Relationship Review Process Description

Major Projects and Alternative Procurement

April 2021

A. Introduction

This document describes the process ("Relationship Review Process") for identifying issues related to actual or perceived conflicts of interest or unfair advantage or the potential to create an actual or perceived conflict of interest or unfair advantage (collectively referred to as "Conflict of Interest") for Ministry of Transportation and Infrastructure ("MOTI") major projects and alternative procurements (together, "Projects" and each individually, "Project").

This Relationship Review Process has been established in order to appropriately manage Conflicts of Interest during the project development phase and during the competitive selection process for Projects which include any part or phase or phases of the procurement process including the Request for Qualifications ("RFQ") and the Request for Proposals ("RFP") (collectively the "Competitive Selection Process").

In the event of a discrepancy between the relationship review process documented herein and the process set out in the RFQ/RFP, the process in the RFQ/RFP will take precedence.

This Relationship Review Process may be updated from time to time by the Major Projects Procurement Oversight Committee (the "Oversight Committee").

In this document, "respondent" means a Respondent to the RFQ or a Proponent under the RFP, and "respondent team" means a Respondent Team or a Proponent Team and has the meaning given to it in the RFQ or RFP for each Project (as applicable).

B. Background/Objectives

Projects will be delivered with some degree of private sector involvement. Therefore, this Relationship Review Process has been set up to address the following objectives:

- To protect the integrity of the Competitive Selection Process and to avoid any actual Conflicts of Interest, and appropriately address any potential or perceived Conflicts of Interest, through maintenance of appropriate measures to separate individuals and organizations that have relationships with the Province or any Restricted Party (as the term is defined in the RFQ/RFP) from respondents.
- To, as permissible, assist in ensuring access by respondents and the Projects to the advisory skills (technical, financial, legal, etc.) necessary for the success of the Projects, while mitigating, minimizing or eliminating the actual, potential or perceived Conflict of Interest.

The Relationship Review Committee will use the Relationship Review Process to consider all the Persons (as defined below in Section D) that have been involved in a Project and assess how their relationship with the respective Project may affect the Competitive Selection Process.

The relationships of Persons that are, or have been, involved with a Project will be reviewed at various stages of Project planning and Competitive Selection Process to determine whether the

Person is a Restricted Party, Shared Use Person or unrestricted (each as defined in the RFQ/RFP) for the purpose of the Competitive Selection Process.

C. Relationship Review Committee and Conflict of Interest Adjudicator

The Relationship Review Committee is established to consider:

- Persons that have or are currently working on a Project for the Province; and
- on an ongoing basis, Persons seeking to participate in the Competitive Selection Process as respondent team members and respondents, as the case may be, to determine whether a Conflict of Interest exists with respect to such Project.

The Relationship Review Committee has five members. Additional individuals will advise and support the Relationship Review Committee. At the discretion of the Executive Project Director, Major Projects and Alternate Procurement, Ministry of Transportation and Infrastructure, membership of the Relationship Review Committee may be amended from time to time, including providing for temporary absences of Relationship Review Committee members.

The quorum for meetings of the Relationship Review Committee shall be three members.

Members of the Relationship Review Committee will be responsible for making the determinations required under the Relationship Review Process. Determination of the Relationship Review Committee will be final and binding on respondents.

The role of advisors to the Relationship Review Committee is to facilitate, assist and advise the members of the Relationship Review Committee in making the required determinations under the Relationship Review Process.

A conflict of interest adjudicator has been engaged to make final and binding rulings with respect to requests for rulings referred by the Relationship Review Committee, in its discretion.

The conflict of interest adjudicator will review each request brought forward to determine whether a Conflict of Interest exists and whether there are any applicable mitigation measures. The conflict of interest adjudicator will document this ruling in writing.

The Relationship Review Committee may seek advice from the conflict of interest adjudicator at any time in the process, and this advice will be taken into account by the Relationship Review Committee in carrying out its duties.

