

2015

# Conflict of Interest Guidelines for Consulting Engineering Services in Ontario





# Proposed Conflict of Interest Guidelines for Consulting Engineering Services in Ontario

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# Executive Summary

## Objective

This policy guideline responds to the increasing frequency of developing and delivering large-scale infrastructure projects in the province of Ontario with the consequent potential for conflict or unfair competitive advantage situations that may arise. Because of the significant costs to the owners of preparing these large-scale projects and for the province's contracting and consulting engineering industry bidding on these, there exists a need for clarity and consistency in determining and adjudicating these situations. This policy aims to reduce the risks that bidders will be unfairly prevented from participating in Ontario's large capital projects, while ensuring that all Ontario's infrastructure providers and citizens derive maximum benefit from them.

The basic premise of this conflict of interest and unfair advantage (COI/UA) policy is that it would be beneficial for all stakeholders in the private and public sector to have agreement on a policy and guidelines that can be adopted by all provincial ministries and agencies and, with encouragement from the province, be recommended for use at the municipal level.

## Preamble

The Government of Ontario and a number of its agencies are striving to resolve the province's infrastructure deficit through the development and delivery of large capital projects. Some of these projects are being implemented through traditional means but increasingly the government is employing alternative delivery methods such as Design/Build (D/B) and Alternative Finance and Procurement (AFP). These projects are frequently large, complex undertakings developed over extended timeframes requiring significant resources to complete. The financial risks to pursue and execute them are far greater than those encountered in traditional Design-Bid-Build (DBB) delivery models, particularly as they relate to the provision of engineering services.

Perceived COI/UA situations – defined as a risk that professional judgement or actions regarding a primary interest will be unduly influenced by a secondary interest, or that a bidder has access to information unavailable to other bidders – will occur by the very nature of today's megaprojects.

Large projects require multiple parties, especially when there are shortlists that result in three bidding teams. Frequently, the member firms for all shortlisted parties are restricted from bidding on related assignments until contract negotiations are concluded with the preferred proponent. This, combined with the numerous firms that may be working for the owner's agency in the development of the concept and the project agreements, can severely tax the resources of available consulting engineering firms in the local marketplace. Avoidance of a conflict of interest need not require the withdrawal of services by the subject firm. Determining ways of accommodating potential or perceived conflicts of interest while protecting the public interest and the right to participate of subject firms should be considered in a made-in-Ontario COI/UA policy.



Accordingly, this COI/UA policy:

- provides public and private organizations with a well-defined framework for making informed decisions on a sustainable basis prior to project start;
- minimizes impacts to both the public and private sectors and ensures that both parties enjoy the benefits that can be derived from the province's and its partners' capital investments; and
- considers not only the benefits to the public and private sector parties involved in Ontario's infrastructure projects, but also to the community at large.

The values that government and industry in Ontario strive to maintain in all their dealings would underpin any COI/UA policy, namely:

- fairness;
- transparency;
- cooperation;
- consistency;
- openness to change and improvement;
- value-for-money for all Ontarians;
- local employment and industrial benefits; and
- compliance with standards and safety policies.

A concise, informed COI/UA policy for the provision of professional services in Ontario will provide the following benefits to all parties responsible for the delivery of Ontario's multi-billion dollar infrastructure program -- and thus to the province as a whole.

### **Improved Governance and Transparency**

A well-defined COI/UA policy will provide public and private organizations with a framework for making informed decisions on a sustainable basis. By reducing the burden on public authorities to make rulings on real or perceived conflicts, the policy will help avoid legal challenges. A provision for third party adjudication would support this effort.

### **Reduced Risks/Costs, More Efficient Delivery**

The policy will allow professional services firms to make informed decisions and obtain consensus on a potential conflict in a timely manner so that they can respond quickly to bidding opportunities. The COI/UA policy will limit the number of conflicts, thereby maximizing the number of domestic firms available to compete and undertake the work. It will also reduce the risks and costs related to team building and bidding on large-scale projects. The policy would indemnify principal respondents from responsibility for a COI/UA attributable to a second or third party under its management.

## **Increased Economic, Environmental and Social Benefits**

A definitive COI/UA policy will ensure the availability of more domestic design capability and fit comfortably within the legislative framework and regulatory regime of the province with respect to design, environmental and safety standards. A COI/UA policy that is clear and concise will allow Ontario firms to expand their local employment base and service offerings, broadening their capabilities and increasing exports.

A concise COI/UA policy may offer the registered professional engineers in the province of Ontario more opportunities to practice in their own market in contrast to their current barriers to entry and exclusion from many other jurisdictions in the U.S. and international markets.

A well-articulated COI/UA policy will result in fewer firms being excluded from submitting competitive and value added proposals/bids and that will lead to the improvement and expansion of the engineering services industry in Ontario while at the same time reducing the overall cost of the province's capital projects, ultimately resulting in economic, employment and other benefits to the province as a whole.



