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STATE OF NEBRASKA

DEPARTMENT OF ROADS

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November 15, 2011

Mr. Joseph Werning
Division Administrator
Federal Highway Administration
100 Centennial Mall North Rm 220
Lincoln, NE 68508-3803

Subject: Financial Integrity Review and Evaluation (FIRE) (FY10), Soft Match Process Review Report

Dear Mr. Werning:

Referring to your September 2, 2011 letter, and the accompanying bridge soft match program review report, please find enclosed Nebraska Department of Roads' (NDOR) responses to the four findings. To summarize, NDOR proposes taking the following actions:

- A) Not accepting new applications for soft match credits until a new soft match policy is in place.
- B) Work with your office to agree to specific methodology and criteria to be applied to eligibility reviews of soft match "source" projects, based on the 2004 policy. We will commit resources as necessary to accomplish this task by December 31, 2011.
- C) Complete eligibility reviews as described below, and based on the methodology and criteria established from (B) above.
 - a. For the specific projects which had findings mentioned in the FIRE report, by February 1, 2012.
 - b. As needed each year. The proposed priority is the program of federal-aid bridge projects on the Statewide Transportation Improvement Program (STIP). Each federal fiscal year NDOR will do a detailed eligibility review of "source" soft match project credits intended to be applied to a federal bridge "use" project. Adjustments to soft match balances will be made, if necessary, as a result of those reviews. For federal fiscal year 2012 projects, reviews will be done and reported to FHWA-NE by January 1, 2012. For subsequent years, reviews will be done and reported to FHWA-NE by November 1st of the fiscal year. If eligibility reviews overall show substantial compliance with the agreed upon criteria, per (B) above, NDOR will seek FHWA-NE concurrence to check randomly selected source projects for subsequent years instead of reviewing all source projects.

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- c. Soft match source projects for which applications were accepted prior to the program suspension date (the date of your letter) and which have not yet been accepted for soft match credits. Referring to the current (2004) policy, page 2, NDOR will do this detailed review prior to Step 9 in order to ensure that the requested soft match credits are eligible.

- D) Communicate in writing to LPA's which have soft match credits that support documentation for "source" projects must be kept until at least three years after final payment of the "use" federally funded project. This notice will be sent via email by December 1, 2011.

Regarding Finding 4, NDOR agrees that the preliminary engineering expenses are ineligible for soft match credits under the soft match program policy, and disagrees with FHWA's finding that construction engineering expenses are ineligible. Under the 2004 policy, we believe that construction engineering expenses were intended to be included in the calculation for soft match credits. Refer to Section III of the current policy. "No credit is allowed for preliminary engineering, advertising for bids, approach grading, or surfacing." If construction engineering was not to be credited, this sentence would have so stated. Therefore, NDOR's position is that the intent of the soft match policy is to allow construction engineering expenses. While we acknowledge that the third sentence of Section VI (15) of the policy is written "Engineering and advertising are not eligible for soft match credit" we believe that the word "Engineering" is meant to be consistent with Section III and apply to preliminary engineering only.

NDOR requests FHWA concurrence with NDOR's plan of corrective action as detailed above, and in the enclosed responses.

Sincerely,

/Monty W. Fredrickson, P.E.
Director – State Engineer

MWF/JW/vk

Attachment

NDOR Responses to FHWA FY10 FIRE Review of Soft Match Program
November 15, 2011

Finding 1

Ineligible costs were included in computation of the Soft Match Credit:

- a. Two of the five projects reviewed included costs for ineligible items. Soft Match construction costs on Nuckolls County Source Structure C006522213 and Sarpy County Source Structure C007710415 included culvert pipe and flared end section charges. These items were not part of the bridge replacement project and should not be included in the Soft Match Computation.

- b. The Review Team found one project in Pawnee County, structure C006714310, where engineer hourly rates exceeded those allowed in the Construction Engineering (CE) contract (letter) by \$440. It also found \$660 charged for "Non-contract items" hours not included in the original contract. No amendment of the higher hourly rates or additional "Non-contract items" hours was found in the files and the consultant confirmed there was no amendment. Higher rates or additional charges not covered in the original contract or through an amendment/change order are not eligible for use as Soft Match.

Recommendation 1:

- a. NDOR should determine and confirm the total amount of ineligible costs (e.g. culvert pipe and flared end section) billed on Nuckolls County project 2395004 and Sarpy County project 7077057. The amount of ineligible costs should be identified and the amounts approved by FHWA. Soft Match credit for the related "source" structures should be recalculated to remove ineligible costs and a corresponding adjustment made to the "use" project. A credit for the adjusted Federal-aid share of the "use" project should be processed through Rapid Access State Payment System (RASPS) on the next Federal aid billing following acceptance by the FHWA Review Team.

