

**Office of Real Estate Services - Project Development Guide
Chapter 6**

Donations, Lands Acquired Early, and Matching Share Credit

**23 U.S.C. 108
23 U.S.C. 138
23 U.S.C. 323**

**23 CFR 710.501
23 CFR 710.503
23 CFR 710.505
23 CFR 710.507
49 CFR 24.102
49 CFR 24.108**

REFERENCES

Title 23 U.S.C. 323 allows state Departments of Transportation (DOTs) to credit the non-federal share of project costs with the fair market value (FMV) of lands donated or lawfully obtained, and/or donated materials, and services that are incorporated into a specific transportation project. Unless otherwise noted, the provisions for state DOTs apply to local public agencies (LPAs). Federal regulations consider the LPA to be a state agency and, as such, the Federal requirements for state agencies apply to LPAs that wish to use Federal funds in its transportation project. To assure compliance with Federal regulations, please consult with the appropriate FHWA Division Office for clarification, when necessary, or for additional information.

23 U.S.C. 323(b)(3) states that donations made by a Federal agency **are not eligible for credit** toward the project matching share. In addition, 23 CFR 710.507(c) provides that credits are not available for lands acquired with any form of Federal financial assistance, or for lands already incorporated and used for transportation purposes.

23 U.S.C. 323 provides that a credit toward the matching share for a specific transportation or transportation-related project **may** be allowed for the FMV of land lawfully obtained, provided this does not influence the environmental assessment; is incorporated into the project; and is not land described in Title 23 Section 138. This means that land lawfully obtained prior to completion of the environmental document, property acquired using non-federal funds, donations, property acquired through use of police power, and previously owned property **may** be eligible for a credit.

To be accepted for credit, the property, materials, and services must meet specific criteria. If the Federal Highway Administration (FHWA) determines that the agency has not complied with the appropriate criteria, the value of the property, material, or service will not be accepted for credit. If the FHWA determines that the agency failed to comply with required law or regulation, Federal-aid participation in the entire project may be in jeopardy. If you have reason to believe that a mistake occurred during the acquisition but that corrective action can be taken, please contact the local FHWA division office for advice on how to proceed.

In 2005 the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) was enacted. It eliminated the previous 23 U.S.C. 323(e) called "Crediting of Contributions by Units of Local Government toward the State Share." SAFETEA-LU revisions now allow local contributions to be treated in the same fashion as state contributions. This eliminates the need for 23 CFR 710.507(e), which has not been changed since SAFETEA-LU was enacted.

6.0. LANDS ACQUIRED EARLY

23 CFR 710.501 sets out requirements pertaining to property or lands an agency acquires early, defined as an acquisition prior to receiving a Federal-aid authorization to proceed to acquire property with Federal-aid funds. Federal authorization to proceed with full Federal funding can not be given prior to completion of the environmental document. 23 CFR 710.501(c) contains the additional rules to be followed in order for these acquisition costs to be eligible for Federal-aid reimbursement under 23 U.S.C. 108(c)(2)(C) and (D). Chapter 6.5., below, lists the requirements which must be met for reimbursement of costs incurred prior to Federal-aid authorization.

23 CFR 710.503 contains the requirements for protective buying and hardship acquisitions using Federal-aid funds, after receiving Federal authorization and approval. These purchases are covered in section 6.2., below.

23 CFR 710.505 contains rules regarding real property donations. Acquiring agencies may accept donations at any time during project development. Donations are further discussed in chapter 6.3.

6.1. ACQUISITION USING NON-FEDERAL FUNDS

Many agencies use their own funds to acquire real property. The FHWA considers acquisitions made prior to a Federal authorization to proceed and prior to completion of the environmental document, as **early or advance acquisitions**. These are addressed in 23 CFR 710.501. Each state DOT should describe the procedure it follows for these early or advance acquisitions in its right-of-way (ROW) procedures manual. Local agencies should follow the state's procedures unless the state approves a different process for the local agency. The state DOT may call acquisitions which occur after approval of the environmental document "early" acquisition, simply because these acquisitions are not yet on its timeline for full scale project acquisition. This can cause considerable confusion. For FHWA funding purposes an early or advance acquisition is an acquisition that occurs prior to completion of the environmental document. Acquisitions which occur after the completion of the environmental document are considered regular (normal) acquisitions and are fully eligible for Federal-aid reimbursement, provided that a project agreement is in place and the project has received a Federal authorization to proceed.

