

San Bernardino County Transportation Authority	Policy	30102
Adopted by the Board of Directors	January 4, 2018	Revised
Consultant Conflict of Interest Policy for Design-Build Projects		Revision No. 0

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I. PURPOSE

The purpose of this policy is to prescribe a Conflict of Interest policy applicable to private entities, including Consultants and Proposers, participating or deciding to participate in SBCTA’s planning, procurement, design, construction or development of a design-build (DB) project. A private entity’s failure to comply with this policy may result in potential liability to SBCTA and the private entity and the private entity’s preclusion from participation in a DB project. This policy is intended to apply to SBCTA’s procurement of architect and engineering and other consultant services and construction work for projects developed pursuant to a design-build delivery method. As used herein, design-build includes design-build-maintain, design-build-operate-maintain, design-build-finance and similar variations.

II. DEFINITIONS

Section 2.1. "Affiliate" means with respect to any Consultant: (a) any member, partner or joint venturer of such Consultant; (b) any individual or entity that directly or indirectly controls, or is controlled by, or is under common control with, such Consultant or any of its members, partners or joint venturers; and (c) any other entity for which 20% or more of the equity interest in such other entity is held directly or indirectly, beneficially or of record by (i) such Consultant, (ii) any of such Consultant’s members, partners or joint venturers or (iii) any Affiliate of such Consultant under clause (b) of this definition.

Section 2.2. "SBCTA" means the San Bernardino County Transportation Authority.

Section 2.3. "Conflict of Interest" means a circumstance arising out of a Consultant’s existing or past activities including past activities as a Consultant to or employee of SBCTA, business interests, familial relationships, contractual relationships, and/or organizational structure (i.e., Affiliates, etc.) wherein (i) the Consultant is or may be unable to render impartial assistance or advice to SBCTA, (ii) the Consultant’s objectivity in performing the scope of work sought by SBCTA is or might otherwise be impaired, (iii) the Consultant has, or is perceived to have, an unfair competitive advantage; (iv) the Consultant’s performance of Services on behalf of SBCTA does or may provide an unfair competitive advantage to a third party; or (v) regardless of whether accurate, there is a perception or appearance of impropriety or unfair competitive advantage benefiting the Consultant or a third party as a result of the Consultant’s participation on a design-build project.

Section 2.4. "Consultant" means any person or business entity (including any individual employee of such entity or any division and/or Affiliate of such entity) previously employed, previously or currently retained, or in the process of being retained, by SBCTA to provide Services in connection with a design-build project, including subconsultants and individual employees of subconsultants.

Section 2.5. "Department Director" means the department director of SBCTA’s Rail and Transit Department or Project Delivery Department or his or her designee.

Section 2.6. "Policy" means this San Bernardino County Transportation Authority Consultant Conflicts of Interest Policy for Design-Build Projects.

Section 2.7. "Procurement Manager" means the procurement manager of SBCTA or his or her designee.

Section 2.8. "Proposer" means any person or business entity, including joint ventures, partnerships, limited liability companies, corporations, consortia, teams or other groups or organizations of individuals or entities, or

the individuals and entities that make up such groups, that have submitted a qualification submittal or proposal for work on a design-build project or are interested in submitting a qualification submittal or proposal for work on a design-build project.

Section 2.9. "Services" means, in the context of this Policy, consulting services related to a design-build project, which may include, but are not limited to, some or all of the following: planning services; procurement services; procurement management/construction management (PCM) services; federal and state environmental services; financial advisory services; insurance services; legal services; DBE compliance or program development services; labor compliance services; program oversight; design and construction management services; preliminary engineering services (including right-of-way, structures, survey and utility); and public and community outreach services.

III. POLICY

Section 3.1. Purpose. This section prescribes SBCTA's policy on Conflicts of Interest relating to Consultants participating or desiring to participate in the planning, procurement, design, construction or development of a design-build project, and thereby:

- (A) Protects the integrity and fairness of the planning, procurement, design, construction or development of design-build projects;
- (B) Avoids circumstances where a Consultant or Proposer obtains, or appears to obtain, an unfair competitive advantage as a result of work performed by a Consultant;
- (C) Provides guidance to Consultants and Proposers, or potential Consultants and Proposers, so they may assess, and make informed business decisions concerning their decision to provide Services on design-build projects or to submit a qualification submittal and/or proposal related to the design, construction or development of design-build projects; and
- (D) Protects SBCTA's interests and confidential and sensitive project-specific information.

