstances of each procurement, (iii) specialized expertise needed by VDOT, the PPTA or DB programs and the private industry to implement specific innovative technologies or disciplines, (iv) the particular VDOT division or district managing the procurement; (v) the past, current or future working relationship between the Consultant, Offeror, Private Entities and VDOT; and (vi) the period of time between the potential conflict situation and the initiation of the PPTA 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 PPTA or DB project. With that, these Guidelines neither purport to address every situation that may arise in the context of VDOT's PPTA program nor to mandate a particular decision or determination by VDOT when faced with facts similar to those described in these Guidelines.

PROCEDURES:

VDOT will apply the following procedures in accordance with the law and on a project specific basis. The Director of the Innovative Project Delivery Division will review potential organizational conflicts of interest related to VDOT procurement of contracts under the PPTA or design-build legislation. The Director's determination may be appealed to the Chief Engineer.

A. 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.

B. Prior to submitting a proposal or response to a Request for Proposals (RFP), each developer 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. Developers are notified that prior and existing contractual obligations between a company and a federal or state agency relative to the proposed procurement or VDOT PPTA or DB programs may present a COI or a competitive advantage.

If a potential COI or competitive advantage is identified, the developer shall submit in writing the pertinent information to the VDOT project Point of Contact (POC) 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 for proposals in response to RFPs for PPTA or design-build contracts. 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:

1. An organization or individual hired by VDOT to provide assistance in development of instructions to developers or evaluation criteria for a specific PPTA or DB Project.
2. An organization or individual hired by VDOT to provide assistance in development of instructions to developers or evaluation criteria as part of the programmatic guidance or procurement documents for VDOT's PPTA or DB programs, and as a result has a unique competitive advantage relative to a specific Project.
3. 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 developers in a timely manner prior to the project's procurement process.

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.

IMPLEMENTATION: These Guidelines will become effective immediately on all PPTA and DB procurements administered by VDOT; provided, however, that to the extent that VDOT has, prior to issuance of the Guidelines, consented to (i) performance by a Consultant of consultant services that are in conflict with these Guidelines or (ii) participation by a Consultant on a Developer's team or as an equity owner, team member, consultant or sub-consultant of or to a Developer or having a financial interest in any of the foregoing entities, these Guidelines shall not modify or alter such prior consent. The foregoing shall not preclude, however, the application of the Guidelines to the Consultant for future PPTA or DB projects or changes in scope of existing projects, including taking into account the performance of Consultant services on the project for which consent was obtained.

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