The FHWA considers these acquisitions (whether early/advance or not) to be "under the threat of eminent domain" and subject to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act), and 49 CFR part 24, in order to avoid jeopardizing Federal funding for phases of the project, including construction. The Uniform Act requirements must be satisfied. Problems arise when an agency uses its own funds to acquire property for the project, does not follow the Uniform Act regulation in 49 CFR part 24, and later applies for Federal-aid funding for the construction phase of the project.

6.2. PROTECTIVE BUYING AND HARDSHIP ACQUISITION

23 CFR 710.503 allows that prior to approval of the environmental document, the state DOT may request FHWA agreement to reimburse for the advance acquisition of a particular parcel or a limited number of parcels, to prevent imminent development and increased costs on the preferred location (protective buying), or to alleviate hardship to a property owner or owners on the preferred location (hardship acquisition), provided the following four conditions are met:

- a. The project is included in the currently approved statewide transportation improvement program (STIP).

- b. The state DOT has complied with applicable public involvement requirements in 23 CFR parts 450 (public involvement in the planning process) and 771 (any public involvement, coordination, and notifications required by the environmental process). The expectation for adequate public involvement in conjunction with protective buying and hardship acquisition is that the general public has had reasonable opportunity to be aware of the project for which the property is to be acquired and that sufficient outreach activities have been conducted such that scope of the project and range of alternatives and preliminary alignment locations to be evaluated through the environmental process have been shared with the public. Public involvement can be accomplished through one or more of the following activities:
 - 1. Corridor studies.
 - 2. Development of a metropolitan planning organization (MPO) long range transportation plan.
 - 3. Development of an MPO transportation improvement program (TIP).
 - 4. Development of a statewide TIP (STIP).
 - 5. Development of a city or county comprehensive plan.

- c. A determination has been completed for any property that is subject to the provisions of 23 U.S.C. 138, also known as a Section 4(f) land, e.g. public park and recreation lands; wildlife and waterfowl refuges; and historic sites. This can be accomplished by one of the following, as appropriate:
 - 1. Documenting that the property in question does not qualify for protection under Section 4(f).
 - 2. Providing a Section 4(f) determination in which the concluding statement specifies that there is no feasible and prudent alternative to the use of the Section 4(f) property and that the proposed action includes all possible planning to minimize harm to the Section 4(f) property resulting from such use.

- d. Procedures of the Advisory Council on Historic Preservation are completed for properties that are subject to 16 U.S.C. 470(f), Section 106 historic properties. This can be accomplished by either of the following, as applicable:
 - 1. Documenting that the property in question does not qualify for protection under Section 106.
 - 2. Providing Section 106 process documents which demonstrate that one of the following applies to the proposed acquisition and subsequent use of the property in question:
 - no historic properties will be affected,
 - no historic properties will be adversely affected, or
 - acquisition and use of the property is consistent with the Section 106 memorandum of agreement concerning the proposed action.

Protective buying. The state DOT must demonstrate that development of the property is imminent and that such development would limit future transportation choices. A significant increase in cost may be considered as an element justifying a protective purchase, but can not be the sole criteria. Examples of information to demonstrate that development of the property in question is imminent and could result in the loss of alternatives include:

- a. Development requests, including plat and building permit requests.
- b. Analyses demonstrating the cost impact if the property were to be developed beyond its current use.

Hardship acquisition. The state DOT may concur in a request for a hardship acquisition based on a property owner's written submission that:

- a. Supports the hardship acquisition by providing justification, on the basis of health, safety or financial reasons, that remaining in the property poses an undue hardship compared to others; and
- b. Documents an inability to sell the property because of the impending project, at fair market value, within a time period that is typical for properties not impacted by the impending project.

Acquisition of property under 23 CFR 710.503 shall not influence the environmental assessment of a project, including the decision relative to the need to construct the project or the selection of a specific location.

Remember, parcels authorized using 23 CFR 710.503 must be incorporated into the final project in order to retain eligibility for Federal-aid participation, per 23 CFR 710.203(b) on direct eligible costs.

6.3. DONATIONS

Property owners may make a gift or donation of property, any part of it, or any of the compensation that would have been paid for it, to the agency needing the property for a transportation project. A donation may be made at any time during the development or acquisition phases of the project.

23 U.S.C. Section 323 requires that documents transferring donated property to the state DOT must include provision to revest the property in the grantor, or the grantor's successors in interest, if the donated property is not required for the project. Please check state or local laws for additional requirements. There may be state time limits governing the return of property, or factors that may allow the agency to retain ownership.