# 1. Background

The province of Ontario manages a very significant capital program to develop and rehabilitate government assets, including buildings, transit and highway systems, and related infrastructure. Various government ministries and agencies are responsible for sponsoring capital projects encompassing program planning, design, and construction of infrastructure rehabilitation and improvement. The ministries and agencies with the largest capital programs are the Ministry of Transportation (MTO), Ministry of Health and Long-Term Care (MHLTC), the crown agency Metrolinx responsible for GO Transit (and certain TTC projects), the Ministry of Economic Development, Employment and Infrastructure (MEDEI) and the crown agency Infrastructure Ontario (IO), responsible for certain capital projects delivered using Alternative Finance and Procurement (AFP – generally P3). Throughout this document, the reference to project sponsor is applicable to any one or more of these ministries or agencies. In support of this provincial capital program, the planning, design and construction management of projects is contracted to various private sector entities, including professional architectural and engineering firms, and construction contractors.

The majority of infrastructure capital program delivery in Ontario is still carried out via the conventional Design-Bid-Build (DBB) approach. However, alternative methods of program delivery have become more widely used over the past decade and many projects are now delivered using different models such as Design/Build (D/B) and variants of AFP ranging from Build-Finance to Design-Build-Finance-Maintain-Operate. Management of AFP projects is the responsibility of IO, which works in collaboration with the provincial ministries and numerous other provincial agencies, such as Metrolinx, as well as municipalities and other public agencies, such as hospital boards. There is a wide variation in the size and complexity of the contracts that the province and its agencies enter into with private sector entities for the planning, design, construction, and in some cases financing and operations, of capital projects. More recently, the province is considering the bundling of smaller projects to obtain economies of scale and speed of delivery.

The provincial ministries and agencies employ open, transparent and competitive selection approaches for the outsourcing of DBB and AFP contracts. Contracts for professional services, construction, operations and maintenance (reference to pg. 5) are awarded through open solicitation and submission processes available to qualified firms. Normal procurement rules, including any mandatory and specific requirements, apply at the bidding stage. Any submission not meeting the requirements is disqualified. All qualified submissions are evaluated based on the pre-determined criteria and the best submission is selected for award.

The growing size of capital projects and their increased number, generated by growth and the infrastructure deficit, are attracting more companies from outside Ontario and Canada. Professional engineering services, however, are still primarily provided by Ontario-based companies for several reasons including the availability of local staff and their intimate knowledge of provincial regulations, standards, codes, processes and costs. Most of Ontario's professional engineering firms are members of Consulting Engineers of Ontario (CEO), a non-profit association that represents the authoritative voice for CE firms in Ontario. A major and growing segment of CE firms' combined business is working with the province and its agencies on the planning and delivery of infrastructure projects – projects that build a strong and competitive Ontario while directly boosting GDP and providing sustainable high quality employment.

MTO uses the Total Project Management (TPM) approach for the procurement of planning, engineering and construction administration services for DBB projects. MTO's TPM approach makes a service provider responsible for project coordination and management together with technical activities required for the delivery of a project. Engineering work includes both functional and multi-functional planning, design, and construction administration. The work varies in complexity from simple and straightforward with low risk to complex and high risk work. Complex assignments require diverse technical and managerial activities. Since 2001, MTO has adopted a performance-based procurement approach by which a service provider's past performance is applied toward selection and award of work.

Since 2008, MTO has been piloting and applying innovative contracting models including D/B, Construction Manager General Contractor (CMGC) and other similar contracts, as appropriate. These models, though complex compared to the conventional DBB approach due to their multi-party relationships, can provide efficiencies in terms of accelerated delivery, risk management, cost and innovation. These innovative contracts have also been applied in varying forms by other jurisdictions.

Contracting models employed by other project sponsors for DBB methodology include various processes and documentation similar to those used by MTO, although contracts may differ depending on the type of project and services being procured. At Metrolinx, for example, the current process for securing professional services includes the Request for Qualification and Quotation (RQQ), which incorporates the contractual terms under which the selected professional services company will provide the planning, design and construction administration services.

On AFP projects, initial studies such as value-for-money, and various professional advisory services leading up to and supporting the main procurement phase, are contracted through a range of different agreements currently in use between the project sponsor and the professional services provider. The result of the main procurement phase is the selection of an entity, often a sole or special purpose entity (SPE), which enters into the project agreement (PA), as applicable, for design, construction, financing, operations and maintenance of the proposed works. The terms for delivery of services for design, construction, operations and maintenance are set out in the PA, and captured in contracts between the SPE and the primary service providers, who are acting on behalf of the SPE. On AFP projects the professional services being provided either directly or indirectly to the SPE are commonly termed bid-side services. Those provided on the owner side include owner's advisory, program management and related services.

Agreements for provision of professional services contracted in Ontario by the project sponsors, as well as by private sector entities, contain various restrictions in regards to conflict of interest and unfair advantage (COI/AU). The primary purpose of COI/AU provisions is to ensure that competition for such professional services is fair and that a particular provider does not – by virtue of their current or prior involvement in another stage of the project – have inside knowledge unavailable to other competitors that would create an uneven playing field.

As more infrastructure projects of the Ontario government are delivered using alternative delivery solutions such as AFP, the application of unclear, inconsistent or restrictive COI/AU criteria is challenging the ability of Ontario's CE firms to deliver these projects and to provide the most qualified and experienced domestic engineering innovations, capability and capacity. It is



in the interests of Ontario that the resources applied to the province's capital program produce opportunities for jobs to be created in Ontario, in an open and competitive process that also ensures that the best technical expertise and financial resources from outside of Ontario are available when warranted.

