

Conflict of Interest Guidance
For
Consultant Services on Local Agency Federal-Aid Projects
Revised: 03 30 2020

Purpose

The purpose of this document is to clarify the Michigan Department of Transportation (MDOT) and the Federal Highway Administration (FHWA) guidance when **Federal-aid Highway Program (FAHP) funds** are participating for Consultant Services (engineering/management) on a Local Agency project. There is a potential for conflict of interest to occur when a single consulting firm is involved in program functions and/or multiple project phases of a Local Agency project. The Local Agency must clearly define the roles, responsibilities, and duties for a project to protect the interest of all stakeholders especially as it relates to potential conflict of interest. It is important to understand conflicts of interest may be direct or indirect (e.g., as result of a personal or business relationship). Additionally, the appearance of a conflict of interest shall be avoided as an apparent conflict may undermine public trust if not sufficiently mitigated.

If there are no FAHP funds participating for Consultant Services during any phase of a project, the Local Agency may procure services in accordance with its own established policies and procedures which reflect applicable laws. Using Conflict of Interest Self-Certification Form (#2660) is highly recommended, however, it is not required if FAHP funds are not participating.

Requirements

When FAHP funds are participating in **Consultant Services**, 23 CFR (Code of Federal Regulations) and 2 CFR 200 requirements shall be followed.

Additional guidance can be found in the FHWA documents (<https://www.fhwa.dot.gov/programadmin/consultant.cfm>, under “Guidance”:

[Procurement, Management, and Administration of Engineering and Design Related Services - Questions and Answers](#) (05/19/2017 Category VIII – Conflicts of Interest)

[Responsible Charge](#) (08/04/2011)

The Local Agency shall designate a person in Responsible Charge on the MDOT Program Application who is accountable for the project. In addition, the person designated Responsible Charge is recommended to have an executed Code of Conduct Agreement available if requested by MDOT and/or FHWA to comply with 2 CFR 200.318(c)(1). The agreement requires written standards of conduct covering conflicts of interest and governing the actions of the Local Agency’s employees who are engaged in the selection, award and administration of a contract using FAHP funds. Appendix A contains reference material for

the creation/development of the Code of Conduct agreement which addresses the principals of ethical conduct.

If FAHP funds are used on Consultant Services for any phase of a project, the Conflict of Interest Self-Certification Form (#2660) shall be completed and submitted to Local Agency Programs (LAP) with the Program Application form. If any changes are made later, it is the Local Agency's responsibility to ensure an updated form is re-submitted to LAP (prior to letting) or the MDOT Transportation Service Center (TSC) Construction Engineer (after letting).

MDOT Responsibilities

On Local Agency FAHP funded projects, MDOT Local Agency Program Section (MDOT LAP) will review the submitted documents for completeness.

Additionally, FHWA or MDOT may identify a project as a high-risk project, warranting special oversight and additional approval actions, as appropriate, based on cost and risk thresholds (as specified in 2 CFR 200.207).

Prohibited Scenarios

If FAHP funds are intended for use on Consultant Services (engineering/management) on any phase of a project, then **the following scenarios constitute a conflict of interest and are not allowed:**

1. Multiple Project Phases as the Local Agency Engineer (23 CFR 1.33)
 - A consulting firm hired to serve as the Local Agency Engineer may provide either scoping/design or construction/inspection services on the project, but is prohibited from performing **both**. A consultant not serving or having the appearance of serving as the Local Agency's Engineer, may perform both the PE and CE work if proper mitigation is in place.
2. Real Estate Acquisition **and** Appraisal [49 CFR 24.102 (n)]
 - A consultant or its affiliate shall not provide both services (an exception is when the acquisition is uncomplicated, less than \$10,000 and a Waiver Valuation can be used).
3. Developer Affiliation (23 CFR 1.33)
 - A consultant or its affiliate shall not be eligible to participate in any phase of Consultant Services for a project if they provided or may provide Consultant Services to a developer on the same project or an adjacent project. In accordance with 23 CFR 1.33, a 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 for the project.
 - The consultant and its affiliates shall not provide any Consultant Services to a construction contractor or any entity that may have an interest in a project or an adjacent project for which it has provided services to MDOT or the Local Agency.

4. A consultant serving in a management role on behalf of the Local Agency [23 CFR 172.7 (b)(5)]
 - Generally prohibited, however, permissible if the Local Agency has secured FHWA approval of the Request for Proposal (RFP). In addition, Consultants serving in a management roll on behalf of the Local Agency require FHWA approval of a Conflict of Interest mitigation plan prior to advertising.