D. Scope of Review

At its discretion, the Relationship Review Committee will assess, from time-to-time, those individuals and entities that are working, or have worked, on a Project providing advice or other services to the Province, to determine their status with regard to that Project, including:

- Firms, corporations, partnerships, joint ventures;
- Employees, officers and directors of those entities;
- Subcontractors, consultants and advisors to those entities; and
- Public sector employees

(collectively, **"Persons"**).

Individuals will be reviewed on a case-by-case basis as respondent teams request rulings or as the Relationship Review Committee becomes aware of them.

Each assessment by the Relationship Review Committee will reflect the information provided at a particular point in time. The decision may be reviewed and revised from time-to-time, as appropriate, to reflect changing circumstances. For example, an individual who is currently categorized as a Restricted Party might, in time, not present a Conflict of Interest by joining a respondent team if the confidential information to which they had been privy no longer provides an unfair advantage to a respondent team.

E. Underlying Assumptions

In developing the Relationship Review Process, the following assumptions apply:

- All applicable laws and professional rules will apply. In the event of a discrepancy between the Relationship Review Process documented herein and any applicable law or rule, the higher or more onerous standard will take precedence;
- Advisors to the Province and public sector employees and other Restricted Parties have an ongoing duty to monitor their circumstances, to act prudently, to respect applicable confidentiality undertakings and to disclose any relationships which may be a Conflict of Interest.

F. Categorization

Persons that are working, or have worked, on a Project will fall into one of three categories:

- Restricted Party;
- Shared Use Person; and
- No Restrictions.

The provisions of each category are outlined below.

1. Restricted Party

The Restricted Party classification means that a respondent may become ineligible to participate in the Competitive Selection Process if it, its respondent team members (as defined in the RFQ/RFP), or any of their contractors, subcontractors, directors, officers, employees, consultants etc. use a Restricted Party (directly or indirectly) to advise or assist it or as an employee, advisor or consultant in connection with the respondent's participation in the Competitive Selection Process.

"Restricted Party" will be defined in the RFQ/RFP for each Project. It is anticipated that it will mean a party who is or has participated in, or who is or has been involved in:

- the Competitive Selection Process;
- the design, planning or implementation of the Project; or
- any other relationship with the Province or other public entities

and as a result, has a Conflict of Interest. The Conflict of Interest may arise because the Restricted Party may provide an unfair advantage to a respondent or may have access to confidential information to a respondent that is not, or would not reasonably be expected to be, available to other respondents.

There will be an initial presumption that officers, directors and employees (current and former) of organizations that are Restricted Parties will themselves be restricted.

It may be possible for Persons to put in place appropriate mitigation measures (ethical barriers) to manage Conflicts of Interest so that the Person may participate in the Competitive Selection Process.

2. Shared Use Person

There may be circumstances in which a Project wishes to make it possible for all respondents to have access, on an equal basis, to a Person that would otherwise be restricted to the public sector side of the Project, or exclusive to one particular respondent. For example, there may be specialized traffic study information requiring interpretation by a particular individual or organization. Under these circumstances, the Project and Person could enter into a shared use arrangement approved by the Relationship Review Committee. Unless a party is designated as shared use, a respondent team member (as defined in the RFQ / RFP) may only participate as a member of one respondent team.

When a shared use arrangement is in place for a Person, it is presumed to apply to all relevant officers, directors and employees of such Person.

3. No Restrictions

Persons that fall into this category will be free to participate as member of any respondent team, subject to any prohibitions or restrictions set out in the RFQ or RFP or any changes to a Persons circumstances which could result in Person becoming a Restricted Party.

G. Determining Restricted Party Status

As indicated above, the Relationship Review Committee in determining Restricted Party status will review the fact pattern, the definition of Restricted Party in the RFQ/RFP (as applicable and available) and the following considerations:

- Does the Person have confidential **information or knowledge** in relation to a Project and/or other initiatives that could materially improve, or reasonably be perceived to materially improve, the relative competitive position of a respondent?