Response: *NDOR will do this by February 1, 2012. Note that per page 1 of the Soft Match Policy paragraph III (3) drop pipe culverts at the bridge location are eligible.*

- b. NDOR should reduce the "source" structures used as match for Pawnee County project 7067019 by the \$1,100 (\$440+\$660) of ineligible engineering costs, recalculate the Soft Match credit and make a corresponding adjustment to the "use" project. A credit for the adjusted Federal-aid share of the "use" project should be processed through RASPS on the next available Federal-aid billing.

Response: *NDOR will review eligibility and take necessary actions by February 1, 2012.*

- c. NDOR should review, revise and implement (if appropriate) processes and procedures to ensure subsequent Soft Match "source" project costs applied to "use" projects include only eligible costs. Projects initiated after October 1, 2011 should be reviewed to ensure that only eligible costs are included and amounts credited to Soft Match are calculated correctly. Any amounts determined to have been incorrectly included in the Soft Match credit on a Federal-aid project should have a credit processed through RASPS on the next Federal-aid billing following acceptance by the FHWA Review Team

Response: *NDOR will review Soft Match "source" projects in order to ensure that only eligible costs are applied to "use" projects in the federal fiscal year 2012 (FFY12) and beyond programs. All "source" projects for FFY12 "use" projects will be reviewed for eligibility. If eligibility reviews overall show*

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substantial compliance, NDOR will seek FHWA-NE concurrence to check randomly selected source projects for subsequent years instead of reviewing all source projects. Furthermore, NDOR is not accepting any more soft-match applications until a new policy is in place.

Finding 2

Documentation in file did not fully/adequately support Soft Match calculations:

a. For one Pawnee source structure C006700710 neither the NDOR, County or Consultant files contained a copy of the CE contract. Without a copy of the contract we are unable to determine the validity of the amounts charged and if the amounts should be included in the Soft Match award calculations.

b. Letting and bid support documentation was in file for the Steel purchase on structure C002012655 in Cuming County, but was not available for the contract with the construction firm utilized on the project. Without a copy of the contract we are unable to determine the validity of the amounts charged and if the amounts should be included in the Soft Match award calculations.

c. NDOR Soft-Match Bridge Program Policies (2004) Section VI(19) states the LPA must keep (retain) records for 3 years after the date the Soft Match source structure is complete and accepted by NDOR for Soft Match credit. On some source structure projects the review team was informed the county had destroyed payroll and vendor payment records. Records destroyed may have been retained in compliance with the NDOR Policies. However, the NDOR Policies do not satisfy 49 CFR 18.42 requirements for retention of support records until 3 years after completion of a federally funded project. The NDOR Soft Match program builds up a pool from completed source structure construction costs (not federally funded) for application as the LPA's share of future federally funded projects. The actual application of these funds to a use structure (federally funded project) may not occur until several years after the source structure is completed. As a result, records applicable to the use structure project are not available for review by FHWA or NDOR to determine if support documentation satisfies 49 CFR 18.42.

d. The Review Team was able to reconcile and confirm construction and CE costs documentation in LPA files. However, adequate documentation to support the 1) Soft Match amounts, 2) calculations of amounts awarded or 3) satisfaction of requirements was not found in the NDOR files. For example, in the NDOR file on Sarpy County structure C007710415 there was no support for the source structure's cost used as a basis for the Soft Match calculation and the letter to NDOR stating Soft Match requirements had been met. No evidence NDOR had reviewed the information in the Sarpy County files or used it to support the amount awarded was found.

Note- Although the NDOR file information was lacking, the Review Team was able to reconcile Soft Match amounts awarded to supporting documentation during its review of County files. And, the Review Team was able to reconcile documentation supporting expenditures for construction and CE to Soft Match award amounts.

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Recommendations:

a. NDOR should obtain a copy of the CE contract for Pawnee County source structure C006700710, verify the validity of the amounts charged and adjust the Soft Match award on use project 706701 if necessary. If an adjustment is required a corresponding adjustment should be processed through the next RASPS billing.

Response: *NDOR will do this by February 1, 2012.*

b. NDOR should obtain a copy of the letting and bid documentation for Cuming County source structure C0020122655, determine if the selection process was properly conducted, amounts charged are valid and correct, and if adjustment of the Soft Match award on use project 7021024 is required. If NDOR is unable to obtain a copy of the contract, an evaluation and acceptance of the amounts charged should be performed using a comparison or methodology accepted by FHWA, and the Soft Match award should be adjusted as required.

