



RICK SNYDER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF TRANSPORTATION  
LANSING

KIRK T. STEUDLE  
DIRECTOR

May 4, 2012

Mr. John Niemela, Director  
County Road Association of Michigan  
417 Seymour – Suite 1  
Lansing, Michigan 48933

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

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

Dear Mr. Niemela and Ms. Minnick:

Enclosed is the final document and federal approval related to “Conflict of Interest Guidance for Local Agency Consultant Use on Federal Aid Projects.” The guidance was approved by the Federal Highway Administration in its letter dated May 1, 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](mailto:cadenar@michigan.gov), or by phone at (517) 335-2233.

Sincerely,

Rudolph S. Cadena  
Local Agency Programs Engineer

Enclosure

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



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

Michigan Division

May 1, 2012

315 W. Allegan Street, Room 201  
Lansing, MI 48933  
517-377-1844  
517-377-1804  
Michigan.FHWA@dot.gov

In Reply Refer To:  
HDA-MI

Mr. Mark A. Van Port Fleet, P.E.  
Director  
Bureau of Highway Development  
Michigan Department of Transportation  
P.O. Box 30050  
Lansing, Michigan 48909

Dear Mr. Van Port Fleet:

FHWA is pleased to receive your April 20, 2012 letter with the revised "Conflict of Interest Guidance for Local Agency Consultant Use on Federal Aid Projects" dated April 16, 2012. FHWA approves the revised guidance which did not change the content, but used language to ensure that all parties can understand the requirements.

As stated in your February 7, 2012 letter, Local Agencies are still expected to be substantially compliant with the new guidance document by October 1, 2012. Some exceptions may be allowed on a case-by-case basis if it is determined there will be 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.

Should you have any questions, please contact Mrs. Ruth Hepfer at 517-702-1847.

Sincerely,

David M. Calabrese, P.E.  
Engineering & Operations Manager



STATE OF MICHIGAN  
DEPARTMENT OF TRANSPORTATION  
LANSING

RICK SNYDER  
GOVERNOR

KIRK T. STEUDLE  
DIRECTOR

April 20, 2012

Mr. David Calabrese  
Engineering and Operations Manager  
Federal Highway Administration  
315 West Allegan Street, Room 201  
Lansing, Michigan 48933

Dear Mr. Calabrese:

On February 7, 2012, the Federal Highway Administration (FHWA) approved the document titled *Conflict of Interest Guidance For Local Agency Consultant Use on Federal Aid Projects*. The Michigan Department of Transportation (MDOT), in a cooperative effort with FHWA's Michigan Division, is working to develop a policy that complies with federal regulation.

Our local agency and consulting partners requested further clarification. Enclosed is the revised document *Conflict of Interest Guidance For Local Agency Consultant Use on Federal Aid Projects*, dated April 16, 2012. FHWA and MDOT staff reviewed the suggested verbiage. The intended guidance was not substantially changed; rather language was rewritten to ensure all parties understand the requirements.

Thank you for your continued cooperation in the development of this important guidance. If you have questions, please contact Rudy Cadena, MDOT's Local Agency Program Manager, at [CadenaR@michigan.gov](mailto:CadenaR@michigan.gov) or 517-335-2233.

Sincerely,

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

Enclosure

BOHD:DD:BCW:jh

cc: M. DeLong  
B. Wieferrich  
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 areas and phases of a project. This document is written with the understanding that Federal-aid funds are participating in the physical construction of a project.

**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 work.

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 physical construction 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 of work, *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 project phase of work. The project phases of work 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 on a project for the Local Agency on both preliminary engineering and construction engineering phases of work, and Federal-aid funds are participating in either or both phases.

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. During selection. 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. After selection approval but prior to LAP authorization. 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. During the performance of the preliminary engineering service. 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 either or both phases 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 [*updated on 3/2/12*]  
web address: [http://www.fhwa.dot.gov/programadmin/172qa\\_08.cfm](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

Conflict of Interest Matrix

(See Attachment)

**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.

**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 identified.

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

**Note:**

This matrix is written with the understanding that the physical construction of the project is funded with Federal-aid.

4/16/2012