



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 21-167

For business meeting on November 19, 2021

Title

Court Facilities: Conflict of Interest Policy
for Design-Build Projects

Agenda Item Type

Action Required

Rules, Forms, Standards, or Statutes Affected

None

Effective Date

November 19, 2021

Recommended by

Court Facilities Advisory Committee
Hon. Brad R. Hill, Chair
Hon. Patricia M. Lucas, Vice-Chair

Date of Report

November 2, 2021

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Executive Summary

The Court Facilities Advisory Committee recommends adoption of a conflict of interest policy governing the ability of a person or entity seeking to perform services for the Judicial Council on a design-build project to submit a proposal as a design-build entity, or to join a design-build team. Assembly Bill 143 (Stats. 2021, ch. 79), enacted on July 16, 2021, reauthorized the Judicial Council to utilize the design-build delivery method for its courthouse construction program. The conflict of interest policy shall apply to consultants and contractors for design-build projects authorized under article 7.1, Superior Court Design-Build Projects (Gov. Code §§ 70398–70398.7).

Recommendation

The Court Facilities Advisory Committee recommends that the Judicial Council, effective November 19, 2021, adopt the *Conflict of Interest Policy for Design-Build Projects*. The proposed policy is included as Attachment A to this report.

Relevant Previous Council Action

The council has taken no previous action on the attached policy.

Analysis/Rationale

Conflict of interest policy

The policy (see Attachment A) has been developed in response to Government Code section 70398.1(b), which requires the Judicial Council to develop “a standard organizational conflict of interest policy, consistent with applicable law, regarding the ability of a person or entity that performs services for the Judicial Council relating to solicitation of a design-build project to submit a proposal as a design-build entity, or to join a design-build team.” The policy was modeled on similar conflict of interest policies adopted by executive branch agencies in compliance with identical design-build statute requirements.

The policy addresses potential conflicts of interest that may arise in relation to design-build programs or projects. Organizational conflicts of interest can occur when, because of existing or planned activities or because of relationships with other persons, the consultant or contractor (proposer) is unable or potentially unable to render impartial assistance or advise the Judicial Council; the proposer’s objectivity in performing the contract work is or might be otherwise impaired; or the proposer has an unfair competitive advantage.

The policy and its provisions regarding conflicts of interest for design-build projects will be incorporated or referenced in the design-build request for qualifications or request for proposal documents, as well as any contract for the engineering services, inspection, or technical support in the administration of the design-build program or projects. Also, attached to the policy is a conflict of interest checklist, checklist instructions, and a disclosure form.

Capital project delivery methods

Construction for courthouse capital projects has been primarily procured through the construction manager at risk (CMAR) method. The CMAR delivery method will continue to be utilized for renovation projects and certain new construction projects, such as single-courtroom courthouses. However, to take advantage of market conditions, be consistent with other state agencies, and save time and cost through single-vendor procurement, the Judicial Council will use the design-build delivery method for all other new capital construction projects.

Design-build was previously available to the Judicial Council under Government Code section 70391.7. However, that section contained certain scope limitations that made it unusable in the current context. In a budget trailer bill (Assem. Bill 143; Stats. 2021, ch. 79) enacted on July 16, 2021, the Legislature repealed Government Code section 70391.7 and reauthorized the council to utilize the design-build delivery method for its courthouse construction program. This authority now exists as article 7.1, Superior Court Design-Build Projects (§§ 70398–70398.7) of chapter 5.7 of title 8 of the Government Code (see Link A).

Policy implications

On June 28, 2021, the Budget Act of 2021 (fiscal year 2021–22) was signed, which included a total of \$115 million for the following trial court capital-outlay projects:

- Butte—Butte County Juvenile Hall Addition and Renovation;
- Lake—New Lakeport Courthouse;
- Los Angeles—Los Angeles Master Plan;
- Mendocino—New Ukiah Courthouse;
- Monterey—New Fort Ord Courthouse;
- Nevada—New Nevada City Courthouse; and
- San Bernardino—San Bernardino Juvenile Dependency Courthouse Addition and Renovation.

This policy is necessary to assist Judicial Council Facilities Services with soliciting proposals for the Lake, Mendocino, and Monterey projects and for other future projects identified in the council’s *Judicial Branch Five-Year Infrastructure Plan for Fiscal Year 2022–23* (see Link B).