In June of 2012, MTO issued a draft policy on this subject and solicited comments from CE firms, channelled through CEO. The draft Procedures Guide prepared by MTO has not been officially implemented. In the fall of 2012, Metrolinx produced a policy and guidelines on conflict of interest related to specific Toronto transit projects that are part of the Big Move multi-year program and which are intended to be delivered using AFP models. In addition, other provincial ministries and agencies have incorporated COI/UA provisions in their agreements with public sector employee groups, boards, and with professional services contractors.

Because of the plethora of COI/UA situations associated with program growth and greater use of alternative delivery methods, as well as the increasing occurrences of unclear, inconsistent or restrictive COI/UA criteria already affecting professional engineering companies' ability to do business and impacting the efficiency of program delivery from the government's perspective, a group of six CEO member firms approached Infrastructure Ontario (IO), and through IO, Metrolinx and MTO, to determine if the problem could be addressed through a joint effort of CEO and the project sponsors. A task group of CEO member firms commenced work on the draft guideline in the spring of 2013, following agreement from IO and other concerned agencies to enter into discussions. As a result of members of the task group retiring, the development of the guidelines was reassigned by CEO to their business risk committee in the fall of 2014.

The basic premise of this document on COI/UA is that it would be beneficial for all stakeholders in the private and public sectors to have agreement on a policy and guidelines that can be adopted by all provincial ministries and agencies and, with encouragement from the province, be recommended for use at the municipal level as well.

The establishment of a policy and consistent process to deal with potential COI/UA is required so that the best engineering talent in Ontario can continue to play its important role in delivering the province's capital program.

## 2. Definitions

### **Conflict of Interest:**

A situation in which there is a risk that professional judgement or actions regarding a primary interest will be unduly influenced by a secondary interest, whether real or perceived.

### **Potential Conflict of Interest:**

A situation in which there may be a risk of conflict of interest.

### **Perceived Conflict of Interest:**

A situation in which a third party believes that a real or potential conflict of interest exists.

### **Unfair Advantage:**

A risk that the bidder or any of its members had access to information related to the bid solicitation that was not available to other bidders and that would, in the project sponsor's, and/or an informed independent third party's opinion, give or appear to give the bidder an unfair advantage.



## 3. Principles

### Overarching Values

The following values should underpin any COI/UA policy and be recognized by all parties including sponsors, owners, implementing agencies and service providers:

- fairness;
- transparency;
- cooperation;
- openness to change and improvement; and
- value-for-money for all Ontarians.

### Principles

The following principles should govern the management of COI/UA matters throughout the project delivery cycle.

#### **Not in Conflict for Working on Prior Phase Activities**

Any service provider who has worked on previous phases may be a proposed respondent or participate as an equity owner, team member, consultant or sub-consultant to a proposal. From inception, projects undergo many studies including, but not limited to, feasibility, planning, environmental assessments and various phases of design, including conceptual, preliminary and detail (or final) design. In principle, the deliverables from any prior phase of the work may be made available to all proponents as reference material for subsequent studies or for a potential AFP or D/B project. As such, a service provider's involvement in earlier phase work should not create a COI/UA for the party undertaking downstream work, provided that the earlier phase work does not create an unfair advantage (as would work on a business case, Terms of Reference or Project Specific Output Specifications)

#### **All Project Information in the Public Domain**

Many perceived COI/UA can be avoided by making as much information as possible readily available to all potential service providers. Sponsors and implementing agencies should provide ample definitions of terms such as "information that may not be in the public domain", "commercial and strategic", etc. In cases where confidential data (which could put a service provider into a COI/UA position) is to be shared with that service provider, the distributing party should advise the service provider in advance and provide adequate rationale for such a decision (for example, the information was protected under the Freedom of Information Act).

#### **COI/UA Rulings Made Early upon Request**

Teaming of partners for an AFP or D/B project is a long-term initiative in itself, involving patient relationship building and, frequently, complex legal agreements. Recognizing that the ability to team early in the bid process is a benefit to both the owner/tendering agency and the service providers, the owners and procuring agents should decide and respond in

writing to potential COI/UA situations upon written request and should have resources and systems in place to do so.

### **COI/UA Issues to be Addressed Immediately**

All parties must be prepared and committed to deal with issues in a proactive and timely manner.

### **Timely Decision Making**

Potential COI/UA situations should be addressed immediately. Decision making should be timely and predictable.

### **COI/UA Rules Need to be Consistent and Clearly Outlined in Legal Agreements**

The need to identify COI/UA situations that may arise throughout the life of a project and procedures for dealing with them should be codified in appropriate legal agreements between the parties of an AFP, D/B or traditional DBB project.

### **Project Sponsor is Accountable to Avoid Creating Conflicts for Consultants**

A project may evolve from a traditional procurement model to an AFP, D/B or other alternative model. In such cases, the sponsor may request a current service provider to undertake work that, if done, would restrict or nullify that provider's ability to participate in a future procurement process. Such work requests should be avoided as much as possible and be undertaken by retaining an "owner's engineer" or "technical advisor" early in the process. Alternatively, the service provider should have the opportunity to decline the undertaking of the additional work to maintain their eligibility to participate in a subsequent procurement.

