



June 12, 2024

John Evers, President/CEO  
American Council of Engineering Companies of New York  
6 Airline Drive  
Albany, NY 12205

Dear Mr. Evers:

Thank you for sending the New York State Department of Transportation (NYSDOT) a copy of your February 2, 2024 letter to the Federal Highway Administration (FHWA) regarding NYSDOT's application of the Federal Acquisition Regulations (FAR) to forgiven Paycheck Protection Program (PPP) loans. You have raised several issues which I will address below.

The PPP Program was established to provide a direct incentive for businesses to keep their workers on payroll in the face of work stoppages or reductions caused by the COVID-19 pandemic. Consistent with the intent of the PPP program and FAR 31.201-5, *Credits*<sup>1</sup>, FHWA issued guidance<sup>2</sup> which precluded using PPP loans to pay for any direct labor costs on any<sup>3</sup> Federal-aid highway project and allowed PPP funds to be used for indirect labor costs (as well as indirect non-labor costs) but required a corresponding credit against the firm's indirect costs pool. The result eliminated the possible duplicate recovery of direct or indirect costs. In the case of PPP loans, the credit provision is considered only if a firm has had their PPP loan forgiven and used their PPP loan to cover costs allowable under FAR.

The PPP loan program required applicants to maintain documentation of the expenses covered by the loan. In addition, FAR 31.201-2 requires firms to have documentation supporting their cost determinations. If firms did not adequately support where their PPP funds were spent, NYSDOT based any applicable credit on an equitable allocation of the forgiven funds, consistent with the requirements of FAR 31.201-4 and with FHWA's guidance. In general, forgiven funds were allocated based on the breakdown of costs incurred during the covered period as a percentage of firm's overall labor costs in that same period. What that meant varied from firm to firm depending on their specific circumstances. This approach, in the absence of adequate records, assumed the PPP funds were used to help retain all workers, not just those working on non-FAR contracts, and accordingly, all labor benefitted from the PPP funds.

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<sup>1</sup> Requires that a firm credit the government for any portion of funds it receives related to any costs that are otherwise allowable to be billed on a government contract.

<sup>2</sup> FHWA Memorandum HCFB-30, *Treatment of Paycheck Protection Program Funds for Architectural and Engineering Consultants Guidance*, page 2, bullet 1.

<sup>3</sup> State and/or locally administered.

Your letter raises concerns that other States are applying methodologies that differ from NYSDOT's. All States struggled with the application of the PPP requirements when the forgiveness program was announced. And while your letter referenced a working group FAQ document, that document is not official guidance. As such, FHWA's order and the FAR regulations provided the basis for NYSDOT's methodology. Before applying our approach, NYSDOT obtained confirmation from FHWA officials that this approach was acceptable. In addition, firms were given the unique opportunity to appeal to FHWA regarding our determinations. In all cases, NYSDOT's approach was upheld.

The concern that firms will lose more than the amount of their forgiven federal loans should not be the case. FHWA Memorandum HCFB-30 states: "The indirect cost rate credit should only be applied until the credit is recovered fully." Firms are responsible for documenting and tracking the recovery/payback of the PPP credit. This is critical as entities other than NYSDOT could be applying the credit on FAR-based contracts. While no firm has raised this concern to date, NYSDOT will work closely with any firm who does to understand where credits may have already been applied to ensure over crediting does not occur.

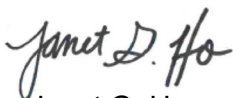
Your letter also raises concerns that firms are largely not permitted to submit their own professional third-party audits and that NYSDOT is securing their own audits. NYSDOT not only permits but requires almost all firms to submit FAR audits. NYSDOT reviews the audits and where a firm's method was not sufficiently supported or did not appear to comply with FAR, NYSDOT requests additional information and makes any necessary adjustments. This is standard practice and is not limited to PPP matters.

Lastly, NYSDOT's PPP process is not creating a '*new fund*' for use on our projects. As with any disallowance (PPP or otherwise) that reduces the allowable costs or even simply an overall billing less than the contract's Maximum Amount Payable, the funds that remain on a contract become available for use on other projects when the contract is closed. NYSDOT fully expects to pay for allowable costs incurred on our contracts but should not be expected to pay for costs already reimbursed through other government monies.

NYSDOT projects continued in earnest throughout COVID and due to the concerted efforts of NYSDOT, your ACEC members and other industry partners, we were successful in delivering projects while the rest of the world waited. NYSDOT truly appreciates the efforts of your members and looks forward to continuing to deliver projects and ensuring the proper expenditure of taxpayer funds. If changes are implemented in how states are to administer the PPP loan forgiveness program on Federal-aid projects, NYSDOT will make the necessary adjustments.

If you have any further questions, please contact Theresa Vottis at 518-457-6300.

Sincerely,



Janet G. Ho

Assistant Commissioner for Finance and Integrated Modal Services