Section 3.2. Applicability. This Policy applies to Consultants who desire to participate in, have participated in or are participating in the performance of Services for SBCTA related to design-build projects. This Policy may prohibit or restrict the ability of a Proposer to have a Consultant participate on a Proposer team as an equity owner of the Proposer or team member, act as a consultant or subconsultant to a Proposer, or have a financial interest in a Proposer or an equity owner or team member of a Proposer. This Policy relates solely to design-build projects and does not address SBCTA's approach to conflicts of interest on other SBCTA projects.

Section 3.3. Conflicts of Interest Disclosure.

Section 3.3.1. Obligation to Disclose. Consultants participating in a design-build project shall arrange their affairs so as to prevent Conflicts of Interest from arising. Any Consultant having an actual, potential or perceived Conflict of Interest shall disclose the matter to SBCTA in writing with supporting facts and information to the following individual:

San Bernardino County Transportation Authority
1170 W 3rd St., Second Floor
San Bernardino, CA 92410
Attention: Procurement Manager
Phone: 909.884.8276
E-mail: procurement@gosbcta.com

Disclosures will also be requested as part of any request for qualifications or request for proposals relating to the design, construction or development of a design-build project.

The Consultant's Conflict of Interest disclosure obligation is ongoing. Consultants should undertake reasonable due diligence, including necessary conflict searches, to determine whether new actual, potential or perceived Conflicts of Interest arise. Due diligence should extend to investigation of past relationships and, if the Consultant is an entity, to employees, officers or directors of the Consultant. If a Consultant becomes aware of an actual, potential or perceived Conflict of Interest at any time during its participation in a design-build project, the Consultant shall promptly disclose the matter to the Procurement

Manager as described herein. A Consultant shall use its best efforts to respond to any requests for additional information and documentation that the Procurement Manager deems necessary to fully evaluate SBCTA's Conflict of Interest issues and to consider the SBCTA's determination. Consultant's failure to provide such information or documentation when requested may impact the Department Director's final determination hereunder.

Section 3.3.2. Failure to Comply. If a Consultant fails to comply with this Policy, including failure to comply with any mitigative measures imposed under this Policy, or otherwise fails to disclose an actual, potential or perceived Conflict of Interest, the Department Director may, in his or her sole discretion:

- (A) Preclude and/or disqualify the Consultant and its Affiliates, including any Proposer with whom the Consultant is or had affiliated or teamed, from participation in the planning, procurement, design, construction and/or development of the design-build project, including any associated competitive process;
- (B) Require the Consultant and its Affiliates, including any Proposer with whom the Consultant is or had affiliated, to implement mitigative measures;
- (C) Segregate or terminate the Consultant and its Affiliates, including any Proposer with whom the Consultant is or had affiliated, from planning, procurement, design, construction and/or development of the design-build project; and/or
- (D) Pursue any and all other rights and remedies available at law, in equity or set forth in any request for qualifications or request for proposals, which rights and remedies shall include the right to seek any and all direct or indirect costs and damages resulting from the Consultant's failure to comply with this Policy, including, but not limited to, costs resulting from third-party challenges to the procurement or SBCTA's re-procurement of the design-build project.

Section 3.4. Period in Which a Conflict of Interest Applies. If the Department Director determines that the performance of Services by a Consultant creates an actual, potential or perceived Conflict of Interest, the provisions in this Policy and any decisions made by the Department Director related to such Conflict of Interest (including prohibitions, mitigative measures, etc.) shall continue and apply for the duration of the planning, procurement, design, construction and development of a design-build project, provided that the Department Director may, on a case-by-case basis and in his or her sole discretion, modify the length of this time period in writing if he/she determines that the modification is in the best interests of SBCTA and the design-build project.

Section 3.5. Application to New Firm. If a Conflict of Interest applies to an individual, the Conflict of Interest and prohibition with respect to the individual will not apply to the individual's new place of employment, unless the new employer is an Affiliate of the individual's previous employer or unless mitigative measures will not, in the Department Director's sole discretion, mitigate or eliminate the Conflict of Interest issue. If the new employer is not an Affiliate of the previous employer and is otherwise eligible to perform Services for SBCTA pursuant to this Policy and applicable law, the new employer will remain eligible despite the employment of the individual, but mitigative measures may be required of the new employer with respect to the employee (including, but not limited to, preclusion of such employee from participation in the design-build project).

