



U.S. Department
of Transportation

**Federal Highway
Administration**

Memorandum

Subject: **INFORMATION:** Procurement of Federal-aid
Construction Projects

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Dwight A. Horne

From: Dwight A. Horne
Director, Office of Program Administration

Reply to
Attn. of: HIPA-30

To: Directors of Field Services
Acting Resource Center Manager
Division Administrators

Over the years, a number of questions have been brought to our attention concerning the procurement of Federal-aid construction projects under 23 U.S.C. 112. This statute defines the FHWA requirements for awarding Federal-aid construction contracts and design-build contracts. In addressing these questions, this office has issued a number of memorandums, e-mails and letters to communicate the decisions regarding these questions. As a result, the FHWA's guidance on the procurement of construction contracts is contained in different sources. The purpose of this memorandum is to consolidate and briefly restate existing guidance and policy.

All grants and subgrants from the United States Department of Transportation, including those under the Federal-aid highway program, are subject to 49 CFR Part 18 – Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (referred to as the Common Rule). Specifically, under 49 CFR 18.4(a), the Common Rule applies to all grants and subgrants to State, local and Tribal governments, except where inconsistent with Federal statutes. While 49 CFR 18.36 specifies the procurement standards to be followed, this provision is inconsistent with 23 U.S.C. 112. Thus, 23 U.S.C. 112 applies to any procurement contract for highway construction or architect/engineering (A/E) services related to a Federal-aid highway project. This is also reflected in 49 CFR 18.36(j) and (t).

In general, Federal-aid highway construction projects must be awarded on the basis of the lowest responsive, responsible bidder (23 U.S.C. 112) unless the State DOT is able to demonstrate that some other method is more cost effective or that an emergency exists. The State DOT's process for advertising, letting, and awarding highway construction contracts must comply with 23 CFR Parts 635 or 636. As a condition of receiving Federal-aid assistance for A/E services in the design or construction management phases of construction projects, State DOTs must comply with the procurement requirements of 23 CFR Part 172.

On November 12, 1996, the FHWA issued a policy memorandum titled: "[Procurement of Transportation Enhancement Projects](#)." This memorandum clarified that the State DOTs may procure transportation enhancement projects not located within the highway right-of-way using State-approved procedures under the Common Rule. For consistency, this same rationale applies



to all other Federal-aid construction projects that are not within the right-of-way of a public highway. In these situations, the procedures in 49 CFR 18.36(a) apply and a State DOT may use State-approved procurement procedures (or a local public agency may use State-approved local procurement procedures) for these types of projects. This includes:

- Construction projects physically located outside the right-of-way of a public highway. Examples include the restoration of historic railroad stations, shared use paths, recreational trails, landscaping and scenic beautification, railroad mainline improvements, rail yard improvements, etc. However, the procurement of any contract for a non-highway construction project that is linked to, dependent upon, or would not exist except to fulfill a separate requirement of another highway project (i.e. an environmental commitment) must comply with 23 CFR Part 635 or Part 636.
- Operational improvements or service related projects that take place within the right-of-way of a public highway, but the scope of the contract does not meet the definition of “construction” in 23 U.S.C. 101. Examples include operational improvement projects such as service patrols, route diversion and evacuation routing, 911/ 511 telephone systems, computer-aided dispatch systems, highway advisory or other radio systems for communicating with vehicles, etc.

Special procurement considerations:

Force account by a public agency: This procedure may be used when an State DOT can demonstrate to the satisfaction of the Division Administrator that it is more cost effective to allow the work to be completed by force account using the personnel and resources of a public agency (State, local or Tribal). The requirements for a cost effectiveness finding are detailed in 23 CFR 635 Subpart B. The public agency must be able to complete the work using personnel and equipment already on the agency’s rolls. Materials used to complete the work must meet the requirements in 23 CFR 635 Subpart D. Reimbursement is limited to the Federal share of the actual costs to the agency. Note: if the State DOT can demonstrate to the Division Administrator’s satisfaction that the work can most cost effectively be done by a nonprofit organization, the procurement process under any grant or subgrant to a nonprofit organization must fulfill the requirements of 49 CFR Part 19 – Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Learning, Hospitals, and Other Non-Profit Organizations. See 49 CFR 19.1 and 19.5. The stewardship/oversight agreement between the State DOT and the Division Office must address the review and approval of all public agency force account requests.

Emergency repair work: Emergency repair work may be accomplished by contract, negotiated contractor or public agency force account methods under 23 CFR 668.105(i). The term emergency repair is defined in 23 CFR 668.103 as “Those repairs including temporary traffic operations undertaken during or immediately following the disaster occurrence for the purpose of: (1) Minimizing the extent of the damage, (2) Protecting remaining facilities, or (3) Restoring essential traffic.” The emergency finding must meet the requirements of 23 CFR 635.204. Materials used to complete the work should meet the requirements of 23 CFR 635 Subpart D to the maximum extent possible under the emergency, however, waivers may be considered where appropriate.

Permanent repair and reconstruction work following an emergency: Under 23 CFR 668.105(i), all projects for permanent repair or reconstruction must be procured in accordance with 23 CFR Part 635 or Part 636.

Ferry Boats: Projects for the construction of ferry boats, dock construction or ferry terminals must comply with the procurement requirements of 23 CFR Part 635 or Part 636 if the ferry route is part of a public highway system.

High Priority and other Congressionally-designated projects: Unless specifically exempted by law from the requirements of Title 23, Federal-aid highway construction projects must be procured in accordance with 23 CFR Parts 635 or 636.

Railroad-highway projects: The procurement requirements in 23 CFR 646.216(f) apply to all railroad-highway projects.

Force account by a railroad or utility: Railroad and/or utility work done by the affected railroad or utility as a result of a Federal-aid highway construction project (for example, the improvement of a railroad crossing or relocation of utility lines) has been established as cost effective in 23 CFR 635.205(b). Materials used to complete the work must meet the requirements in 23 CFR Part 635, Subpart D.

Rail-only projects: Construction projects that provide for the construction, relocation, adjustment or alteration of rail facilities that are not associated with a highway construction project may be procured using State-approved procedures in accordance with 49 CFR Part 18. Minor construction activities (such as grade transition, advance construction warning signs, drainage connections, etc.) that are necessary to provide a connection to a Federal-aid highway would not result in a requirement to use highway procurement procedures.

Recreational Trails Program (RTP): RTP projects not located within a public highway right-of-way must use procurement procedures under 49 CFR 18.36. Procurement for an RTP project within a public highway right-of-way must use procedures under 23 CFR Parts 635 and 636, including projects that are administered by an agency other than the State DOT. Where Parts 635 and 636 mention State, State Transportation Department, or STD, this may be interpreted as meaning the State agency administering the RTP.

Safe Routes to School and Nonmotorized Transportation Pilot Projects: Congress required that States treat these projects as if they were on the Federal-aid system despite their functional classification or location. Therefore, these projects must comply with the procurement and contracting requirements of 23 CFR Part 635 or Part 636. See: [P.L. 109-59, Section 1404\(j\)](#).

Projects with Title 23 funds transferred to other Federal agencies: Mr. Park's July 19, 2007, memorandum titled "Fund Transfers to Other Agencies and Among Title 23 Programs" indicates that other Federal Agencies may use their own construction contracting requirements in lieu of those imposed on a State under Title 23. Therefore, other Federal Agencies may use their own procurement requirements instead of those in 23 CFR Part 635 or Part 636.

If you have any questions regarding the applicability of FHWA's procurement requirements for Federal-aid construction projects, please contact Mr. Gerald Yakowenko at 202-366-1562.

SUPERSEDED