OR

- Does the Person make decisions or have **influence** over decisions that could materially improve, or reasonably be perceived to materially improve, the relative competitive position of a respondent?

In applying the first question, to determine whether information or knowledge is material, the Relationship Review Committee will consider the nature of the information or knowledge, and the circumstances surrounding the information or knowledge: Some relevant questions for this determination are:

- Do or will all potential respondents have equal access to the same information or knowledge?
- How current is the information?
- How relevant is the information?

If the questions above indicate the possession of information or knowledge in relation to a Project and/or other initiatives that could materially improve, or reasonably be perceived to materially improve, the relative competitive position of a respondent in relation to a Project, the Relationship Review Committee will begin with the presumption that a Conflict of Interest exists. Consideration should also be given to whether an individual's or organization's involvement on other Provincial initiatives may give rise to a Conflict of Interest in relation to a Project.

There may nonetheless be situations where sufficient procedures, barriers, separation and confidentiality can be put in place to manage a Conflict of Interest.

H. Ethical Barriers

The following general guidelines should be considered when assessing the adequacy of an entity's ethical barriers or other measures that an organization has put in place, including where a Person that wishes to participate in the Competitive Selection Process has a relationship with a Restricted Party:

(a) The Person must ensure that the Restricted Party does not have any involvement in the Person's preparation of responses to any element of the Competitive Selection Process (for example, the

Project's RFQ or RFP, any interview process or other meetings).

(b) The Person must ensure that the Restricted Party does not discuss the respective Project or any information relating to such Project with anyone else forming part of or employed or engaged by the Person and that the Restricted Party is not put in a position where such discussions can occur or be overheard.

(c) No other member of the Person can discuss a Project with the Restricted Party.

(d) The Person must segregate all files, including computer files, relating to such Project and, the Restricted Party's files must be physically and electronically segregated (as applicable) in a secure manner from the Person's regular filing and document management systems, and be accessible only by the Restricted Party.

(e) No member of the Person may disclose to, or discuss with, the Restricted Party any documents relating to the Person's intended response in the Competitive Selection Process, including the RFQ and RFP.

(f) The measures taken by the Person to screen the Restricted Party should be stated in a written policy explained to all employees, and contractors as applicable, who are involved in the preparation of responses to the respective Project RFQ/RFP, supported by a warning that violation of the policy may result in sanctions, up to and including dismissal or termination.

(g) Affidavits, or declarations, or other acceptable evidence of compliance, may be required by the Relationship Review Committee, by (i) the Restricted Party and (ii) other appropriate organization members (including all those directly involved in the Competitive Selection Process on behalf of the organization, including those preparing responses to the RFQ or RFP) setting out that they have adhered to and will continue to adhere to all elements of the ethical barriers.

(h) The Restricted Party's office or workstation must be at a separate location or otherwise adequately and securely segregated from the offices or workstations of those working on responses to the respective Project's RFQ/RFP.

(i) The Restricted Party must use support staff different from those working on responses to the RFQ or RFP and the support staff must be cautioned and subject to the same restrictions as the Restricted Party.

I. Determining Shared Use

In order to categorize an individual or organization in the shared use category, the severity of the resource constraint would be material enough as to likely:

- lower the quality of proposals;
- lower the quality of advisors available to a Project; and
- increase the respondent's cost of preparing a proposal.

The Relationship Review Committee will apply the following principle considerations to determine whether the shared use category should apply:

- Are there a limited number of expert advisors available in the relevant category?
- Does the individual or organization possess a unique skill which, if not available to all respondents, would significantly curtail the ability of other respondents to compete?
- Is there some other significant advantage in designating the individual or organization as shared use, rather than restricted, in order to allow the individual or entity to participate in the Competitive Selection Process in a manner that is fair to all respondents?
- Can adequate, appropriate and effective ethical barriers and other measures be put in place to protect the integrity of the Projects and ensure that any Conflict of Interest is mitigated and does not impair the Competitive Selection Process?