The above list is not considered all inclusive. Other scenarios could be considered a conflict of interest. It is recommended Local Agencies request consultants refrain from submitting bids or proposals where a prohibited conflict or the appearance of a prohibited conflict of interest exists. If a Local Agency is uncertain, they should contact MDOT LAP. The Local Agency shall require the prime consultant and subconsultants to disclose all other interests which may be considered a conflict of interest for each phase of the project.

Mitigatable Scenarios

All non-prohibited scenarios are allowable with varying levels of mitigation.

If a consultant or its affiliates are selected for a project phase utilizing FAHP funds, the Local Agency shall establish policies, procedures, practices and oversight controls to ensure conflict of interest or the appearance thereof does not exist. The Local Agency shall be able to demonstrate the administration of the Consultant Services contract(s) are being conducted in a manner complying with state and federal laws, regulations, and requirements, as well as assuring adequate opportunity for fair competition.

If a Local Agency intends to use FAHP funds on Consultant Services, then MDOT will require the Local Agency to complete a mitigation plan by filling out the Conflict of Interest Self-Certification Form (#2660) and submit it to MDOT LAP prior to requesting FAHP funding for any phase(s). The Conflict of Interest Self-Certification Form (#2660) shall be submitted with or prior to the Program Application. See “Control Procedure” below for further information.

MDOT requires a Third-Party Agreement between the Local Agency and a Consultant selected for project phases using FAHP funds. MDOT LAP will review and approve the Third-Party Agreement prior to authorizing the Local Agency to proceed with the specified service. Conflict of Interest language and the Local Agency signed Conflict of Interest Self-Certification Form (#2660) will be incorporated by reference in the Third- Party Agreement.

Control Procedures

Local Agencies procuring Consultant Services for project phases utilizing FAHP funds shall develop and sustain organizational capacity and provide the resources and training necessary for the procurement, management and administration, engineering, and design related consultant services specified in 23 CFR 172.5(c).

During the review of the completed Conflict of Interest Self-Certification Form (#2660), if MDOT LAP perceives there is a potential conflict of interest where the proposed mitigation is insufficient, MDOT LAP will inform the Local Agency immediately. The Local Agency may change their selected consultant or provide the consultant with the opportunity to avoid or otherwise mitigate the conflict or potential thereof. If the consultant and/or its affiliates cannot eliminate the conflict or choose to retain the interest constituting the conflict, the Local Agency will be asked to move on to the next most qualified consultant or undertake a new solicitation. If only one consultant responded to the initial solicitation (RFP), a new solicitation will be required to be undertaken by the Local Agency. Failure of a Local Agency to sufficiently document mitigation on the Conflict of Interest Self-Certification form will delay obligation of FAHP funds.

If a conflict of interest is identified by MDOT LAP or TSC during the performance of engineering/managing consultant services funded by FAHP, the Local Agency shall suspend duties and take all necessary corrective actions.

If the conflict of interest cannot be mitigated to the satisfaction of MDOT or FHWA, FAHP funds will be withheld or withdrawn for the respective Consultant Services phase in question.

Appendix A

Guidance to Creating/Developing Code of Conduct Agreement for the Responsible Charge

Principles of Ethical Conduct for Government Officers and Employees

The following Principles of Ethical Conduct are an excerpt from Executive Order 12674 of April 12, 1989, as modified by Executive Order 12731. These Principles apply to all employees of the Federal Government. *(FHWA/MDOT recommend the Local Agency use the same or similar language for the creation/development of a Responsible Charge Code of Conduct Agreement.):*

Part I-Principles of Ethical Conduct

Section 101. Principles of Ethical Conduct. To ensure every citizen can have complete confidence in the integrity of the Federal Government, each Federal employee shall respect and adhere to the fundamental principles of ethical service as implemented in regulations promulgated under sections 201 and 301 of this order:

- a. Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.
- b. Employees shall not hold financial interests that conflict with the conscientious performance of duty.
- c. Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.
- d. An employee shall not, except pursuant to such reasonable exceptions as are provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.
- e. Employees shall put forth honest effort in the performance of their duties.
- f. Employees shall make no unauthorized commitments or promises of any kind purporting to bind the Government.
- g. Employees shall not use public office for private gain.
- h. Employees shall act impartially and not give preferential treatment to any private organization or individual.
- i. Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.
- j. Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.
- k. Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

- l. Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law.
- m. Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.
- n. Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order.