### **Commitment of All Parties**

Project sponsors should mutually be held accountable to COI/UA issues and mitigation. An early and proactive response to potential real or perceived COI/UA situations is imperative.

### **Time Limits on Conflicts**

Projects can stop, re-start and/or be re-configured over time. The period during which a service provider may be restricted from participating in an AFP, D/B or subsequent phase of traditional DBB delivery by virtue of perceived COI/US should be defined at the time of a project announcement and prior to release of the Request for Qualifications/Express of Interest (RFQ/EOI). To avoid COI/UA situations, owners/sponsors will be prepared to terminate contracts on a mutually agreeable basis.



## **Working with Contractors (or other stakeholders) on Projects Unrelated to Subject Project Does Not Create a Conflict**

Consultants, contractors and other service providers may have different working relationships on several projects simultaneously. Unless projects overlap geographically, or have an ability to influence each other, in principle a COI/UA does not exist.

## **Ownership in Parties of Multiple Teams**

Service providers who are part of a merger, own stock, hold debt or other proprietary interests in a proposal respondent are not necessarily in a COI/UA situation when this occurs part way through a procurement or project. In such cases, the service provider should advise the owner(s), sponsor(s) and implementing agency immediately and be required to propose and implement a solution, such as ethical walls, to the satisfaction of the owners, sponsors and implementing agency.

## **Limited Obligations of Sub-Consultants (or other third parties) with Respect to COI/UA**

Consultants should require that their team members and sub-consultants adhere to COI/UA requirements as outlined in these principles and in project agreements. It should be recognized, however, that consultants cannot provide a guarantee on compliance for other firms and/or departing staff members not under their control.

## **Right to Audit COI/UA Mitigation Measures**

Project sponsors and implementing agencies should have the right to audit the service provider's COI/UA mitigation measures, where a conflict of interest is identified and such measures are put in place, at agreed upon intervals depending on the nature and timing of the project. Project sponsors and implementing agencies should have the right to conduct unannounced spot audits of such mitigation measures.

## **Requiring COI/UA Complaints/Inquiries to be Made Prior to Closing of a Bid**

During a Request for Proposals (RFP) process, identification of issues, enquires or complaints regarding potential COI/UA concerns regarding any team or entity should be submitted to the project sponsor and/or implementing agency well in advance to permit rulings to be made before the closing date for the bid.

## **COI/UA Appeal Panel**

Firms subject to disqualification because of a perceived COI/UA should have recourse to an appeal mechanism, ideally a specially constituted and impartial panel.

## **Project Implementing Agency Required to Make COI/UA Principles Available to Project Sponsor**

To help ensure consistency of application and predictability, the project implementing agency should make COI/UA principles and policies available to all project sponsors.

## **Guideline Terms, Periodic Review and Revision**

The development of new procurement models is an on-going process. While the industry requires stability and predictability with respect to potential COI/UA matters, it is recognized that future changes to the above principles may not be appropriate for all parties. As such it is suggested that the principles, once adopted, be reviewed and updated as appropriate every one to two years.

## **Staff Seconded to Sponsors, Owners and Proponents**

The secondment of a limited number of staff for unrelated work on a long-term contract to a project sponsor should not constitute a conflict of interest for the private sector employer. Rather, the individuals should be required to sign appropriate confidentiality agreements. It should be the joint responsibility of consultants and project sponsors to ensure that seconded staff are not exposed to circumstances that would unnecessarily place the private sector employer into a COI/UA situation.

A family member (parent, child or sibling) of a service provider employee working for a project sponsor should not create a conflict of interest. The situation shall be declared by both parties and appropriate measures put in place, consistent with current public sector code of conduct policies, to avoid creating a COI/UA situation for the service provider. The same actions should apply to family members of project sponsors working for a service provider.

Promotion, endorsement, or advancing of plans and/or projects by agents or advocates operating on behalf of a service provider should be considered the same as an employee when considering COI/UA situations.

With respect to addressing and mitigating the potential for real or perceived COI/UA situations associated with seconded staff, family members of the service provider working for sponsors, family members of the sponsor working for the service provider, or agents working on behalf of the service provider, both the public and private sector service providers have the same responsibility for self-identification and the implementation of mitigation measures.



## 4. Process for Identifying Conflict of Interest/Unfair Advantage

The process for identifying a potential conflict of interest and unfair advantage (COI/UA) should rely primarily on self-identification by firms having an interest in participating in a project. This self-identification should be based on clearly defined criteria as set out in this document or published by the project sponsor as early as possible in the competitive selection process. The final determination of COI/UA situations, including allowance for appeals, should be made no later than the Request for Qualifications/Express of Interest (RFQ/EOI) stage. For projects using alternative delivery models (D/B, AFP), opportunities for early determination of COI/UA situations are encouraged as project teams typically begin to form before formal project announcements are made.

The project sponsor/owner should also declare at an early stage situations that will create a potential COI/UA, particularly where participation in specific activities (including seconding of staff) during early phases of a project may create a COI/UA with respect to downstream work.

