PROGRAM MANAGEMENT BULLETIN 17-02

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TO: District Directors of Transportation Operations, District Directors of Transportation Development, District Program Management Administrators, District Procurement Managers, District Local Programs Administrators

FROM: Stefanie Maxwell, P.E., Manager, Program Management Office

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SUBJECT: Local Agency Program- Confidentiality of Consultant Data

REQUIREMENTS

Local agencies participating in the Department’s Local Agency Program (LAP) procure consultants with Federal-aid Highway Program funds to perform professional services. A local agency must comply with 23 USC 112(b)(2)(E) and 23 CFR 172.11(d) and protect the confidentiality of consultant’s cost data. Department staff and consultants monitoring local agency contracts shall protect the confidentiality of consultants’ cost data.

In-house Department consultants who are responsible for supporting the Districts in their delivery of LAP projects shall not have access to:

- Department Consultant Pre-qualification Letters which contain audit information
- Overhead Rates (audited information)
- Facilities Capital Cost of Money (FCCM) rates (audited information)
- Direct Expense rates (audit information)
The Department shall not use general engineering consultants to review other consultant cost data containing confidential audit information, and shall restrict access to files containing confidential consultant audit data.

Local agency general engineering consultants who are responsible for supporting an agency in the delivery of LAP projects shall also not have access to other consultant cost data elements listed above.

Per Chapter 18.6 of the LAP Manual, the Local Agency shall retain documentation of the negotiations activities in their project files and the Department shall collect the independent man-hour estimate for its project file. Documentation of the consultant cost certification and supporting documentation of the accepted indirect cost rate to be applied to the contract must not be uploaded in the Local Agency Program Information Tool (LAPIT) or transmitted to Department general engineering consultants. In order to protect the confidentiality of the cost data, the information listed above shall be redacted from local agency consultant contract fee schedules or permission from the consultant must be obtained before sharing this information with anyone other than the Department’s Local Programs Administrators or other authorized government agencies. Confidential data shall be transmitted using secure methods, electronic or otherwise.

COMMENTARY

Indirect cost rates are audited in compliance with cost principles contained in the Federal Acquisition Regulations of 48 CFR 31. Cost and rate data obtained from a consultant firm in solicitation and award of a Federal-aid Highway Program funded contract shall be confidential and shall not be accessible or provided, in whole or in part, to another firm.

BACKGROUND

In March of 2016, the Federal Highway Administration, Florida Division Office issued a letter concurring with the Department’s February 2016 request to utilize specific rates of compensation for maximum limiting amount contracts. The purpose of the request was to continue to utilize general engineering consultants in support roles without having direct access to other consultants’ confidential information by converting rate information into fixed hourly rates. The Local Programs staff and consultants are required to comply with the guidance.

23 USC 112 (b)(2)(E): Prenotification; confidentiality of data.—A recipient of funds requesting or using the cost and rate data described in subparagraph (D) shall notify any affected firm before such request or use. Such data shall be confidential and shall not be accessible or provided, in whole or in part, to another firm or to any government agency which is not part of the group of agencies sharing cost data under this paragraph, except by written permission of the audited firm. If prohibited by law, such cost and rate data shall not be disclosed under any circumstances.
23 CFR 172.11(d): Prenotification; confidentiality of data. FHWA, recipients, and subrecipients of FAHP funds may share audit information in complying with the recipient's or subrecipient's acceptance of a consultant's indirect cost rates pursuant to 23 U.S.C. 112 and this part provided that the consultant is given notice of each use and transfer. Audit information shall not be provided to other consultants or any other government agency not sharing the cost data, or to any firm or government agency for purposes other than complying with the recipient's or subrecipient's acceptance of a consultant's indirect cost rates pursuant to 23 U.S.C. 112 and this part without the written permission of the affected consultants. If prohibited by law, such cost and rate data shall not be disclosed under any circumstance; however, should a release be required by law or court order, such release shall make note of the confidential nature of the data.

IMPLEMENTATION

The requirements identified herein are effective immediately. The LAP Manual (Topic No. 525-010-300) will be updated accordingly.

CONTACT

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