



THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION



Victoria F. Sheehan
Commissioner

William Cass, P.E.
Assistant Commissioner

Date: **June 2, 2020**

To: **Local Public Agencies (LPA) & Consultant Community (ACEC)**

From: **Bureau of Planning and Community Assistance**
New Hampshire Department of Transportation (NHDOT)

Re: **Notice #2020-05: NH Department of Transportation Consultant Conflict of Interest Guidelines**

Dear Local Public Agencies (LPA's) and consulting firms interested in working on Federal and State funded LPA projects. We are writing to remind you that the Department's June 12, 2013 Conflict of Interest Guideline related to Preliminary Engineering (PE) and Construction Engineering (CE) applies to all projects including projects with sub-recipients, otherwise known as LPA projects. In summary, the guideline (attached) is intended to assure procurement of consulting services for engineering design and/or construction inspection is done in a fair, open, and competitive manner, and avoids conflicting professional or personal interests when such competing interests could potentially affect a firm's ability to provide impartial decisions and/or perform their contractual obligations.

To better align the LPA program with the June 12, 2013 guideline, as well as the Department's own practice for NHDOT managed projects, the Department is requesting that after **July 1, 2020** all LPA projects that have not received approval from NHDOT to advertise bids **should** comply with the 2013 guideline and be utilizing a different CE firm for construction inspection/oversight than the PE firm that was selected for the design. In addition, the Department is requiring that after **January 1, 2021** all LPA projects that have not received approval to advertise bids **shall** comply with the June 12, 2013 guideline. Please note, between July 1, 2020 and January 1, 2021, if an LPA should make the decision to utilize the same consultant for PE and CE, a formal waiver (outlined further in this notice) will NOT be required. However, the Department will require documentation from the consultant as outlined in the waiver section of this notice.

To assist the LPA's with this directive, the Department is currently developing a list of qualified CE firms for LPAs to review and select firms to provide proposals (3 proposals minimum). This CE prequalification list, anticipated to be available this summer, will help ensure communities can find qualified firms to engage in CE services. In addition, likely by the summer of 2021, the Department will have its own "on call" list of CE consultants that could work directly for NHDOT to manage the construction inspection aspects of an LPA project. More information about both of these developing

efforts can be found in the attached May 16, 2020 Community Assistance Notice #2020-03 LPA Project Management and Consultant Selection Options.

Waiver Guidance

As the attached June 12, 2013 guideline indicates, if a sub-recipient (LPA) determines there is a justified need to retain the same consulting firm for CE services on the same project the same firm performed PE services, then a waiver to the conflict of interest guidelines can be requested by the LPA to the Department. The waiver documentation from the LPA to the Department needs to include the following information:

- a) A written request by the LPA (on LPA letterhead) to utilize the same firm for both PE and CE services on the same project,
- b) One of the following:
 - a statement by the firm that no conflict exists or,
 - a statement by the firm that a potential conflict could be perceived but mitigation measures will be implemented and tracked that will assure no conflict of interest.
- c) One of the following:
 - A statement by the firm that no conflict disclosures are necessary, or
 - The firm's disclosure of any association, interest, or circumstance which could influence the firm's judgment or quality of services
- d) A plan and procedures for mitigation to be put in place by the firm and the LPA to avoid:
 - A perception of a conflict of interest (if no conflict is known) and/or
 - A conflict of interest (if a conflict is identified)

The waiver request information noted above shall be submitted to the Department's Community Assistance Project Manager for review and forwarding onto the Department's Director of Project Development, and eventually NHDOT's Chief Engineer.

Documentation between July 1, 2020 and January 1, 2021

During the transition period, the documentation from the LPA to the Department needs to include the following information:

- One of the following:
- a statement by the firm that no conflict exists with a short plan on how that will continue through the construction of the project, or
 - a statement by the firm that a potential conflict could be perceived but mitigation measures will be implemented and tracked that will assure no conflict of interest, including identification of those measures, or

- A statement by the firm that a conflict exists. In this case, the Department, LPA and consultant would have to come to specific written agreement that through the firm's disclosure of any association, interest, or circumstance which could influence the firm's judgment or quality of services, every reasonable effort will be made to eliminate any potential conflicts.