Comments

In advance of the advisory committee’s review of the attached policy, it was posted for public comment from September 27 through October 7, 2021. No comments were received.

Alternatives considered

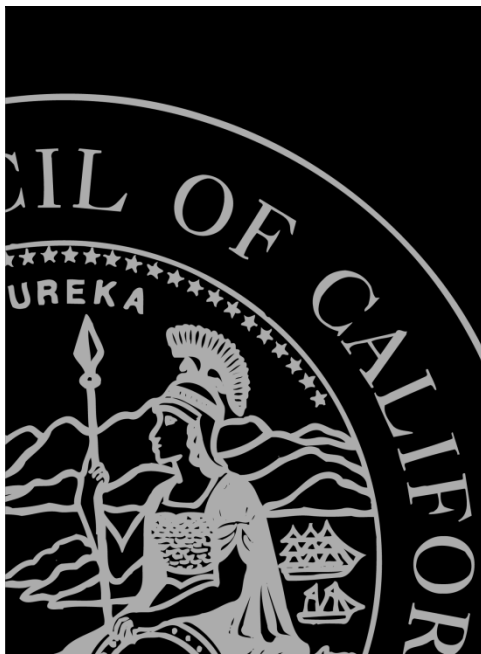
Because the policy is mandated by statute, no alternatives to the recommended action were considered.

Fiscal and Operational Impacts

No new costs will be incurred by implementing the proposed policy, as it will be effected on behalf of the council by its Facilities Services staff.

Attachments and Links

1. Attachment A: *Conflict of Interest Policy for Design-Build Projects* (November 19, 2021)
2. Link A: Article 7.1, Superior Court Design-Build Projects (Gov. Code, §§ 70398–70398.7), https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=GOV&division=&title=8.&part=&chapter=5.7.&article=7.1
3. Link B: *Judicial Branch Five-Year Infrastructure Plan for Fiscal Year 2022–23* (July 9, 2021), <https://www.courts.ca.gov/documents/5year2223.pdf>



Conflict of Interest Policy for Design-Build Projects

ADOPTED BY JUDICIAL COUNCIL ON:
NOVEMBER 19, 2021

AS REQUIRED BY GOVERNMENT CODE
SECTION 70398.1(B)



JUDICIAL COUNCIL
OF CALIFORNIA

I. Purpose

The purpose of this document is to establish Judicial Council of California (“Judicial Council”) policy on potential conflicts of interest that may arise in relation to design-build programs or projects under Government Code section 70398.1(b).

Organizational conflicts of interest can occur when, because of existing or planned activities or because of relationships with other persons, the consultant or contractor (“Proposer”) is unable or potentially unable to render impartial assistance or advise the Judicial Council; the Proposer’s objectivity in performing the contract work is or might be otherwise impaired; or the Proposer has an unfair competitive advantage.

The policies and guidelines concerning the organizational conflicts of interest found herein will be specified or referenced in the design-build request for qualifications (“RFQ”) or request for proposal (“RFP”) documents, as well as any contract for the engineering services, inspection, or technical support in the administration of the design-build program or projects.

II. Conflict of Interest Checklist and Disclosure Form

A conflict of interest checklist (see Attachment 1) will be provided to, and is to be used by all Proposers, including subconsultants, to assist in screening for potential organizational conflicts of interest. The checklist, which will provide various examples of conflicts, is for the internal use of the Proposers and does not need to be submitted to the Judicial Council. The checklist will only serve as a guide, and there may be additional potential conflict situations not covered by that checklist. If a Proposer determines a potential conflict of interest exists that is not covered by the checklist, that potential conflict must still be disclosed.

After review of the checklist, the Proposers must complete the Disclosure of Potential Conflict of Interest (see Attachment 1) and submit it along with the proposal. If the Proposer determines a potential conflict of interest exists, it must disclose the potential conflict of interest to the Judicial Council; however, such a disclosure will not necessarily disqualify a Proposer from being awarded a contract. The Proposer shall propose measures to avoid, neutralize, or mitigate all potential conflicts. To avoid any unfair taint of the selection process, the disclosure form will be provided separately from the bound proposal, and it will not be provided to the selection committee members. Judicial Council staff will review the disclosure and the appropriateness of the proposed mitigation measures to determine if the Proposer may be awarded the contract notwithstanding the potential conflict. Judicial Council staff may consult with its legal counsel. Resolution of the conflict of interest issues is ultimately at the sole discretion of the Judicial Council. The Judicial Council reserves the right to cancel or amend the resulting contract if the successful Proposer failed to disclose a potential conflict, which it knew or should have known about, or if the Proposer provided information on the disclosure that is false or misleading.