A state DOT may accept a donation prior to completion of any required environment document only if the following two conditions are completed. Failure to comply with these conditions could jeopardize eligibility of the project for Federal-aid funding:

- a. The property owner must be informed of the right to receive just compensation.
- b. The owner must be informed of the right to an appraisal along with the offer of just compensation. However, an appraisal is not required if the state DOT determines that an appraisal is unnecessary because the valuation problem is uncomplicated and the FMV of the property is estimated to be \$10,000 or less. See 49 CFR 24.102(c).

The owner may release the agency from either or both of these obligations, at the owner's option. Some state DOTs require that an appraisal be prepared and the estimated FMV of the donated property be disclosed to the donor. Check state DOT procedures for other state requirements. For additional information on donations, go to <http://www.fhwa.dot.gov/realestate/qa710.htm#part3>.

Donations for transportation projects can include donations of funds, goods and **services**. Each agency should set up procedures for valuing donations, including services, to be used as credit toward the project matching share requirement. Parties should reach agreement on how donated services will be valued **before** service is rendered in order to avoid a misunderstanding. This is especially important for transportation enhancement projects undertaken by LPAs who plan to use donated services, in lieu of cash, to fulfill the matching funds requirement. Credit for services performed prior to receiving Federal-aid authorization is not allowed. More information on matching requirements for transportation enhancement projects can be found at http://www.fhwa.dot.gov/environment/te/donations_credits.htm and http://www.fhwa.dot.gov/environment/te/qa_general.htm#q10.

DO NOT be fooled into accepting the donation of contaminated property where the clean-up cost exceeds the value of the property.

6.4. VALUE OF STATE AND LOCAL CONTRIBUTIONS

23 CFR 710.507 states that real property owned by state and local governments incorporated within a federally funded project can be used as a credit toward the state matching share of total project cost. Chapter 6.9. contains examples and illustrates how to compute the credit.

The FMV of real property contributions may be credited to the state matching share of the project cost. The value of land contributions for credit purposes is not related to just compensation, in that damage to the remainder property is not considered. Costs relative to relocation and incidental costs related to acquiring these properties are not eligible for credit.

Credits are not available for lands acquired with any form of Federal financial assistance, or for lands already incorporated and used for transportation purposes, as set out in 23 CFR 710.507(c).

The FMV of land donated will be established as of the date the donation became effective or the date title vested with the agency, whichever is earlier. Per 23 CFR 710.505(b), the agency shall develop sufficient documentation to indicate compliance with donation requirements.

The agency may claim the value of donated or acquired lands for a credit by using an appraisal, by using historical cost, or submitting other reasonable documentation supporting the credit. A current FMV appraisal of property can be used, or if the agency has an eminent domain appraisal that included donated property, the credit amount may be abstracted from the appraisal.

Credits based on FMV are subject to the following conditions:

- Increases and decreases in the value of the donated property caused by the project are to be excluded.
- An appraisal shall not reflect damages or benefits to the remaining property.
- The value of donated or acquired property includes the contributory value of any improvements.

6.5. ACQUISITION UNDER 23 U.S.C. 108(c)

23 CFR 710.501(c) refers to costs incurred by the state DOT for acquisition of ROW, acquired in advance of any Federal approval or authorization, where reimbursement is sought. This section of the regulation addresses the provisions required by 23 U.S.C. 108(c). Keep in mind that the FHWA can only consider reimbursement for real property that is subsequently incorporated into a project eligible for surface transportation program funds. The Federal share payable of costs shall be eligible for reimbursement after the state DOT demonstrates, and the FHWA finds compliance with, all of the following provisions of 23 U.S.C. 108(c).

- a. Any land acquired, and relocation assistance provided, complied with the Uniform Act.
- b. The requirements of title VI of the Civil Rights Act of 1964.

- c. The state has a mandatory comprehensive and coordinated land use, environment, and transportation planning process under state law and the acquisition is certified by the Governor as consistent with the state plans before the acquisition.
- d. The acquisition is determined, in advance by the Governor, to be consistent with the state transportation planning process pursuant to Section 135 of this title.
- e. The alternative for which the ROW is acquired is selected by the state pursuant to regulations to be issued by the Secretary which provide for the consideration of the environmental impacts of various alternatives.
- f. Before the time that the cost incurred by a state is approved for Federal-aid participation, environmental compliance pursuant to the NEPA has been completed for the project for which the ROW was acquired by the state, and the acquisition has been approved by the Secretary under this Act, and in compliance with section 303 of title 49, section 7 of the Endangered Species Act, and all other applicable environmental laws shall be identified by the Secretary in regulations.
- g. Before the time that the cost incurred by a state is approved for Federal-aid participation, both the Secretary and the Administrator of the Environmental Protection Agency have concurred that the property acquired in advance of Federal approval or authorization did not influence the environmental assessment of the project, the decision relative to the need to construct the project, or the selection of the project design or location.