The NHDOT believes that the 6-month transition time line noted above provides ample time for LPA's to line up separate CE services on their LPA projects. It is important to note that although the waiver process noted above is part of the attached June 12, 2013 guideline, the Departments intent is to only grant waivers on a very limited basis.

Please refer any questions or concerns to either C.R. Willeke or Bill Watson.

C.R. Willeke, PE
Municipal Highways Engineer
Bureau of Planning and Community Assistance
603-271-6472
Charles.Willeke@dot.nh.gov

Bill Watson, PE
Administrator
Bureau of Planning and Community Assistance
603-271-3344
Bill.Watson@dot.nh.gov



THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION



CHRISTOPHER D. CLEMENT, SR.
COMMISSIONER

JEFF BRILLHART, P.E.
ASSISTANT COMMISSIONER

June 12, 2013

Mr. Patrick Bauer
Division Administrator
FHWA New Hampshire Division
J.C. Cleveland Federal Building
53 Pleasant Street, Suite 2200
Concord, NH 03301


Attention: Ms Brigitte Mandel

Dear Mr Bauer:

This letter is intended to provide you the document developed out of the National Review Team (NRT) findings concerning the recommendation for a conflict of interest guideline. Attached please find enclosed the NH Department of Transportation Consultant Conflict of Interest Guideline. This guideline was developed from input from your office, the ACEC, the Attorney General's Office and internal NHDOT staff. This document is intended to provide NHDOT staff and sub-recipients receiving Federal Aid funds, guidance to assure procurement of consulting services for engineering design and/or construction inspection is done in a fair, open, and competitive manner, and avoids conflicting professional or personal interests.

The information in this document will be incorporated into the Department's Consultant Contract boiler plate language to insure that it is implemented for every consultant agreement. In addition, this document will become part of the NHDOT's Local Public Agency Manual to make all municipal recipients of Federal Aid Project funds aware of this issue and as well as the need for mitigation measures. The Guideline is intended to be a living document and will be updated periodically as changes are made to the process.

Sincerely,


Craig A. Green, PE
Assistant Director of Project Development

CAG/cag

cc: B. Cass
N. Mayville
✓ W. Hardiman

NH Department of Transportation Consultant Conflict of Interest Guideline

6/12/13

Subject: Use of Design Consultants for Construction Inspection Services

Purpose: The purpose of this conflict of interest guideline is to assure procurement of consulting services for engineering design and/or construction inspection is done in a fair, open, and competitive manner, and avoids conflicting professional or personal interests when such competing interests could potentially affect a firm's ability to provide impartial decisions and/or perform their contractual obligations. This guidance applies to all Federal Aid Projects including projects of "sub-recipients" (i.e. Local Public Agencies (LPA's) otherwise known as the community administering the project) of these funds. This guideline is intended to supplement, but not replace any applicable state and federal laws governing conflict of interest applicable to state agencies.

Policy: A consulting firm, officer/employee of a consulting firm, or a firm acting in the capacity as a sub-consultant, performing professional services for the NH Department of Transportation (NHDOT) or sub-recipients receiving Federal Aid funds in connection with a project, shall not directly or indirectly have a financial, personal or other interest, in any contract or subcontract in connection with such project other than employment or retention by the NHDOT or sub-recipient.

Procedure: In general and as practical, consulting firms that have performed the engineering design for a project should not be selected for the construction inspection/oversight for the same project, as it can have the appearance of a conflict of interest.

However, if the Department or sub-recipient determines there is a justified need to retain the same consulting firm for construction inspection/oversight services on the same project the firm performed the engineering services on, the consultant may be considered for the construction inspection/oversight services provided that there is a determination that no conflict of interest exists, or mitigation measures can be implemented that will assure no conflict of interest. If the consulting firm is aware of, or identifies a conflict of interest, the firm shall disclose to the Department or sub-recipient any association, interest, or circumstance which could influence the firm's judgment or quality of services, and submit a plan and procedure for mitigation that shall be put in place by the firm to avoid the conflict of interest or perception. This disclosure and mitigation shall be provided to the Department's lead person/project manager or the sub-recipient.