Third parties should have the right to identify a perceived or potential COI/UA and bring this to the attention of the project sponsor for determination.

### Self-Identification

- All firms participating in a procurement process have an obligation to disclose a potential COI/UA.
- Declarations should be based on clearly defined principles and criteria.
- Opportunity should be provided for proponents to request determination regarding a potential COI/UA in advance of RFQ/EOI submission. This may be undertaken as part of the Request for Clarifications process.
- If determined that a potential COI/UA exists, the proponent should have the opportunity to propose mitigation and receive confirmation of the acceptability of this mitigation.

### Project Sponsor Identification

- Project sponsor/owner should clearly identify situations where participation in a project will create a potential COI/UA related to downstream work. These situations should be identified in the RFQ/EOI documents. Submission of a Statement of Qualifications or EOI should be deemed to be acknowledgement and acceptance by the members of the proponent team making the submission of the stated COI/UA. However, the downstream COI/UA shall only apply to the successful proponent.
- A registry of COI/UA shall be established, listing any firms deemed to have a COI/UA and therefore ineligible to participate. Listing in the registry shall not occur unless the conflict has been acknowledged by the firm or until all avenues of appeal have been exhausted.

### Third Party Identification

- Third parties may bring a potential COI/UA to the attention of the project sponsor/owner.
- The party identified as potentially being in a COI/UA situation should be notified of the third party concern and be given the opportunity to respond, including proposing mitigation to address the concern.

## **Timely Determination of Potential Conflict of Interest**

- The project procurement process and schedule should recognize the need for potential proponents to obtain an early determination regarding potential conflict of interest situations.
- When a potential proponent or a third party requests a determination regarding a potential conflict of interest, the project sponsor/owner should issue a decision in a timely manner. Responses should be provided in writing within five (5) business days unless stated otherwise in the RFQ/EOI documents.

## **Opportunity to Mitigate**

- In situations where the project sponsor/owner determines that a conflict of interest exists, the proponent should be given the opportunity to mitigate the conflict. The mitigation plan should be submitted within five (5) business days of the initial determination.
- The project sponsor/owner should render a timely decision regarding the acceptability of the proposed mitigation. Decisions should be issued within five (5) business days unless stated otherwise in the RFQ/EOI documents.
- Parties should have the right to appeal the decision as outlined in the next section of this document.

## **Potential Conflicts Arising During Procurement or Following Project Award**

- It is acknowledged that potential COI/UA situations may arise following the initial declaration/determination.
- All firms participating in a procurement process or in the execution of a project have an obligation to promptly disclose potential conflicts of interest arising during the course of these activities. Where the situation is determined to create a conflict, the proponent should have the opportunity to mitigate the conflict.
- When potential conflict situations arise during the execution of the project, the firm shall not undertake any activities that may be deemed to be in conflict until the project sponsor has made a final determination.
- The project sponsor/owner should make every effort to avoid creating situations following short-listing or award (e.g. scope changes) that place potential proponents or service providers into a conflict of interest position. Where such situations cannot be avoided (e.g. seconded staff or employment of family members), proponents should be given reasonable opportunity to mitigate the conflict.

The Appeal Provisions outlined in Section 5 should also apply to these situations.



## 5. Appeal and Resolution Process

Conflict of interest and unfair advantage (COI/UA) issues can be identified and raised either by a company related to their own circumstances or by a third party who identifies a perceived or potential conflict by that company and raises this with the project sponsor. In these circumstances it is imperative to secure a speedy determination of conflict/no conflict from the project sponsor so that all parties, including the project sponsor, can proceed with some degree of assurance related to their future roles and responsibilities.

A determination on conflict/no conflict will be most useful to all parties early in the procurement process, preferably before the prequalification phase is initiated, and certainly before the proposal phase is concluded. A predetermined appeal process, including specific predefined time periods for the appeal process, will further assist the project sponsor and potential bidder(s) in establishing appropriate roles and responsibilities in sufficient time to take remedial action as required, up to and including withdrawal from the procurement process, if needed.

The establishment of a standing appeal panel will be most useful to all parties, including the project sponsor, to review and provide judgment on potential COI/UA issues where these issues are complex and onerous. This appeal panel should be used to move the ruling of conflict/no conflict forward, to the benefit of all parties involved. The proposed composition of the appeal panel is outlined below.

### Appeal Process

A predetermined process for requesting that the project sponsor provide judgment on a COI/UA issue, should be defined early in the process, before the prequalification phase is initiated, to provide clarity to all parties. This should follow an appeal process that includes specific predetermined periods for appeals, reviews and the provision of decisions. In particular:

- The bidder/potential bidder company should at the earliest possible time after they become aware of a potential conflict submit a written request for clarification to the project sponsor. This request should include the nature of the potential conflict and the background information that is material to the request.
- In the case of a third party submitting a similarly documented written request for clarification to the project sponsor, the bidder/potential bidder company will be provided the opportunity to respond to this third party request. This will include the opportunity to request and receive clarification, through the project sponsor, of the third party concerns.
- The project sponsor should then determine if in its opinion a potential or real COI/UA exists and should provide a written notice of clarification to all parties within five (5) business days of being so informed. If the determination by the project sponsor is “no conflict”, all parties should receive the notice of clarification and the potentially prejudiced company is free and clear to proceed.
- If however the determination is “potential conflict”, the notice of clarification to all parties should so state and should provide the written rationale for that judgment. The company has the right to seek further determination from the appeal panel should that company so decide and a request for hearing should be made by the company within five (5) business days of receiving the notice of clarification from the project sponsor.

