RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF TRANSPORTATION
LANSING

KIRK T. STEUDLE
DIRECTOR

February 17, 2012

Mr. John Niemela, Director
County Road Association of Michigan
P.O. Box 12067
Lansing, Michigan 48901-2067

Ms. Summer Minnick, Director of State Affairs
Michigan Municipal League
208 North Capitol Avenue, 1st Floor
Lansing, Michigan 48933-1354

RE: Guidance for Consultant Conflict of Interest for Federal Aid Projects

Dear Mr. Niemela and Ms. Minnick:

Attached is the final document related to "Conflict of Interest Guidance for Local Agency Consultant Use on Federal Aid Projects." The guidance was approved by in the Federal Highway Administration letter dated February 7, 2012.

As stated in the documents, the guidance applies only to those segments of the project for which local agencies use federal aid to reimburse their consultants. Please refer to the matrix contained on the final page of the guidance documents.

Local agencies are expected to be in compliance with the guidance on or before October 1, 2012.

We appreciate all the work and assistance that you and your committee members have contributed to develop this guidance.

If you have any questions, please contact me by email at cadenar@michigan.gov, or by phone at (517) 335-2233.

Sincerely,

Rudolph S. Cadena
Local Agency Programs Engineer

Enclosure

cc: M. VanPortfleet
B. Wieferich
✓ B. Kadzban
M. Harrison
M. DeLong
K. Cooper
M. Harbison
G. Puente

U.S. Department of Transportation
Federal Highway Administration

Michigan Division

315 W. Allegan Street, Room 201
Lansing, MI 48933
517-377-1844
517-377-1084
Michigan.FHWA@dot.gov

February 7, 2012

In Reply Refer To:
HDA-MI

Mr. Mark Van Port Fleet, P.E.
Director, Bureau of Highways
Michigan Department of Transportation
Lansing, Michigan 48909

Dear Mr. Van Port Fleet:

FHWA is pleased to receive your January 30, 2012 letter with the new "Conflict of Interest Guidance for Local Agency Consultant Use on Federal Aid Projects." Your letter also indicated that Local Agencies are expected to be substantially compliant with the new guidance document by October 1, 2012; with some exceptions being allowed on a case by case basis if failure to continue an existing contract(s) would cause a significant hardship to the respective Local Agency. As these exceptions arise, FHWA will need to concur in the determination before approval is given to the respective Local Agency.

FHWA approves the guidance and implementation schedule. FHWA concurs that this document should provide a clear definition of what constitutes a conflict and what controls must be in place when a potential conflict is identified.

This has been a controversial policy to implement and FHWA appreciates all the outreach and coordination that MDOT provided to the local agencies as well as the consultant community. FHWA feels this addresses all the concerns that were raised by the National Review Team in 2010. FHWA would like to thank everyone that has been involved in the development of this guidance.

Sincerely,

David M. Calabrese
Engineering & Operations Manager

RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF TRANSPORTATION
LANSING

KIRK T. STEUDLE
DIRECTOR

January 30, 2012

Mr. David Calabrese
Engineering and Operations Manager
Federal Highway Administration
315 West Ottawa Street
Lansing, Michigan 48933

Dear Mr. Calabrese:

The Michigan Department of Transportation (MDOT) understands the importance of its role with respect to consultant conflict of interest oversight on local agency federal-aid projects. We appreciate the cooperation of the Federal Highway Administration's Michigan Division office in coordinating with consultants and local agencies to develop a policy that complies with federal regulation.

Enclosed is a document titled *Conflict of Interest Guidance For Local Agency Consultant Use on Federal Aid Projects*. This guidance provides local agencies clear definition of what constitutes a conflict and what controls must be in place when a potential conflict is identified. We trust this document will strengthen MDOT's procedures and establish safeguards that will mitigate the potential for fraud, waste, or abuse.

Local agencies will be expected to be in compliance with the new guidance document by October 1, 2012. Some exceptions will be allowed, where failure to continue an existing contract(s) will result in significant hardship to the county or municipality. Specifically where construction project oversight will continue past October 1, 2012, and possibly extend into the next construction season. The goal will be for all communities to be in substantial compliance by October 1, 2012.

If you have questions, please contact Rudy Cadena, MDOT Local Agency Program Manager, at 517-335-2233 or CadenaR@michigan.gov.

Sincerely,

Mark A. Van Port Fleet, P.E., Director
Bureau of Highway Development

Enclosure

BOHD:DD:BCW:jh
cc: R. Brenke, ACEC
S. Minnick, MML
J. Niemela, CRAM
T. Matson, APWA
bcc: Region Engineers
M. DeLong
B. Wieferich
R. Cadena

Conflict of Interest Guidance
For
Local Agency Consultant Use on Federal Aid Projects

Purpose

The purpose of this document is to clarify the Michigan Department of Transportation (MDOT) and the Federal Highway Administration (FHWA) position on conflict of interest and provide guidance on actions required with respect to the involvement of engineering consultants in local federal aid projects. The agencies are concerned that a potential for adverse impacts to federal aid projects exists when a single consulting firm is involved in multiple program and project phases of a job.