Response: *NDOR will do this by February 1, 2012.*

c. The Soft Match agreement between FHWA and NDOR provides that NDOR is responsible for maintaining the Soft Match balances for each LPA. NDOR should develop a retention system for records that meets or exceeds the requirements of 49 CFR 18.42. NDOR should review and update the Soft Match Bridge Program Policies to include the record retention system developed as a requirement for the Local entities.

Response: *NDOR will send notice to LPAs that support documentation must be kept until at least 3 years after final payment of the "use" federally funded project. This notice will be sent via e-mail by December 1, 2011. NDOR is not accepting any more soft-match applications until a new policy is in place.*

d. NDOR should develop and implement procedures to insure adequate documentation to support Soft Match amounts has been provided and reconciled is provided by the LPA and verified by NDOR. Additionally, NDOR should revise the Soft Match Policy to provide additional guidance on and examples of support documentation required to qualify as Soft Match.

Response: *NDOR will review Soft Match "source" projects in order to ensure that only eligible costs are applied to "use" projects in the federal fiscal year 2012 (FFY12) and beyond programs. All "source" projects for FFY12 "use" projects will be reviewed for eligibility. If eligibility reviews overall show substantial compliance, NDOR will seek FHWA-NE concurrence to check randomly selected source projects for subsequent years instead of reviewing all source projects. Furthermore, NDOR is not accepting any more soft-match applications until a new policy is in place; see responses 1.c and 2.c above.*

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e. Periodic reviews should be conducted by NDOR over the next three years to verify support documentation is being maintained, modified procedures are functioning as designed and LPAs are adequately meeting Federal-aid requirements. This issue will be addressed further and resolved in the Operations review during FY 11.

Response: NDOR will review Soft Match “source” projects in order to ensure that only eligible costs are applied to “use” projects in the federal fiscal year 2012 (FFY12) and beyond programs. All “source” projects for FFY12 “use” projects will be reviewed for eligibility. If eligibility reviews overall show substantial compliance, NDOR will seek FHWA-NE concurrence to check randomly selected source projects for subsequent years instead of reviewing all source projects. Furthermore, NDOR is not accepting any more soft-match applications until a new policy is in place; see responses 1.c and 2.c above.

f. NDOR should verify and document that processes and procedures have been implemented and are being followed.

Response: NDOR will review each Soft Match “source” project in order to ensure that only eligible costs are applied to “use” projects in the federal fiscal year 2012 and beyond programs. Furthermore, NDOR is not accepting any more requests for new soft match credits.

g. NDOR should document their acceptance of soft match credit including documentation of required submittals, reviews, inspections and formal acceptance.

Response: NDOR will review each Soft Match “source” project in order to ensure that only eligible costs are applied to “use” projects in the federal fiscal year 2012 and beyond programs. Therefore, the review of current soft match credits will take place over time according to the fiscally constrained federal-aid program. Furthermore, NDOR is not accepting any more requests for new soft match credits.

h. NDOR should review all county Soft Match project credits awarded since implementation of the Soft Match Bridge Program Policies approved July 14, 2004. The review should determine if credits awarded were eligible (Finding 1) and adequately supported (Finding 2). A report summarizing the review should be prepared and submitted for FHWA review and approval by October 14, 2011. Supporting documentation for the review should be maintained and available at NDOR. Soft Match for projects should be recalculated to remove costs that are not eligible, adequately supported or reasonable. Any amounts determined to have been incorrectly included as a Soft Match credit on a Federal-aid project should result in a credit being processed through RASPS on the next Federal-aid billing following acceptance by FHWA.

Response: NDOR will review Soft Match “source” projects in order to ensure that only eligible costs are applied to “use” projects in the federal fiscal year 2012 (FFY12) and beyond programs. All “source” projects for FFY12 “use” projects will be reviewed for eligibility. If eligibility reviews overall show substantial compliance, NDOR will seek FHWA-NE concurrence to check randomly selected source projects for subsequent years instead of reviewing all source projects. Furthermore, NDOR is not accepting any more soft-match applications until a new policy is in place; see responses 1.c and 2.c above.