- In response the project sponsor should hold an appeal panel hearing within ten (10) business days of receiving the request for hearing and should hear all parties on the issue. The parties should include all the private sector parties and the appropriate staff of the project sponsor and others as may be required. Each party should be provided the opportunity to state their rationale and reasoning related to the determination of “potential conflict”.
- The appeal committee should then render an appeal committee decision simultaneously in writing to all parties within ten (10) business days of the hearing. The appeal committee decision is final, binding on all parties and not subject to further appeal.

### **Appeal Panel**

The standing appeal panel should be made up of three senior level industry representatives with appropriate knowledge of contractual issues and relationships related to AFP projects and appropriate knowledge of the AFP procurement process. One should be appointed by Infrastructure Ontario (IO), one should be appointed by Consulting Engineers of Ontario (CEO) and the third should be appointed by mutual agreement of IO and CEO.

The appeal panel should be available on short notice to hold hearings as needed and as requested by the project sponsor. At the hearing, each party should be provided the opportunity to state their case verbally and in writing with all parties present and with a free exchange of written information taking place. The appeal panel should render its appeal panel decision within a further ten (10) days of holding that hearing.

It is expected that all parties will act responsibly related to this process. First, the private sector should respect the level of effort required to establish and to conduct such hearings, and will not raise frivolous COI/UA issues to the detriment of on-going relationships with the province. Second, the appeal panel’s mandate is to provide fair and dispassionate assessment and consequent decisions, without malice, related to the COI/UA issues being heard.



## 6. Mitigation Measures

In some cases it may be necessary to implement measures to mitigate any adverse effects arising from a real or perceived COI/UA. These measures may include:

- The project sponsor establishing a data room to ensure that all proponents have equal access to information that may be used in the preparation of a bid or Expression of Interest (EOI). The data room could contain the following types of information:
  - all preliminary studies, baseline reports and environmental studies;
  - geotechnical information, including source data and interpretive reports;
  - mapping of surface and subsurface features (lidar or equivalent);
  - topographic and legal surveys (required);
  - all costs estimates;
  - utility information, including relocation plans and clear definition on any betterments;
  - geo-environmental information;
  - property information, including easements;
  - planning information for any adjacent developments in process;
  - existing building condition surveys;
  - design drawings and specifications, to the highest level that currently developed; and
  - as-built engineering drawings (e.g. where project is being expanded or extended).
- In some cases it may be necessary for members of a proponent's team to establish "ethical walls" within their organization, to separate and isolate persons who are participating in a proponent team from persons who are privy to undisclosed information that they have obtained while working for the project sponsor. Ethical walls should meet the following guidelines:
  - all parties should be notified in writing of the potential COI/UA, the affected persons and the restrictions that will be put in place;
  - the persons in possession of the undisclosed information should enter into a confidentiality agreement with the project sponsor, specifically restricting the disclosure of project information to anyone, unless authorized by the project sponsor;
  - all physical and electronic files should be secured properly against unauthorized access; and
  - the specific rules governing the ethical walls must be submitted in writing to the project sponsor.

All parties are expected to act fairly and reasonably and to adhere to the spirit of the guidelines. These mitigation measures are necessary to protect the interests of parties that may be affected by a real or perceived conflict of interest. Therefore, the implementation of these measures must be transparent and effective. The sponsors will have the right to audit the mitigation process.

## 7. Specific COI/UA Situations and Remedies

The following tables summarize a range of typical potential COI/UA situations pertaining to the provision of engineering and related services, along with potential remedies. The tables are not intended to be exhaustive, but rather to illustrate the potential application of the principles outlined in this document in a variety of commonly occurring situations.



	POTENTIAL CONFLICTS	POTENTIAL REMEDIES
<b>1.</b>	<b>Planning/Preliminary Design/Feasibility</b>	
1a.	A firm participating in planning or preliminary design work for a project sponsor also wishes to pursue a subsequent detail design assignment, Design/Build (D/B) assignment or Alternative Finance and Procurement (AFP) project.	This is not considered to be a COI/UA. All documentation developed during the planning or preliminary design phase should be made available to all proponents pursuing downstream work. The sponsor responsible for the planning or preliminary design assignment should make every reasonable effort to close out the agreement for planning/preliminary design services before initiating procurement for the subsequent work.
1b.	A firm is participating in planning or preliminary design assignment for a project sponsor. With this work ongoing, the firm also would like to work for a third-party stakeholder on a project that may impact, or be impacted by, the planning or preliminary design assignment.	This situation may create a COI/UA and should be declared. Potential remedies include: <ul style="list-style-type: none"> <li>a) Upon review of the third party project and the firm's role, the sponsor may determine that there is no conflict of interest and the firm may proceed with both projects.</li> <li>b) If a potential conflict is deemed to exist, the firm may implement separation of staffing and resources to ensure that the same staff do not work on both projects. The firm must also maintain separate records for each project and take appropriate measures to prevent the exchange of records between project teams (ethical wall).</li> <li>c) The firm may decline components of the third party stakeholder's project that are potentially in conflict.</li> </ul>
1c.	A firm undertakes feasibility studies to support decision making regarding project procurement models (e.g. cost estimates, risk assessment, etc.). The firm wishes to participate in the subsequent procurement for the project (D/B, AFP, CMGC, etc.)	This is generally not considered to be a COI/UA. All documentation developed during the studies should be made available to all proponents pursuing downstream work. If it is considered that the products of these studies are to be treated as confidential; this should be stated in the Terms of Reference for the studies and participating team members should be required to sign confidentiality agreements. Those team members may be prohibited from participating in the subsequent procurement, although the firm may pursue them with appropriate separation of staff and records.