III. Responsibilities and Additional Guidance

After award, conflict of interest guidelines and policies shall continue to be monitored and enforced. If an organizational conflict of interest is discovered after award, the Proposer will make an immediate and full written disclosure to the Judicial Council that includes a description of the action that the Proposer has taken or proposes to take to avoid or mitigate such conflicts. If an organizational conflict of interest is determined to exist and the Proposer was aware of an organizational conflict of interest prior to award of the contract and did not disclose the conflict, the Judicial Council may terminate for default. If the Proposer is terminated, the Judicial Council assumes no obligations, responsibilities, and liabilities to reimburse all or part of the costs incurred or alleged to have been incurred by the Proposer.

The Judicial Council recognizes that the Proposers must maintain business relations with other public and private sector entities in order to continue as viable businesses. The Judicial Council will take this reality into account as it evaluates the appropriateness of proposed measures to mitigate potential conflicts. It is not the intent of the Judicial Council to disqualify Proposers based merely on the existence of a business relationship with another entity, but rather only when such relationship causes a conflict that potentially impairs the Proposer's ability to provide objective advice to the Judicial Council. The Judicial Council would seek to disqualify Proposers only in those situations in which a potential conflict cannot be adequately mitigated.

The California Board for Professional Engineers, Land Surveyors, and Geologists provides additional guidance and has established conflict-of-interest rules applicable to those professionals licensed by the Board (see Board Rules 475 and 476 (16 Cal. Code Regs. §§ 475, 476)). These rules require full disclosure when a licensee has any business association or financial interest that may influence his or her judgment in connection with the performance of professional services and when a licensee provides professional services for two or more clients on a project or related project.

IV. Conflict of Interest Determination

Based on applicable state and federal laws, codes, regulations, and policies, the Judicial Council will consider the following to determine whether a conflict of interest exists in relation to a design-build project:

1. Proposers will NOT be allowed to participate in the design-build project or to join a design-build team if, including but not limited to:
 - a. The Proposer is the Judicial Council's criteria architect ("CrA") to the design-build program. Subconsultants to the CrA that have not yet performed work on the contract to provide services for design-build programs may participate as a Proposer or join a design-build team.

- b. The Proposer has assisted the Judicial Council in managing or assisting in the management of this design-build project, including the preparation of RFP language or evaluation criteria.
 - c. The Proposer has conducted preliminary design services for the design-build project.
 - d. The Proposer performed design work related to the design-build project for other stakeholders.
 - e. The Proposer has performed work on a previous contract that specifically excludes them from participating further in the design-build project or joining a design-build team.
 - f. The Proposer is under contract with any other entity or stakeholder to perform oversight on the design-build project after letting.
 - g. The Proposer has obtained any advice from or discussed any aspect relating to the project or procurement of the project with any person or entity with an organizational conflict of interest, including but not limited to the consultants of any entity who have provided technical support on the design-build project or program.
2. Proposers who may have potential conflicts of interest in relation to the design-build project and wish to participate in the design-build project or join a design-build team must:
- a. Conform to federal and state conflict-of-interest rules and regulations.
 - b. Disclose all relevant facts relating to past, present, or planned interests of the Proposer's team (including the Proposer, Proposer's proposed consultants and subconsultants and/or subcontractors, and their respective chief executives, directors, and key personnel) that may result in or could be viewed as an organizational conflict of interest in connection with any design-build procurement, including present or planned contractual or employment relationships with any current employee of the Judicial Council.
 - c. Disclose in the response documents to a design-build RFQ and RFP all of the work performed in relation to the design-build program and project.
 - d. Provide ALL records of such work performed for the Judicial Council so that all information can be evaluated and made available to all potential design-build teams, if necessary.