Requirements

The Code of Federal Regulations, in Title 23 (Highways), Section 1.33 (Conflicts of Interest) states:

> ***"No engineer, attorney, appraiser, inspector or other person performing services for a State or a governmental instrumentality in connection with a project shall have, directly or indirectly, a financial or other personal interest, other than his employment or retention by a State or other governmental instrumentality, in any contract or subcontract in connection with such project. No officer or employee of such person retained by a State or other governmental instrumentality shall have, directly or indirectly, any financial or other personal interest in any real property acquired for a project unless such interest is openly disclosed upon the public records of the State highway department and of such other governmental instrumentality, and such officer, employee or person has not participated in such acquisition for and in behalf of the State. It shall be the responsibility of the State to enforce the requirements of this section."***

Conflict Definitions

For the purpose of this document, the term "preliminary engineering" refers to any pre-construction project services including, but not limited to planning, scoping, early preliminary engineering, design engineering and real estate acquisition; "construction engineering" refers to any inspection, survey, or other construction project oversight duties.

1. A consulting firm hired by a local agency to serve as the Local Agency Engineer or perform other program management duties is ***prohibited*** from performing preliminary engineering or construction engineering services on projects for that local agency where Federal-aid funds are participating in those phases of a project.

2. A consulting firm hired to serve as the Local Agency Engineer or hired to perform any preliminary engineering or construction engineering services for a specific local agency project using Federal-aid in any phase is ***prohibited*** from working for the contractor in the construction phase of that same project.

3. A consulting firm that ***has not*** been hired by a local agency to serve as the Local Agency Engineer or perform other program management duties ***may provide*** both preliminary engineering and construction engineering services on a project using Federal-aid in either phase, ***only if adequate controls are in place and procedures are followed, as required by MDOT policy***.

MDOT Responsibility

MDOT is responsible for enforcing conflict of interest regulations on local agency federal aid projects. MDOT Local Agency Programs (LAP) personnel will review contractual relationships and determine if a conflict of interest or the appearance of a conflict of interest exists. **This document may be used to guide judgment, but is not intended to cover every situation.** The recommendation for action needs to be balanced between the benefits to the project and the potential issues that can arise if a consultant or its affiliate is responsible to more than one party on the same project. An "affiliate" is any entity linked to the consultant through common ownership.

Control Procedures

MDOT requires that a third party agreement is executed between local agencies and consultants hired to perform any preliminary engineering or construction engineering work on federal aid projects, where the authorized amount of work in a phase exceeds $25,000 and federal aid is participating in that phase. MDOT LAP staff will review and approve the contract language that is placed in third party contracts between the local agency and its consultant(s), prior to authorizing the local agency to proceed with the specified service. Conflict of Interest language similar to what is written below shall be included in all third party contracts:

> ***The CONSULTANT and its Affiliates agree not to have any public or private interest, and shall not acquire directly or indirectly any such interest in connection with the project, that would conflict or appear to conflict in any manner with the performance of the SERVICES under this Contract. "Affiliate" means a corporate entity linked to the CONSULTANT through common ownership. The CONSULTANT and its Affiliates agree not to provide any services to a construction contractor or any entity that may have an adversarial interest in a project for which it has provided services to the DEPARTMENT or LOCAL AGENCY. The CONSULTANT and its Affiliates agree to disclose to the LOCAL AGENCY and the DEPARTMENT all other interests that the prime or sub consultants have or contemplate having during each phase of the project. The phases of the project include, but are not limited to, planning, scoping, early preliminary engineering, design engineering, real estate acquisition, and construction engineering. In all situations, the***

DEPARTMENT will decide if a conflict of interest exists. If the DEPARTMENT concludes that a conflict of interest exists, it will inform the LOCAL AGENCY and CONSULTANT and its Affiliates. If the CONSULTANT and its Affiliates choose to retain the interest constituting the conflict, the DEPARTMENT may require the LOCAL AGENCY to terminate the Contract for cause if a conflict of interest finding is upheld.

Following are examples where MDOT will determine if a conflict of interest exists:

1. If the consultant or its affiliate provided or will provide services to a developer involving the same project.
2. The consultant or its affiliate works for the Local Agency on several phases of a project (i.e., planning, scoping, early preliminary engineering, design engineering, real estate acquisition or construction engineering).