	POTENTIAL CONFLICTS	POTENTIAL REMEDIES
1d.	A firm participating in planning or preliminary design project for a sponsor also wishes to undertake work for a third party stakeholder on a different project that is outside the limits of the provincial project.	If there is no direct interaction between the projects, this is not considered to be a conflict of interest.
1e.	A firm wishes to pursue planning or preliminary design project for a sponsor. The firm is engaged in work for a potential third party stakeholder on a project that may be impacted by the planning or preliminary design project.	This may create a potential conflict of interest. The firm must declare the situation and seek a ruling. Potential remedies include: <ul style="list-style-type: none"> <li>a) Upon review of the third party project and the firm's role, the sponsor may determine that there is no conflict of interest.</li> <li>b) If a potential conflict is deemed to exist, the firm may implement separation of staffing and resources to ensure that the same staff do not work on both projects. The firm must also maintain separate records for each project and take appropriate measures to prevent the exchange of records between project teams (ethical wall).</li> <li>c) The firm may withdraw from the pursuit.</li> </ul>
<b>2. Detail Design</b>		
2a.	A firm is working on a detail design assignment for a sponsor. With this work ongoing, the firm would also like to work for a third-party stakeholder on a project that may impact, or be impacted by, the detail design assignment.	This situation may create a conflict of interest. Potential remedies include: <ul style="list-style-type: none"> <li>a) Upon review of the third party project the sponsor may determine that there is no conflict of interest (e.g. a municipality and provincial ministry cooperating to implement a project having work in both jurisdictions).</li> <li>b) If a potential conflict is deemed to exist, the firm may implement separation of staffing and resources to ensure that the same staff do not work on both projects. The firm must also maintain separate records for each project and take appropriate measures to prevent the exchange of records between project teams (ethical wall).</li> <li>c) The firm may decline components of the third party stakeholder's project that are potentially in conflict.</li> </ul>



	POTENTIAL CONFLICTS	POTENTIAL REMEDIES
2b.	A firm that participated in the detail design of a project wishes to provide construction administration services for the construction phase of the project.	This is not considered to be a conflict of interest.
2c.	During detail design a sponsor decides to change the project delivery method from DBB to D/B or AFP. The firm undertaking detail design would like to participate in the D/B or AFP project.	This is not considered to be a COI/UA. All documentation developed during the detail design phase should be made available to all proponents pursuing downstream work. The sponsor responsible for the detail design assignment should make every reasonable effort to close out the agreement for detail design services before initiating procurement for the subsequent work. Where agreement close-out is not practical or achievable, the firm will be given the opportunity to mitigate the potential COI/UA situation.
2d.	A firm wishes to pursue a detail design project for a sponsor. The firm is engaged in work for a potential third party stakeholder on a project that may be impacted by the detail design project.	This situation may create a COI/UA. The firm must declare the situation and seek a ruling. Potential remedies include: <ul style="list-style-type: none"> <li>a) Upon review of the third party project and the firm's role, the sponsor may determine that there is no conflict of interest.</li> <li>b) If a potential conflict is deemed to exist, the firm may implement separation of staffing and resources to ensure that the same staff do not work on both projects. The firm must also maintain separate records for each project and take appropriate measures to prevent the exchange of records between project teams (ethical wall).</li> <li>c) The firm may withdraw from the pursuit.</li> </ul>
<b>3.</b>	<b>Construction Administration</b>	
3a.	A firm is participating in provision of construction administration services for a project being constructed by contractor X. The firm also wishes to provide design services for contractor X on a different project.	This is not considered to be a COI/UA as they are separate projects.