- e. Ensure that the Proposer's contract with any related entity to perform services related to the design-build project or program has expired or has been terminated.
 - f. In situations in which Proposers on different teams belong to the same parent company, each consultant or contractor shall describe how the subconsultants and/or subcontractors would avoid conflicts through the qualification bid phases of the project. Upon review of the information provided above, the Judicial Council will determine, in its sole discretion, if the Proposer has obtained an unfair competitive advantage.
3. For other potential conflicts of interest not mentioned above (e.g., employee changing companies, mergers/acquisitions of firms, property ownership, business arrangements, financial interest), Proposers shall disclose and address any conflicts of interest or potential conflicts of interest when participating as a prime or joining a design-build team. The Judicial Council will then determine if a conflict of interest exists.
 4. The successful Proposer or firms affiliated with this Proposer are prohibited from competing on any agreement to provide construction inspection services for the design-build project. An affiliated firm is one that is subject to the control of the same persons, through joint ownership or otherwise. Except for subconsultants whose services are limited to providing surveying or material testing information, no subconsultants who provided design services in connection with the design-build project shall be eligible to compete for any agreement to provide construction inspection services for the design-build project.

V. Notes Concerning Attached Checklist and Form

The foregoing is provided by way of example, and shall not constitute a limitation on the disclosure obligations or circumstances under which a conflict of interest may be determined to exist.

Unless otherwise stated, "consultant" or "Proposers" means prime consultant or prime contractor and subconsultants and subcontractors performing services for the prime.

INSTRUCTIONS FOR COMPLETING CONFLICT OF INTEREST CHECKLIST AND DISCLOSURE FORM

Purpose of the Checklist. A conflict of interest checklist will be provided to and is to be used by all Proposers to assist in screening for potential organizational conflicts of interest. The checklist is for the internal use of the Proposers and does not need to be submitted to the Judicial Council of California (“Judicial Council”).

Definition of Proposer. As used herein, the word “Proposer” includes both the prime contractor/consultant and all proposed subcontractors/subconsultants.

Use of the Disclosure Form. After review of the checklist, the Proposers must complete the Disclosure of Potential Conflict of Interest and submit it along with the Proposer’s proposal. If the Proposer determines a potential conflict of interest exists, it must disclose the potential conflict of interest to the Judicial Council; however, such a disclosure will not necessarily disqualify a Proposer from being awarded a contract. To avoid any unfair taint of the selection process, the disclosure form will be provided separately from the bound proposal, and it will not be provided to the selection committee members. The Judicial Council’s staff will review the disclosure and the appropriateness of the proposed mitigation measures to determine if the Proposer may be awarded the contract notwithstanding the potential conflict. The Judicial Council’s staff may consult with its legal counsel. Resolution of the conflict of interest issues is ultimately at the sole discretion of the Judicial Council.

Material Representation. The Proposer is required to submit the attached disclosure form either declaring, to the best of its knowledge and belief, that no potential conflict exists, or identifying potential conflicts and proposing remedial measures to mitigate such conflicts. The Proposer is also responsible for updating conflict information if such information changes after the submission of the proposal. Information provided on this form will constitute a material representation as to the award of this contract. The Judicial Council reserves the right to cancel or amend the resulting contract if the successful Proposer failed to disclose a potential conflict, which it knew or should have known about, or if the Proposer provided information on the disclosure form that is false or misleading.

Approach to Reviewing Potential Conflicts. The Judicial Council recognizes that the Proposers must maintain business relations with other public and private sector entities in order to continue as viable businesses. The Judicial Council will take this reality into account as it evaluates the appropriateness of proposed measures to mitigate potential conflicts. It is not the intent of the Judicial Council to disqualify Proposers based merely on the existence of a business relationship with another entity, but rather only when such relationship causes a conflict that potentially impairs the Proposer’s ability to provide objective advice to the Judicial Council. The Judicial Council would seek to disqualify Proposers only in those situations in which potential conflicts cannot be adequately mitigated.

Additional Guidance for Professionals Licensed by the California Board for Professional Engineers, Land Surveyors, and Geologists. The California Board for Professional Engineers, Land Surveyors, and Geologists provides additional guidance and has established conflict-of-interest rules applicable to those professionals licensed by the Board (see Board Rules 475 and 476 (16 Cal. Code Regs. §§ 475, 476)). These rules require full disclosure when a licensee has any business association or financial interest that may influence his or her judgment in connection with the performance of professional services and when a licensee provides professional services for two or more clients on a project or related project.

