

NDOR

**CONFLICT OF INTEREST GUIDANCE DOCUMENT for
LPA OFFICIALS, EMPLOYEES & AGENTS for**

LOCAL FEDERAL-AID TRANSPORTATION PROJECTS

With this document, NDOR intends to provide an explanation of its understanding of the issues related to conflicts of interest and to provide guidance that will assist the Local Public Agency (LPA) in disclosing actual and potential conflicts, so that they can be eliminated or mitigated where possible.

Federal conflict of interest provisions prohibit a public official, employee or agent, who negotiates, approves, accepts or administers any contract, from having a direct or indirect financial interest, real or apparent, in such contract with the public entity for which he or she is a public official, agent or is employed. Conflicts of interest may occur when (1) LPA is planning on completing any work related to a federal-aid project using the services of a Private Business that Provides Goods or Services for Transportation Projects, or (2) any official, employee or agent of LPA owns real estate that may be needed for any upcoming or active federal-aid project. An example of a prohibited financial interest would be a situation involving a part-time County Highway Superintendent making the award of a county professional engineering contract to a firm in which the Superintendent is presently a partner. Many other less obvious situations may also represent improper conflicts of interest.

A. The Law

Federal law prohibits “conflicts of interest” of local public agency officials, employees or agents in federal-aid transportation projects. One way that federal law prohibits conflicts of interest is by prohibiting certain local public agency officials, employees or agents from having a financial or other interest in a contract entered into by the public entity that they serve. The first sentence of 23 CFR 1.33, Conflicts of Interest, states: “No official or employee of ... any governmental instrumentality who is authorized in his [or her] official capacity to negotiate, make, accept or approve, or to take part in negotiating, making, accepting or approving any contract or subcontract in connection with a project shall have, **directly or indirectly**, any financial interest in any such contract or subcontract.” Similarly, the second sentence of 49 CFR 18.36(b)(3) Procurement, states: “No employee, officer or agent of the grantee or sub grantee [LPA] shall participate in selection, or in the award or administration of a contract supported by federal funds if a conflict of interest, **real or apparent**, would be involved. Such a conflict would arise when: (i) The employee, officer or agent, (ii) Any member of his [or her] immediate family, (iii) His or her partner, or (iv) An organization which employs, or is about to employ, any of the above, has

a financial or **other interest** in the firm selected for award.” This section makes clear that there can be a conflict of interest when a family member or business partner of an employee or official benefits from a contract with an LPA. This section also prohibits “apparent” conflicts of interest.

Federal law also prohibits others involved in federal-aid projects from having conflicts of interest. The second sentence of 23 CFR 1.33 states: “No engineer, attorney, appraiser, inspector or other person performing services for a ... governmental instrumentality in connection with a project shall have, **directly or indirectly**, a financial or **other personal interest**, other than his [or her] employment or retention by a ... governmental instrumentality, in any contract or subcontract in connection with such project.”

Federal conflict of interest provisions have been interpreted by FHWA to prohibit both consultants and local officials, employees or agents from having interests in **real property** acquired for a project, unless certain conditions are met. The third sentence of 23 CFR 1.33 states: “No officer or employee of such person retained by a ... 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.”

Additionally, Nebraska State law prohibits public officials, employees or agents from having certain personal interests in contracts entered into by an employee or official’s governmental entity. See, for example, Neb. Rev. Stat. § 39-1509 (County Highway Superintendent), Neb. Rev. Stat. § 23-3113 (County Purchasing Agent), and the Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. §§ 49-1401 to 1444 and 49-1493 to 14,104, in particular 49-14,101 to 14,103.07.

It is the responsibility of the LPA, its officials, employees and agents to be familiar with federal, state and local conflict of interest laws that apply to federal-aid projects. The laws and statutes identified above (August, 2010) serve only as a guide. The LPA must adhere to any local laws and policies, and any new or revised federal or state laws.

B. Definitions

Financial Interest in a private Business is generally understood to mean, but is not limited to, receiving income or benefits from, having an ownership interest in (including but not limited to owner, partner, shareholder, member), is employed by or has any other economic or financial stake or interest in the success or failure of the Business.