Section 3.6. Federal and State Requirements.

Section 3.6.1. Federal and State Laws. For federal-aid projects and in certain other circumstances, SBCTA must comply with the Federal Highway Administration's organizational conflict of interest regulations found in 23 CFR §636.116. SBCTA must also comply with certain California laws and regulations, including, without limitation, Government Code §§1090 and 87100 et seq. Nothing in this Policy is intended to limit, modify, supersede or otherwise alter the effect of those laws and regulations, and SBCTA will apply this Policy consistent with those laws and regulations.

Section 3.6.2. Limitations on SBCTA Consents and Approvals. To the extent that application of the federal and state laws and regulations described in Section 3.6.1 would preclude or limit participation by a Consultant or an individual with respect to a design-build project, then notwithstanding any other aspect of this Policy or any contrary decision by the Department Director in response to an actual, potential or perceived Conflict of Interest under this Policy, such federal and state laws and regulations shall control and be determinative. Under no circumstances shall a decision, approval or consent by the Department Director in response to a disclosure, request or actual, potential or perceived Conflict of Interest under this Policy be considered an opinion with respect to the applicability or effect of such federal and state laws or

regulations, and Consultant shall bear all responsibility and liability for determining if a conflict under federal and/or state laws or regulations exist in relation to the Consultant's work or proposed work on the design-build project.

Section 3.7. Binding Effect of SBCTA Decisions. The Department Director shall not withdraw or amend a prior consent or approval granted to a Consultant under this Policy unless:

- (A) The application of the federal and state laws and regulations described in Section 3.6 requires the consent or approval to be withdrawn or amended; or
- (B) The Department Director decides, in its sole discretion, to withdraw or amend the consent or approval based on factual circumstances that the Department Director has been made aware of that were not disclosed when the Department Director made his or her original decision, or factual circumstances that are new or have changed since the Department Director made its original decision; or
- (C) The Consultant or Proposer team fails to comply with any mitigative measures imposed under this Policy.

Section 3.8. General Conflict of Interest Standards. Except as provided in Section 3.9 of this Policy, no Consultant that has previously provided Services or that is currently providing Services to SBCTA with respect to a design-build project may be a Proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a Proposer for that design-build project, or have a financial interest in any of the foregoing entities with respect to that design-build project. In Department Director's sole discretion, this prohibition may be extended to other design-build projects for Consultants that worked for SBCTA on a different design-build project, where such work was, in the Department Director's sole determination, strategic to SBCTA's design-build program or afforded such Consultant access to information about other design-build projects or SBCTA's approach to other design-build projects or procurement of other design-build projects that would provide an unfair competitive advantage for such Consultant.

Section 3.9. Determination Regarding Provision of Services for a Design-Build Project.

Section 3.9.1. Discretion of SBCTA. Unless otherwise indicated in this Policy, all approvals, actions or discretion under this Policy and with respect to an actual, potential or perceived Conflict of Interest shall be within the sole discretion of SBCTA. Unless a particular decision regarding application of this Policy is referred to the SBCTA's General Counsel by the Department Director, the Department Director retains the ultimate and sole discretion to act on behalf of SBCTA hereunder and to determine on a case-by-case basis whether an actual, potential or perceived Conflict of Interest exists and what actions may be appropriate to avoid, neutralize, or mitigate any actual, potential or perceived Conflict of Interest.

Section 3.9.2. Determination Process. In response to a disclosure under Section 3.3 above or information SBCTA obtains independent of a Consultant, the Department Director shall determine whether a Consultant has an actual, potential or perceived Conflict of Interest that the Department Director determines should prevent the Consultant from (i) being a Proposer, (ii) participating as an equity owner, team member, consultant, or subconsultant of or to a Proposer for a design-build project, (iii) having a financial interest in any of the foregoing entities with respect to a design-build project, or (iv) otherwise participating in the design, construction or development of a design-build project. Once the Department Director makes this determination, the Procurement Manager or his/her designee shall send the Consultant a written notice regarding the decision and, if participation is approved, whether the approval and participation is limited or subject to the Consultant meeting certain conditions. The Department Director shall consider some or all of the following factors when making the determination:

