



DATE: **Program Number(s)**

TO: District Engineers 1-6, **Key Number(s)**
LHTAC Administrator
ACHD Capital Projects Manager

FROM: Monica Crider, P.E. **Program ID, County, Etc.**
Contracting Services Engineer

RE: Guidance on Revised Conflict of Interest Guidelines related to Professional Service Agreement and Administration (PSAP IC - 2018 - 02)

Attached you will find revised sections 120 (Conflict of Interest) and 1100 (Definitions) of the PSAP manual.

Highlights of the changes include:

- The practice of allowing the same A/E firm to do both the design and construction engineering and inspection on the same project which has historically not been allowed can now be done by the same firm.
- Additional responsibilities are now given to agreement administrators in regards to the watching for and approving the mitigation of apparent conflicts of interest.
- Some additional terms have been defined.

The effective date for this interim change to the Professional Services Agreement Procedures (PSAP) manual shall be September 1, 2018.

SECTION 120 – CONFLICT OF INTEREST

The Idaho Transportation Department is required to have written procedures for consultant services to be eligible for reimbursement when federal-aid highway funds are used in the agreement for professional services. These ***Professional Service Agreement Procedures*** shall apply to federally-funded and state-funded consultant agreements. Local agencies shall follow these procedures for federally-funded projects. These written procedures and any revisions to them must be approved by FHWA.

The following procedures provide direction in the solicitation, selection, negotiation, and administration of consultant agreements for professional services. These procedures are prepared in compliance with the Code of Federal Regulations, Idaho Code, and the Department's Board and Administrative policies.

120.1 – Purpose

The goal of the following procedures is to ensure fair and open competition in procuring professional services and to maintain the public interest in carrying out a project.

120.2 – FHWA Requirement

According to the Code of Federal Regulations, specifically 23 CFR 1.33, no consultant shall have, directly or indirectly, a financial or other personal interest, other than its employment or retention by the Department, in any contract or subcontract in connection with such project. Such consultant shall not have, directly or indirectly, any financial or other personal interest in any real property acquired for the project unless such interest is openly disclosed upon the public records of the Department and such consultant has not participated in such acquisition for and in behalf of the Department.

No employee of the Department who participates in the procurement, management, or administration, of any contract or subcontract in connection with a project shall have, directly or indirectly, any financial interest, personal interest, or relationship that could impair the employee's ability to act impartially or in the best interest of the Government in any such contract or subcontract.

120.3 – Consultant Responsibility

It is the responsibility of the Consultant to recuse itself from competing for solicited services if a conflict of interest (real or apparent) exists. All consultant firms have an obligation to promptly disclose in writing to the Department, (Agreement Administrator) I conflicts of interest that arise while participating in the execution of a project. This disclosure shall include a description of actions that the Consultant has taken or proposes to take to avoid, mitigate, or neutralize the conflict (real or apparent). Consultants must provide disclosure regardless of their opinion that such a conflict would not impair their objectivity.

120.4 – Department Responsibility

The Department is responsible to ensure the public interest is maintained and that a conflict of interest (real or apparent) does not occur. It is important to understand that a conflict of interest is to be avoided. An apparent conflict may undermine public trust in the integrity of the procurement process.

When a conflict of interest (real or apparent) is disclosed, the Department (Agreement Administrator) will take appropriate actions to address the real or apparent conflict. Such actions may include ensuring equal access to information by all potential proposers; disclosure with the appropriate disclaimers; or by restricting or modifying the work to be performed by the firm with the conflict. If required to prevent a conflict of interest (real or apparent) the Department at its discretion, may terminate the contract. Agreement Administrators seeking guidance can contact the Conflict of Interest Committee Chairperson within the Consultant Services Section at Headquarters.

120.5 – Conflict of Interest Guidelines

Conflicts may arise in the following situations:

- (i) Development of solicitation documents. Any Consultant that developed the scope of services, the Request for Proposal (RFP) or other solicitation documents for a particular project phase is ineligible to compete for that phase of the project for which they developed the documents.
- (ii) Unequal access to information. A Consultant has access to non-public information through its performance on a project related agreement.
- (iii) Impaired objectivity. Impaired objectivity occurs when a Consultant or member of their immediate family (spouse, parent, or child) that has financial or other interests that would impair, or give the appearance of impairing, impartial judgment in the evaluation of Department's programs, in offering advice or recommendations to the Department, or in providing technical assistance or other services to recipients of Federal funds as part of its contractual responsibility. "Impaired objectivity" includes but is not limited to the following situations that would cause a reasonable person with knowledge of the relevant facts to question a person's objectivity:
 - (A) Financial interests or reasonably foreseeable financial interests in or in connection with products, property, or services that may be purchased by a transportation agency, a person, organization, or institution in the course of implementing any program administered by the Department;
 - (B) Significant connections to engineering methodologies or approaches that might require or encourage the use of specific products, property, or services;

(C) No consultant that is currently providing, or has previously provided, consulting services to ITD on a project shall perform any services for the construction contractor on the same project.

Conflicts are not generally considered to be present in the following situations:

- (i) If the firm completed preliminary or final design work for ITD, this firm can also compete for CE&I work on that same project, working for ITD.

- (ii) If the firm completed preliminary design work for ITD, this firm can also compete for the final design work on the same project as long as all documents produced or utilized as part of the preliminary design activities are shared by ITD with all proposers on the final design.