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Finding 3:

Certified non-controversial findings or completed non-controversial checklists (implemented by NDOR in 2004) on file were not adequately supported by documentation. The non-controversial checklist had 8 activities to be completed:

1. USACE 404 Pennit obtained.
2. USACE 404 Penn it completed & closed
3. Coordination with SHPO
4. Coordination with NGPC
5. Coordination with USFWS
6. No impact to public property
7. No condemnation of private property
8. No request for public hearing

The detail of the specific items missing for the selected sample is shown in attachment B. Although the non-controversial checklist was present, it often was only supported by a check mark or initials and dates. Relevant documents such as US Army Corps of Engineers 404 permits, or letters to coordinating agencies should also be included. If an item is non-applicable, a brief explanation why the item is non-applicable should be included to show the item was addressed.

Recommendation 3:

NDOR should revise and strengthen the soft match policy guidance and develop written procedures to ensure that each County maintains adequate support for the non-controversial checklist in their files. The written procedures should ensure that a credit to the Soft Match source pool occurs only after the checklist and supporting documentation is supplied by the LPA and verified by NDOR.

Response: *NDOR is not accepting any more soft-match applications until a new policy is in place; see responses 1.c and 2.c above.*

Finding 4:

Section III of the policies updated in 2004 (see Section IV above) clearly state costs for preliminary engineering, advertising and approach work cannot be applied (as local share) to Soft Match on future federally funded projects. Section VI (15) of the Soft-Match Bridge Program Policies (2004) states engineering is not an eligible credit for Soft-Match. However, NDOR Soft-Match calculations and approval correspondence clearly show that NDOR accepted and allowed Construction Engineering (CE) costs incurred on source projects as part of the Soft-Match credit applied to use projects. NDOR practice is not in line with written policy.

The Federal-aid Policy Guide's (FAPG) Additional Guidance on 23 CFR 630D (<http://www.fhwa.dot.gov/legsregs/directives/fapg/0650dsup.htm>). 23 CFR 650

D 2.a. states:

"The FHWA has determined that for the purposes of implementing 23 US C. 144(n), the term "construction" should be broadly defined. It includes most activities incidental to the development and actual replacement or rehabilitation of a highway bridge "

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Although FHWA has adopted a broad definition of Soft Match costs, the guidance also grants States the ability to limit Soft Match credits to "*hard construction*" activities. Through the NDOR Soft Match Bridge Program Policies (2004), soft match credit is not to be allowed for engineering costs.

Recommendation 4:

NDOR should follow written policy on the eligibility and inclusion of CE costs in the calculation of Soft Match. If NDOR determines CE is eligible and should be included in the Soft Match calculation, NDOR should amend the written policy by reviewing the Soft-Match Bridge Program Policies (2004) language in Section VI (15) and take the following corrective actions:

1. Clarify the eligibility of PE and CE costs as components of Soft Match.

Response: NDOR agrees that preliminary engineering expenses are ineligible for soft match credits under the soft match program policy and disagrees with FHWA's finding that construction engineering expenses are ineligible. Under the 2004 policy, we believe that construction engineering expenses were intended to be included in the calculation for soft match credits. Refer to Section III of the current policy. "No credit is allowed for preliminary engineering, advertising for bids, approach grading, or surfacing." If construction engineering was not to be credited, this sentence would have so stated. Therefore, NDOR's position is that the intent of the soft match policy is to allow construction engineering expenses. While we acknowledge that the third sentence of Section VI (15) of the policy is written "Engineering and advertising are not eligible for soft match credit" we believe that the word "Engineering" is meant to be consistent with Section III and apply to preliminary engineering only.

2. If engineering costs are allowed, provide documentation that procurement of engineering services follows the requirements of the Brooks Act and Nebraska State Law.

Response: The 2004 soft match policy does not specifically address consultant procurement. NDOR's position is that the Brooks Act does not apply because soft match projects are local projects constructed without the use of federal funds. Procurement laws for Nebraska counties come under the County Purchasing Act, Neb Rev Statutes §§23-3101 through §§23-3115. Note that Neb Rev Statutes §§81-1701 through §§81-1721, also referred to as the Nebraska Consultants' Competitive Negotiation Act, only applies to consultant procurement by Nebraska state agencies and does not apply to Nebraska counties.

3. Revise other written guidance that references Soft Match to reflect any changes in Soft Match policy.

Response: The LPA Manual will be revised as necessary.

4. Provide additional training or an update to LPA & State Staff involved in the Soft Match calculation, application and award process. Any amendment to the Soft-Match Bridge Program Policies (2004) should be coordinated with and approved by the FHWA Nebraska Division.

Response: Any amendment to the Soft-Match Bridge Program Policies (2004) will be coordinated with and approved by the FHWA Nebraska Division.