- (A) Whether the Consultant will not, or in the case of the previous performance of Services did not, have access to or obtain knowledge of confidential or sensitive information, procedures, policies and processes that could provide, or could be perceived to provide, an unfair competitive advantage with respect to the procurement, design, construction or development of the design-build project;
- (B) Whether the data and information provided to the Consultant in the performance of the Services is either substantially irrelevant to the procurement for the design-build project or is generally available on substantially an equal and timely basis to all Proposers;
- (C) The type of Services at issue;

- (D) The particular circumstances at issue, including the Consultant's ability to effectively implement the safeguards described in Section 3.12, including an ethical wall, or to otherwise mitigate the Conflict of Interest in a manner satisfactory to SBCTA;
- (E) The specialized expertise, if any, needed by SBCTA and Proposers to implement the design-build project;
- (F) The period of time between the previous work for SBCTA and the potential Conflict of Interest situation;
- (G) Whether the Consultant's work for SBCTA has been completed or is ongoing;
- (H) The potential impact on the procurement and implementation of the design-build project, including impacts on competition;
- (I) Whether, with respect to a Consultant's prior environmental services related to the design-build project, if any, a record of decision or finding of no significant impact or other environmental approval has been issued for the design-build project;
- (J) Whether, with respect to a Consultant's prior traffic and revenue Services related to the design-build project, if any, the prior work will have no impact on the design-build project's plan of finance, on a Proposer's ability to obtain and close funding or on the potential sources of funding for the design-build project;
- (K) Whether the Department Director believes that the Consultant's participation is in the best interests of SBCTA; and
- (L) Any other factors or circumstances deemed relevant by the Department Director.

Section 3.10. Procurement and Financial Services. Independent of the process described in Section 3.9, a Consultant actively engaged and performing procurement services (including PCM services) or financial services with respect to a design-build project may not be a Proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a Proposer for that design-build project, or have a financial interest in any of the foregoing entities with respect to that design-build project. Unless otherwise creating a Conflict of Interest or precluded by applicable law, a Consultant that has provided Services during the planning phases of a design-build project typically will be allowed to pursue and propose for a PCM procurement for that design-build project.

Section 3.11. Multiple Services. If a Consultant is providing more than one category or type of Services to SBCTA for a design-build project (e.g., environmental services as well as procurement services) and there are differences in this Policy's considerations, standards, restrictions, limitations and outcomes applicable to those categories or types of Services, the standards, restrictions, limitations and outcomes applicable to a category that are more stringent will be applied (e.g., if a Consultant were only providing preliminary engineering services that have been completed, they may be approved to participate on a Proposer team, whereas, if they were also providing ongoing procurement services for the design-build project, they may not be approved to participate on a Proposer team).

Section 3.12. Restriction of Services and Conditions to Approvals and Exceptions. In order to address actual, potential or perceived Conflicts of Interest, the Department Director as part of providing his or her consent to the participation of a Consultant may, in his or her sole discretion:

- (A) Restrict the scope of Services the Consultant may be eligible to perform for SBCTA or the Proposer team in order to further the intent and goals of this Policy;
- (B) Condition an approval, determination, or exception as the Department Director determines appropriate to further the intent and goals of this Policy, including by requiring the Consultant or Proposer to implement certain safeguards, including, but not limited to:
 - (i) The execution of confidentiality agreements satisfactory to the Department Director and Procurement Manager, which may, among other things, include the segregation and protection of information obtained as a result of the Consultant's prior or ongoing work for SBCTA or from former or current SBCTA employees; and/or

(ii) The execution of ethical wall agreements satisfactory to the Department Director and Procurement Manager, which segregate certain personnel from participation in the design-build project; and/or

(iii) The execution of agreements satisfactory to the Department Director and Procurement Manager regarding the dissemination of work product and materials created as a result of Consultant's prior or ongoing work for SBCTA, including dissemination to SBCTA and restrictions on dissemination by the Consultant to any Proposer team, including a team on which they intend to participate.

Section 3.13. Provisions are Nonexclusive. The provisions in this Policy do not address every situation that may arise in the context of SBCTA's planning, procurement, design, construction or development of a design-build project nor require a particular decision or determination by the Department Director when faced with facts similar to those described in this Policy. In addition, additional policies, procedures and limits related to conflicts of interest or similar issues may be imposed by SBCTA at any time with respect to a design-build project or any other SBCTA projects.

IV. REVISION HISTORY

Revision No.	Revisions	Adopted
0	Adopted	01/04/18