SECTION 1100.00 DEFINITIONS

Agreement	A binding agreement or contract between the State and the Consultant.
Agreement Administrator	The Agreement Administrator directly administers the consultant's performance and payment per the agreement/contract specifications.
Apparent Conflict of Interest	The perception of a conflict of interest to a reasonable person with knowledge of the relevant facts or if such person would question the impartiality of the consultant/sub-consultant.
Authorization	Professional Services Authorization and Invoice Summary.
Consultant Services	The Consultant Services section of the Contracting Services Section has general oversight responsibility for developing, authorizing, and managing ITD Professional Service Agreements.
Consultant Administration	The overall program of solicitation, selection, negotiation, and administration of consultant agreements for professional services.
Contractor	The individual, partnership, firm, corporation, or any acceptable combination thereof, contracting with the Idaho Transportation Department, for performance of prescribed work.
Combined Overhead	The sum of the payroll additives and general administrative overhead expressed as a percent of the direct labor cost.
Consultant	The individual or firm providing professional services in connection with a project or agreement
Cost Plus Fixed	Payment type consisting the sum of labor costs, combined overhead, other direct

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Department	Idaho Transportation Department.
Direct Labor Costs	The actual salaries paid to personnel for the time worked directly on the project. Also referred to as payroll costs.
Additional Services	Any services or actions required of the Consultant beyond the obligations of the original or modified contract.
FAR	Federal Acquisition Regulations (48 CFR)
FHWA	Federal Highway Administration. The federal agency that provides oversight on all federal-aid highway projects.
Final Design	Any design activities following preliminary design and expressly includes the preparation of final construction plans and detailed specifications for the performance of construction work
Fixed Fee	A dollar amount negotiated to cover the Consultant's profit and business expenses not allocated to overhead costs. It is a percent of the direct labor and combined overhead.
General Administrative Overhead	The allowable overhead expense expressed as a percent of the direct labor cost.
LHTAC	Local Highway Technical Assistance Council
LPA	Local Public Agency.
Lump Sum	Payment type consisting of an agreed upon total amount that constitutes full payment for all work described in the agreement.
Not-To-Exceed Amount	The maximum amount payable unless adjusted by a Supplemental Agreement or additional services.

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Other Direct Costs	The out-of-pocket costs and expenses directly related to the project that are not a part of the company's overhead expense.
Payroll Additives	All payroll additives allocated to payroll costs such as FICA, State Unemployment Compensation, Federal Unemployment Compensation, Group Insurance, Worker's Compensation Insurance, Holiday, Vacation, and Sick Leave. Payroll additives are expressed as a percent of the direct labor cost.
Payroll Costs	The actual salaries paid to personnel for the time worked directly on the project. Also referred to as direct labor cost.
Pre-award Audit Assurance	An evaluation of the cost elements of agreements and work tasks to assure that costs included in the agreement are allowable in accordance with federal cost principles.
Preliminary Design	Defines the general project location and design concepts. It includes, but is not limited to, preliminary engineering and other activities and analyses, such as environmental assessments, topographic surveys, meets and bounds surveys, geotechnical investigations, hydrologic analysis, hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, general estimates of the types and quantities of materials, and other work needed to establish parameters for the final design. Prior to completion of the NEPA review process, any such preliminary engineering and other activities and analyses must not materially affect the objective consideration of alternatives in the NEPA review process."
Professional Services	Any professional services for engineering (i.e., material inspection, bridge inspection, construction inspection, design, environmental, archaeological, geotechnical engineering, transportation planning, public involvement, and information technology engineering), architectural, land surveying, legal, accounting, auditing, and right of way where negotiating the price is the accepted practice of the profession.
Project	The section of highway or that area as shown by the plans, within which work is to be performed.

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Real Conflict of Interest	<p>A situation in which there is a risk that professional judgment or actions in performing the contract work is or might be unduly influenced by existing or planned activities or a personal or business relationship; or that a consultant has an unfair competitive advantage by having access to undisclosed information related to a solicitation. Includes:</p> <p>A. Organizational – The perception to a reasonable person with knowledge of the relevant facts that the objectivity of the consultant/sub-consultant is impaired or that the firm has an unfair advantage.</p> <p>B. Personal - A situation in which there is a risk that professional judgment or actions in performing the contract work is or might be unduly influenced by existing or planned activities or a personal or business relationship. The perception to a reasonable person with knowledge of the relevant facts that the objectivity of individual representing the Consultant is impaired.</p>
Resident Engineer	The administrator acting either directly or through an authorized representative within the limits of the authority granted by the administrator.
Scope of Work	All services, work activities, and actions required of the consultant by the obligations of the agreement.
Specific Rates of Competition	Payment type consisting of the sum of the hourly charge-out rate and other direct costs.
State	The State of Idaho acting by and through the Idaho Transportation Board and the Idaho Transportation Department.
Subconsultant	Any consultant that is hired by the prime consultant to perform contract-related engineering services. All subconsultants must be approved by
	Consultant Services and the Agreement Administrator prior to contracting with the prime consultant.
Supplemental Agreement	An agreement that modifies the existing contract to accomplish work beyond the scope of the original contract.
Unit Cost	The sum of the hourly charge-out rate and other direct costs. Also referred to as Cost.

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Unit Prices	The allowable charge-out rate for units or items directly related to the project that is not a part of the normal overhead expense.
Work Task	Under the Term Agreement, the Work Task details a particular task and the expected output that the pre-qualified consultant will perform.