Local Public Agency or **LPA** means a county, municipality, political subdivision, Native American Tribe, school district, or other entity that is either designated by statute as public or quasi-public; or an entity that is otherwise eligible to serve as a sub-grantee of federal transportation funds under federal or state law.

Immediate Family means a child residing in an individual's household, a spouse of an individual, or an individual claimed by that individual or that individual's spouse as a dependent for federal income tax purposes. (Source, Neb. Rev. Stat. § 49-1425.) Importantly, other familial relationships can cause real or potential conflicts of interest and may require disclosure and appropriate mitigation, if possible.

Business means any corporation, partnership, limited liability company, sole proprietorship, firm enterprise, franchise, association, organization, self-employed individual, holding company, joint-stock company, receivership, trust, activity or entity. (Source, Neb. Rev. Stat. § 49-1407.)

Personal Interest in a Private Business is generally understood to mean, but is not limited to, a previous (within the past two years) or promised future employment relationship with, or having a member of your present or past Immediate Family who is employed by, or who has a Financial, Personal or other Interest in a Private Business.

Private Business that Provides Goods or Services for Transportation Projects means a Private Business that has contracted with or provided, or is capable of providing, goods or services to an LPA for an LPA transportation project or activity, including project development, right-of-way activities, construction, operation or maintenance. **For services**, the following non-exclusive list is of the types of activities of a Private Business that are covered by this definition: feasibility studies, corridor or location studies; environmental studies and documents; surveys; preliminary engineering; design engineering; construction; construction engineering; testing of materials; geotechnical testing and engineering; right-of-way design, appraisal, or negotiations; or for any other project related service. **For goods**, the following non-exclusive list is of the types of goods of a Private Business that are covered by this definition: construction or road materials, such as soil, sand, gravel, rock, asphalt, concrete, sod, erosion control materials; construction or earth-moving equipment; and, supplies. Engineering and architectural firms and Construction Contractors are expressly covered by this definition.

Public Employee means a full or part time employee of an LPA or the state, a political subdivision, or any other entity that is eligible to receive federal-aid funds for a transportation project. (Source, Neb. Rev. Stat. § 49-1442.) This includes the LPA's Responsible Charge (RC) even if such person is on loan from another LPA through an inter-local agreement.

Public Official means an elected or appointed official of an LPA, the state or a political subdivision, or any other entity that is eligible to receive federal-aid funds for a transportation project. (Source, Neb. Rev. Stat. § 49-1443.)

C. Instructions

LPA should review and understand this document, as well as the conflict of interest laws and statutes, and make a good faith effort to determine whether any official, employee or agent of LPA has a real or potential conflict of interest on an active or proposed federal-aid project.

LPA must complete and sign the **Conflict of Interest Disclosure Form for LPAs** for each project. The guidance on the reverse side of the Disclosure Form can also be used to help LPA make a conflict of interest determination. The Disclosure Form must be used for self-reporting and disclosure of all real, apparent and potential conflicts of interest. A detailed and factual account of the nature of any conflict, along with proposed mitigation measures, where possible, must be attached to the form. LPA must email the completed Disclosure Form, and all attachments to the NDOR Local Projects Division (LPD) Project Coordinator (PC) assigned to the project prior to initiating any contract for goods, services or right-of-way for the project.

NDOR, in cooperation with FHWA as needed, will evaluate all reported real or potential conflicts of interest, as well as LPA's proposed mitigation measures, and advise LPA as to the adequacy of the proposed mitigation strategy. NDOR must formally concur with all conflict of interest mitigation proposals, or prescribe appropriate alternative mitigation methods, where possible. NDOR's concurrence or response will be emailed to the LPA applicant by the LPD PC.

If the LPA applicant or Responsible Charge (RC) is unsure whether there is a conflict of interest, and wants to present the circumstances or situation to NDOR, the RC may seek a determination as to whether LPA has an actual or potential conflict of interest on a project. RC should email all conflict of interest inquiries to the LPD PC assigned to the project.

The LPA shall have the duty to notify the LPD PC and submit a revised Conflict of Interest Disclosure Form for LPAs for any changes in circumstances, or discovery of any additional facts, that could result in LPA officials, employees or agents having a real or potential conflict of interest on an LPA federal-aid transportation project.

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