To date, no state DOT has applied for reimbursement using the provisions of 23 U.S.C. 108(c).

6.6. ENVIRONMENTAL REQUIREMENTS

Land acquired prior to approval of the environmental document, including donated land, is subject to the provisions of 23 CFR 771, the FHWA regulation that governs environmental procedures.

Agency files must indicate that lands acquired early will not preclude consideration of all alternatives to a proposed alignment. Land acquired early, and the acceptance of donated property, must not influence the environmental assessment of a project, including the need to construct the project or the selection of a specific location for the project. Files should be documented as appropriate.

The agency should not acquire, even with its own funds, any land described in 23 U.S.C. 138, also known as Section 4(f) land, e.g. public park and recreation lands; wildlife and waterfowl refuges; and historic sites prior to completion of a Section 138 determination. To do so could place the project at risk for later Federal-aid funding.

6.7. LOCAL GOVERNMENT USE, DEDICATIONS AND EXACTIONS

23 U.S.C. 323 allows a credit against the state's share of a project for the FMV of real property that a local unit of government contributes to the project that has been lawfully obtained.

An acquiring agency may accept a parcel of land that a developer of a subdivision has dedicated, or proposes to dedicate for street purposes, in the normal process of developing a subdivision, or that has been obtained from a developer through exaction, which is the compulsory dedication of the property for a public use without payment of compensation.

The agency may accept dedicated property when the dedication is done pursuant to the local planning process or at the request of the property owner for use concessions. The transfer of title to such land varies from jurisdiction to jurisdiction. In some jurisdictions, a deed may be recorded; in other jurisdictions, the acceptance by the local zoning office of a master plan filed by the developer is all that is required. Land obtained in this manner may be incorporated into a Federal-aid project without jeopardizing participation in other project costs.

To be eligible for credit, 23 U.S.C. 323 requires that the acquired land contributed by the state or its nominee, was "lawfully obtained."

If the property was acquired, or is being acquired, for a transportation project under the threat of eminent domain, the requirements of the Uniform Act apply.

Failure to follow the Uniform Act in such cases would not only preclude the FMV of the property from being utilized as a credit, it may preclude Federal-aid funding for the project. However, if the property was acquired earlier by other means (e.g. local government acquisition via tax delinquency, dedication, or exaction), the FMV may be eligible for a credit, if it was otherwise legally acquired in accordance with the laws of the jurisdiction in which the property is located. Reference is made to the Office of Real Estate Services Website for additional information.

CAUTION

ROW acquired through zoning or subdivision procedures requiring donation, exaction, or dedication of strips of land through the normal exercise of police power is not considered an acquisition or taking in the constitutional sense. Thus, payment of just compensation and compliance with the provisions of the Uniform Act and 49 CFR Part 24 may not be required, since police power is being used. ROW acquired through the exercise of police power, that occurs some time prior to the initiation of a project, can be considered lawfully obtained in accordance with 23 U.S.C. 323 (b)(1)(A). If such property is incorporated into a project at a later date, this property may be eligible for credit toward the project match.

ROW being acquired for a current project is considered to be "under the threat of eminent domain" and is subject to the requirements of the Uniform Act and 49 CFR Part 24. ROW currently being acquired for a specific project cannot be acquired through a dedication, exaction or forced donation. This will be considered to be undertaken to circumvent Federal requirements, and can result in the withdrawal of federal-aid funds from all phases of the project, including construction.

6.8. ASSESSMENTS

Assessments are sometimes levied against properties adjacent to a public project because these properties are the direct beneficiaries of the public improvement. For example, when a local jurisdiction installs a new branch to a sewer system to service all properties along the branch, the local government may assess or tax the properties adjacent to the project for the benefits of providing the public sewer system to these properties. To recapture the capital expense of the sewer system, the local government charges the adjacent property owners an amount usually based on a formula. The assessment can be of two types: special and general. Both may be applied at the same time. The special assessment is normally limited in duration and is used to recoup the capital expenditure for the project. The general assessment is used to maintain and operate the system.