Following is an example of a relationship that is not considered a conflict of interest:

1. If the consultant or its affiliate works for another interest, such as a contractor, on a separate project.

Following are actions to be taken if a potential conflict of interest is identified:

1. <u>During selection</u>. It is expected that the consultant or its affiliates will not submit proposals on projects where a conflict or the appearance of a conflict of interest exists. If it is noted by the LAP staff that a conflict or the appearance of a conflict of interests exists, the staff will provide such information to the Development Services Division Administrator. The Development Services Division Administrator will determine if there is a conflict of interest or not. If it is determined a conflict of interest does exist, the consultant will be given the opportunity to avoid, neutralize or otherwise mitigate the conflict. If the consultant cannot eliminate the conflict, the proposal will be considered ineligible for selection, and the consultant and its affiliate will be informed of the reason, and the Local Agency will be asked to move on to the next most qualified consultant for selection. If it is determined a conflict does not exist, the local agency will be allowed to proceed with the selection process with the consultant.
2. <u>After selection approval but prior to LAP authorization</u>. The LAP staff will contact the Development Services Division Administrator explaining the perceived conflict of interest. If the Development Services Division Administrator concurs that a conflict exists, the consultant will be given the opportunity to avoid, neutralize or otherwise mitigate the conflict. If the consultant cannot eliminate the conflict, negotiations will be terminated and the Local Agency will be asked to move on to the next most qualified consultant for selection. If only one consultant responded to the initial selection, a new solicitation will be required to be undertaken by the Local Agency.
3. <u>During the performance of the preliminary engineering service</u>. The LAP staff will contact the Development Services Division Administrator explaining the perceived conflict of interest. If the Development Services Division Administrator concurs that a conflict exists, based on the service, progress of work and potential risks, the

Development Services Division Administrator will recommend action. Possible actions are either termination of contract or continuing with the service with full disclosure required by the consultant and their affiliates.

4. During the performance of the construction engineering service. The MDOT Construction Engineer will contact the MDOT Construction Field Services Division Engineer explaining the perceived conflict of interest. If the Construction Field Services Division Engineer concurs that a conflict exists, based on the service, progress of work and potential risks, the Field Services Division Engineer will recommend action. Possible actions are either termination of contract or continuing with the service with full disclosure required by the consultant and their affiliates.

In order for a local agency to hire the same consultant or its affiliate to perform preliminary and construction engineering on the same project when federal aid is utilized in any phase of work, control must be in place to provide assurance that potential for adverse impacts to federal aid projects are mitigated. In this case, it is required that the local agency provides MDOT evidence that project oversight duties will be performed by a person in responsible charge. This must be an agency employee that is actively engaged in reviewing project progress and documentation.

The following procedure is required in this case:

1. A local agency considering the use of a single consultant or their affiliate to perform both preliminary and construction engineering must notify the LAP staff engineer of this intent in writing prior to soliciting work.
2. Prior to awarding the work, the local agency will notify the LAP staff engineer in writing the name of the individual in responsible charge for providing oversight on behalf of the agency. This notice must include a description of how this individual will interact with the contractor and engineers.
3. If at any time during the project the individual in responsible charge for oversight is changed, written notification must be provided to the LAP staff engineer.

Reference Documents

- 5/5/11; Letter from R. Jorgenson, FHWA to Mark Van Port Fleet, MDOT

- 7/20/11; Letter from Ruth Hepfer, FHWA to Demetrius Parker, MDOT
  FHWA Memorandum on Updated Engineering and Design Related Service Guidance

- 7/20/11; Conflict of Interest Guidance on Procurement, Management and Administration of Engineering and Design Related Services - Q&A
  web address: http://www.fhwa.dot.gov/programadmin/172qa_08.cfm

- 8/4/11; Letter from David A Nicol, Director, FHWA Office of Program Administration to Director of Field-Service "responsible charge" on Federal-Aid projects administered by Local Public Agencies

Local Agency Federal-aid Project

Consultant Conflict of Interest Matrix

Case	Local Agency Engineer or Program Manager	Preliminary Engineering		Construction Engineering		Conflict of Interest	Action
		Non-Fed Participating	Fed Participating	Non-Fed Participating	Fed Participating		
1	X	X		X		No	None
2	X	X			X	Yes	Prohibited
3	X	X				No	None
4	X		X	X		Yes	Prohibited
5	X		X			Yes	Prohibited
6	X		X		X	Yes	Prohibited
7	X			X		No	None
8	X				X	Yes	Prohibited
9		X		X		No	None
10		X			X	Potential	Mitigate
11		X				No	None
12			X	X		Potential	Mitigate
13			X		X	Potential	Mitigate
14			X			No	None
15				X		No	None
16					X	No	None

X : Indicates that a single consultant or its affiliate is performing the work in each case.

1/30/2012

Action Definitions:

None: There is no conflict of interest, and no further action is required to allow the case.

Mitigate: There is a potential for a conflict of interest, but the case may be allowed if control procedures are identifed.

Prohibited: This is a conflict of interest, and the case will not be allowed.