J. Evaluation of Submissions - Determining Membership on a Respondent Team

A Project's RFQ and RFP will require respondents to disclose the Persons that comprise their team.

A Person will be considered to be a member of a respondent or a respondent team member if they meet the definition of such set out in the RFQ/RFP.

Upon receipt of submissions to a Project's RFQ and RFP, the Relationship Review Committee will review the list of respondent team members included in the submission for conflicts with those involved in such Project's evaluation process.

Where applicable and in its discretion, the Relationship Review Committee will investigate, on a case-by- case basis, whether the provisions for ethical barriers for an individual or organization are acceptable.

K. Evaluation Team Members

Due to their role in the decision-making process, individuals involved in the evaluation of submissions to a Project's RFQ and proposals to such Project's RFP will undergo additional Relationship Review Processes specific to the evaluation stages.

Upon receipt of the list of respondent team members during the RFQ evaluation process and for any changes to team composition at the RFP stage, evaluation team members will be required to disclose any former or current relationships they have, or have had, with any individuals or organization detailed on that list.

The Relationship Review Committee will review these disclosures to determine whether or not, in its opinion, any disclosed relationship gives rise to a Conflict of Interest that is of a form / nature requiring that the evaluation team member be removed from the evaluation process or whether

appropriate mitigation steps are required in order for the evaluation team member to continue in that role.

The Relationship Review Committee will take into account the particular circumstances of the disclosed situation to determine whether, in its opinion, there is a Conflict of Interest in favour of one or more respondents. The Conflict of Interest test must be handled with sensitivity to the decision-making context to which it is being applied. What will constitute a Conflict of Interest will depend on the facts and context. Considerations might include, but would not be limited to:

- The nature of the relationship (e.g. contractual/personal; past/present);
- The length of the relationship; and
- Whether the evaluation team members, as a result of the relationship, may have a pecuniary interest in the outcome of the evaluation due to a direct or indirect financial relationship with a particular respondent.

The inclusion of members on the evaluation team who are familiar with members of a respondent's team, as a result of having worked with them on previous Province contracts, would not in itself constitute a Conflict of Interest.

Also, if there is a sufficient number of people who do not have a Conflict of Interest on an evaluation team and are able to identify any bias shown by a member who has a relationship with a respondent, this arrangement may be an adequate safeguard against Conflict of Interest.

In response to Conflict of Interest, the Relationship Review Committee may:

- remove the evaluator and substitute an individual who is free from Conflict of Interest;
- recommend disqualification of a respondent;
- forward the issue to the conflict of interest adjudicator for a binding ruling; or,
- take any other measure it considers appropriate.

L. Departures from a Project Team

Over the course of a Project's design, planning and Competitive Selection Process, organizations and individuals may leave the Project team for a number of reasons including the conclusion of their contract/engagement or, in the case of employees, to pursue other opportunities which may include joining an organization that is on a respondent team. The restrictions for those individuals and organizations who had previously been classified as Restricted Parties continue to apply until such time as the Relationship Review Committee revisits this determination and releases them from these restrictions.

Upon departure from a Project team, the onus is on the Restricted Parties to notify the Relationship Review Committee and request a review of their status. Those individuals on a Project team authorized to contract with organizations and individuals will be asked to notify the Relationship Review Committee of any departures.

In determining whether any Persons should be released from their Restricted Party status, the Relationship Review Committee will apply the same criteria used in making their original determination (as defined in Section G). In the case where the Person joins a potential respondent, appropriate ethical barriers may need to be established by the potential respondent in order to not compromise its ability to participate in the Competitive Selection Process, until such time that this Person can be released of Restricted Party status. Failure to do so may result in the respondent being disqualified, particularly if there were not adequate mitigation measures, in the Relationship Review Committee's opinion, put in place with regard to the Restricted Party.