CONFLICT OF INTEREST CHECKLIST

An organizational conflict of interest may exist in any of the following situations:

- The Proposer, or its principals, own real property in a location where there may be a positive or adverse impact on the value of such property based on the recommendations, designs, or other deliverables required by this contract.
- The Proposer is providing services to another governmental or private entity and the Proposer knows, or has reason to believe, that the entity's interests are or may be adverse to the interests of the Judicial Council of California ("Judicial Council") with respect to the specific project covered by this contract.

Comment: The mere existence of a business relationship with another entity would not ordinarily need to be disclosed. Rather, this focuses on the nature of services commissioned by the other entity. For example, it would not be appropriate to propose on a Judicial Council project if a local government has retained the Proposer for the purposes of persuading the Judicial Council to stop or alter the project plans.

- The Proposer is providing design services to a private entity, including but not limited to developers, whom the Proposer knows or has good reason to believe own or are planning to purchase property affected by the project covered by this contract, when the value or potential uses of such property may be affected by the Proposer's performance of work pursuant to this contract. "Property affected by the project" includes property that is in, adjacent to, or in reasonable proximity to the current or potential right-of-way for a project. The value or potential uses of the private entity's property may be affected by the Proposer's work under the contract when such work involves providing recommendations for right-of-way acquisition, access control, and the design or location of frontage roads and interchanges.

Comment: This provision does not presume the Proposer knows or has a duty to inquire as to all of the business objectives of its clients. Rather, it seeks the disclosure of information regarding situations in which the Proposer has a reason to believe that its performance of work under this contract may materially affect the value or viability of a project it is performing for the other entity.

- The Proposer has a business arrangement with a Judicial Council representative or immediate family member of such representative, including promised future employment of such person or a subcontracting arrangement with such person, when such arrangement is contingent on the Proposer being awarded this contract. This item does not apply to preexisting employment of current or former Judicial Council representatives or their immediate family members.

Comment: This provision is not intended to supersede any statutes or policies applicable to its own employees accepting outside employment. This provision is intended to focus on identifying situations in which promises of employment have been made contingent on the outcome of this particular procurement. It is intended to avoid a situation in which a Proposer may have unfair access to “inside” information.

- The Proposer has, in previous work for any Judicial Council project, provided design services and such professional services that potentially provide the Proposer with an unfair advantage in preparing a proposal for this project.

Comment: This provision will not, for example, necessarily disqualify a Proposer who provided surveying or material testing services for this project; however, such work must be disclosed, and all work products must be provided.

- The Proposer has, in previous work for the Judicial Council, been given access to “data” relevant to this procurement or this project that is classified as “private” or “nonpublic” under the California Rules of Court, rule 10.500 and the California Public Records Act (see Gov. Code §§ 6250–6270), and such data potentially provides the Proposer with an unfair advantage in preparing a proposal for this project.

Comment: This provision is intended to avoid a situation in which a Proposer has been provided information that cannot be provided to other Proposers.

- The Proposer has, in previous work for the Judicial Council, managed or assisted in the management of the Judicial Council’s design-build program, performing such work as helping to create the ground rules for this solicitation, writing this solicitation, or preparing evaluation criteria or evaluation guides for this solicitation.

- The Proposer, or any of its principals, because of any current or planned business arrangement, investment interest, or ownership interest in any other business, may be unable to provide objective advice to the Judicial Council.

DISCLOSURE OF POTENTIAL CONFLICT OF INTEREST

Having had the opportunity to review the Conflict of Interest Checklist, the Proposer hereby indicates that it has, to the best of its knowledge and belief:

_____ Determined that no potential organizational conflict of interest exists.

_____ Determined a potential organizational conflict of interest as follows:

Attach additional sheets as necessary.

Describe nature of the potential conflict(s):

Describe measures proposed to mitigate the potential conflict(s):

Signature

Date

If a potential conflict has been identified, please provide the name and phone number for a contact person authorized to discuss the issue with Judicial Council contract personnel.

Name

Phone