The Department's lead person/project manager or sub-recipient shall review the consulting firm's conflict of interest disclosure and mitigation measures and make a recommendation to the Director of Project Development and Chief Engineer with the justification and the mitigation measures.

The Director of Project Development shall review the recommendation from the lead person/project manager or sub-recipient regarding the conflict of interest disclosure and mitigation measures from the firm, and the Chief Engineer shall approve or disapprove the lead person/project manager, or sub-recipient's recommendation.

If the consulting firm's conflict of interest documentation and mitigation measures are approved for construction oversight/inspection, the lead person/project manager or sub-recipient shall put in place monitoring, evaluation and reporting procedures sufficient to ensure overall compliance and that no conflict of interest exists. This will include regular sampling and evaluation of the contract documents, and preparation of reports of findings and any remedial actions required.

Responsibility: It is the responsibility of the consultant firm to anticipate, identify, and disclose any actual, potential or appearance of a conflict of interest to the NHDOT or sub-recipient. Sub-consultants are responsible for disclosing any actual, potential, or appearance of conflicts of interest to the prime consultant firm, and the prime shall disclose the sub-consultant's conflict to the NHDOT or the sub-recipient. The NHDOT or sub-recipient retains the sole discretion to determine on a case-by-case basis whether a conflict of interest exists and will base the determination on facts made available at the time of determination. Any unknown facts or change in facts may necessitate a re-evaluation of the original determination.

The consulting firm, officer/employee of a consulting firm, or a firm acting in the capacity as a sub-consultant shall notify the NHDOT's Project Manager/Lead Person or sub-recipient of a conflict of interest in writing, fully explaining the conflict and providing suggestions or protocols to remedy the conflict prior to:

- The completion of any consultant selection process;
- Engaging a sub-consultant on a NHDOT contract;
- Performing construction inspection/oversight on a project which the firm performed the design;
- Accepting any work from an entity other than the NHDOT that is associated with a project on which the firm performed services for the NHDOT.

The NHDOT's Project Manager/Lead Person or sub-recipient will be responsible for reviewing the firm's suggestions and protocols, and requesting approval from the Chief Engineer thru the Director on whether to object to the conflict, mitigate the conflict, or require the firm or sub-consultant to remedy the conflict.

A copy of the approval from the NHDOT Chief Engineer must be on file in the firm's office and available for review by the NHDOT, if requested.

Nonconformance Action: Failure to obtain approval for any conflict of interest on any Federal Aid project or sub-recipient project that is federally funded may jeopardize the consultant firm's selection for that project. If there is reasonable cause to believe a consultant firm knew, or, through the exercise of reasonable care should have known, that the consultant firm has actual or possible conflicts of interest with respect to its proposed role in the project, and that the consultant firm failed to disclose such actual or possible conflicts of interest to the NHDOT, the NHDOT or sub-recipient shall inform the firm of the basis for such belief and afford the consulting firm an opportunity to explain the alleged failure to disclose. If, after hearing the consulting firm's response and after making further investigation as warranted by the circumstances, the NHDOT or sub-recipient determines the consulting firm has knowingly or intentionally failed to disclose an actual conflict of interest in violation of this Policy, the NHDOT may take appropriate

disciplinary and corrective action up to and including debarment from the NHDOT Consultant Eligibility List and/or suspension from participation in any Department or sub-recipient work for a period of up to 5 years for the first offense, and permanently for any future offense. In determining whether to impose any such disciplinary or corrective action, as well as the nature and severity of any such action to be imposed, the NHDOT shall take into consideration the seriousness of the alleged violation and the particular circumstances involved, including whether the consulting firm intended by its nondisclosure of the conflict to mislead the NHDOT or to gain an unfair advantage in the selection process.