When Federal funds are used in a project, the acquiring agency may not levy a special assessment against only those properties which are to be partially acquired for the public improvement. This would constitute a form of forced donation, which is coercive and unacceptable.

Property owners adjacent to the project should not be asked to bear the burden of the cost of a community improvement. Suggesting that if the property owner does not accept the acquiring agency's FMV, the property owner will be assessed the property's pro rata share of the project cost is illegal under Federal law. The Uniform Act forbids an acquiring agency from taking any coercive action in order to compel an owner to agree on a price for their property. Noncompliance with the Uniform Act will jeopardize Federal-aid funding for other phases of the project.

6.9. CALCULATING PROJECT CREDITS

A project with a 20% match requirement has incurred cash costs of \$1 million and the value of donations and previously acquired property is \$100,000. The project has a total value of \$1,100,000. To determine the Federal/state pro rata shares, apply the appropriate ratio to the total value of the project. To determine the actual cash outlay by the state DOT, calculate the state's pro rata share, then deduct the value of the real property contribution.

80% FEDERAL / 20% STATE PROJECT COSTS

Actual Cash Outlay for Costs Incurred	\$1,000,000
Value of Donations or Previously Acquired Lands	+<u>100,000</u>
Total Value of Project	\$1,100,000
Federal Pro Rata Share	\$880,000
State Pro Rata Share	+<u>220,000</u>
Total Project Value	\$1,100,000
State Pro Rata Share	\$220,000

For determining the credit, the FMV of donations and acquired lands are essentially treated as incurred cost.

The donated and acquired parcels must qualify as participating costs meeting eligibility standards **and** be within the scope of the project, i.e., credit can only apply to one specific Federal-aid project. The parcel is required to have a direct relationship to the project and be incorporated into the project.

The examples refer to the state's pro rata share, however, the credits and calculations are figured the same way for LPA projects.

Value for Credit	<u>-100,000</u>
Cash Outlay by State DOT	<u>\$120,000</u>
In this example, the Federal cash outlay remains \$880,000.	
EXAMPLE 1	

Determine the total value of project costs. Apply the appropriate ratio to the total value of the project. Determine the Federal pro rata share by deducting the value of the donations and previously acquired properties from the state's pro rata share of the total project value. If the result is zero or less, the Federal pro rata share is limited to the actual cash outlay for the project.

**80% FEDERAL / 20% STATE
PROJECT COSTS**

Actual Cash Outlay for Costs Incurred	<u>\$1,000,000</u>
Value of Donations or Previously Acquired Lands	<u>+ 500,000</u>
Total Value of Project	<u>\$1,500,000</u>
Federal Pro Rata Share	<u>\$1,200,000</u>
State Pro Rata Share	<u>+300,000</u>
Total Project Value	<u>\$1,500,000</u>
State Pro Rata Share	<u>\$ 300,000</u>
Value for Credit	<u>- 500,000</u>
Cash Outlay by State DOT	<u>\$ 0</u>
Federal Cash Contribution to Project	<u>\$1,000,000</u>

In this example, the value of the state contribution exceeds the state's pro rata share of the total value of the project, thereby limiting the Federal participation to \$1,000,000.

EXAMPLE 2

If the value of the donations or previously acquired lands exceeds the state's pro rata share of the total value of the project, then the Federal pro rata share is limited to the amount of actual cash outlay for the project.

Credits to the state's matching share cannot exceed the state's matching share of the total costs for the project. If donations or previously acquired lands result in credits which exceed the ROW cost for the project, such "excess" credits cannot be used on other projects. The state's matching share covers all phases, including ROW, preliminary engineering, and construction, in the total value of the project in Example 2.

The state can increase its matching share, if desired, by receiving donations for the project with a total value amount which is in excess of the non-federal share of the project. This would decrease the Federal share payable on the project in accordance with 23 U.S.C. 120(i) and be subject to any other procedures relating to that provision.

6.10. DONATIONS IN EXCHANGE FOR CONSTRUCTION FEATURES

Per 23 CFR 710.505(c), the acquiring agency may accept a property owner's offer to donate property, or a portion thereof, in exchange for other property, construction features, or services rendered that will benefit the property owner. However, the value of the donation as a credit to the state matching share of project cost is limited. The credit will be the FMV of the property donated less the cost of the construction feature, the FMV of land swapped, or the FMV of services rendered.

The value of the donated property and the construction features, services, or land exchanged, may balance each other out and result in no credit to matching funds. When the value of the donation exceeds the cost of the construction feature, the difference may be eligible for a credit.