	POTENTIAL CONFLICTS	POTENTIAL REMEDIES
3b.	A firm is providing construction administration services for a project being constructed by contractor X. At the same time the firm is supporting contractor X against the sponsor's position related to a claim on a different project.	This is not considered to be a COI/UA as they are separate projects. However the situation should be declared. The firm should manage the potential conflict with separate staffing and resources.
<b>4. Construction</b>		
4a.	A firm that has participated in preparation of detail design and tender documents would like to provide services to the successful contractor on a value engineering change proposal (VECP).	If the VECP has been accepted by the owner, this is not considered to be a conflict of interest. However the situation should be declared.
<b>5. Alternative Delivery Projects</b>		
5a.	A firm that participated in the planning or preliminary design of a project would like to pursue the detail design services for a subsequent construction manager general contractor (CMGC) assignment.	This is not considered to be a COI/UA. All documentation developed during the preliminary design phase should be made available to all proponents pursuing downstream work.
5b.	A firm that participated in the preliminary design or reference design for a D/B or AFP project wishes to participate as part of a D/B or AFP team.	This is not considered to be a COI/UA. All documentation developed during the preliminary design phase should be made available to all proponents pursuing downstream work. The sponsor should ensure that the preliminary design services do not include development of the procurement documents for the D/B or AFP.
5c.	A firm is providing design services to a D/B or AFP contractor and at the same time is providing CA services on another project where the same contractor is undertaking construction.	This is not considered a COI/UA as they are two separate projects. However, the situation should be declared. It may be necessary to implement separation of staffing and records.
5d.	A firm has provided services to a sponsor for the development of procurement documents for a D/B or AFP project. The firm would like to participate on team bidding for the project.	This is considered a COI/UA and is not permitted. The RFP documents for the development of procurement documents should clearly state that the successful firm will be ineligible to participate in the subsequent D/B or AFP pursuit.



	POTENTIAL CONFLICTS	POTENTIAL REMEDIES
5e.	Following shortlisting for (or award of) a D/B or AFP project a sponsor modifies the scope of the project. The newly added work creates a potential conflict of interest for a participating firm.	The agency should generally avoid creating situations that retroactively create conflicts. The potentially impacted team should declare the potential COI/UA. If the situation is deemed to create a COI/UA, the agency should work with the team to mitigate the situation without creating undue hardship or disadvantage for the team or participating firm. If the COI/UA cannot be effectively managed by separation of staffing and records the agency should consider withdrawing the contemplated scope change.
<b>6. Teaming Arrangements</b>		
6a.	A firm that is a member of an unincorporated JV, i.e. a JV in which the member firms pool their resources to deliver professional services but do not gain any competitive advantage by working together, wishes to pursue downstream work for which one or more of the other member firms would have an unfair advantage.	This is not considered to be a COI/UA provided there is a physical separation or ethical wall in place to prevent the firm from gaining access to information that is not made available to the public.

## 8. Summary and Benefits

This proposal for a made-in-Ontario COI/UA policy arose from industry concern over the increasing frequency with which potential or perceived COI/UA situations arise in the development, bidding and execution of large-scale infrastructure projects in the province. Because of the financial risks involved in bidding these projects, particularly for members of the province's consulting engineering industry and the industry's government relations and public affairs associations, Consulting Engineers of Ontario prepared this white paper on the subject. The preceding discussion and recommendations for a COI/UA policy aim to improve governance and transparency in the competitive selection process for Ontario's large capital projects while reducing the risks that bidders will be unfairly prevented from participating in these projects and providing benefits to all Ontarians.

Those benefits include:

### Improved Governance and Transparency

- The single best way to avoid conflicts is for the public tendering agencies to put all of the project information in the public domain in a timely manner such that no proponent gains unfair advantage by virtue of early access to information. Very seldom is there anything so proprietary or sensitive that it could not be made available to all of the bidders, thus resolving any conflicts. Further, the advantage to the project sponsor is more qualified bidders and potentially a better team and product.
- The COI/UA policy will provide public and private organizations with the framework for making informed decisions on a sustainable basis, prior to encountering significant costs associated with a particular project or group of projects.
- The COI/UA policy will also reduce the burden on public authorities to make arbitrary decisions and rulings on real or perceived conflicts. The advantage to the project sponsor is more industry buy-in on decisions where they are represented on the appeal committee.

### Reduced Costs, More Efficient Delivery

- The COI/UA policy will reduce the risks related to team building and bidding on large-scale projects, thus mitigating the ever-increasing bidding costs to all parties.
- A clearly articulated policy will limit the number of conflicts, thereby maximizing the number of firms available to compete and undertake the work. This competition, once again, will reduce bidding costs.
- The policy will allow professional services firms to make informed decisions and obtain consensus on a potential conflict in a timely manner so that they can respond quickly to the opportunities at hand.
- A significant number of conflicts have arisen as a result of the project sponsor changing the project scope after the fact and after the consulting engineers have declared that they are not in conflict. A COI/UA policy that includes mitigation procedures for conflicts that occur as a result of changes in project scope, timing or third party actions, will provide the required flexibility to accommodate the delivery of these significant infrastructure assignments.
- The policy will provide professional services firms with a proactive tool to plan their involvement, manage their workloads, staff their resources and maximize local content.
- The policy will indemnify principal respondents from responsibility for a COI/UA attributable to a second or third party under its management.



## **Increased Economic, Environmental and Social Benefits**

- A COI/UA policy that is reasonable and definitive in scope will result in the provision of more design capability and fit comfortably within the legislative framework and regulatory regime of the province with respect to the standards of design, environmental objectives and safety that are paramount on large-scale undertakings.

All of the above benefits, we believe, will lead to the improvement and expansion of the engineering services industry in Ontario while at the same time reducing the overall cost of the province's capital projects, ultimately resulting in economic and other benefits to the community at large.





10 Four Seasons Place Suite 405 Toronto, Ontario M9B 6H7