



# Memorandum

Subject: **ACTION:** Electric Vehicle Charging Infrastructure  
Procurement Methods under Special Experimental  
Project No. 14 (SEP-14)

Date: July 3, 2023

From: Hari Kalla  
Associate Administrator for Infrastructure

In Reply Refer To:  
HIF

To: Directors of Field Services  
Division Administrators  
Directors of Technical Services

This is to notify you of Federal Highway Administration (FHWA) policy allowing for the delegation of approval of requests under FHWA's Special Experimental Project No. 14 (SEP-14) experimental authority related to the procurement of certain electric vehicle (EV) charging infrastructure projects, under specified conditions, and on a programmatic basis.

This authority only applies to EV charging infrastructure projects subject to the requirements of 23 CFR part 680 and administered by the State Department of Transportation (State DOT) or under its supervision by its subrecipient(s). This includes agreements for the design, installation, operation, and maintenance of EV charging infrastructure, where construction of EV charging infrastructure is a component of the Federally-assisted work.

This memorandum does not apply to contracts that consist primarily of other, unrelated work types, where the installation, operation, or maintenance of EV charging infrastructure is only incidental to the overall contract. For example, this memorandum could apply to a state's program to implement EV charging along designated corridors throughout the state. However, it would not apply where EV charging infrastructure is incidental, such as a contract to reconstruct a ferry terminal that also includes adding EV supply equipment as a minor element of the overall work.

No alteration of other Federal requirements is implied or intended with this memorandum, including requirements such as Davis-Bacon prevailing wages, Buy America, National Environmental Policy Act (NEPA), Form FHWA-1273, 23 CFR Part 680 (National Electric Vehicle Infrastructure Standards and Requirements), 2 CFR Part 200 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards), etc.

## **SEP-14 Requests**

As described below, a FHWA Division Administrator may approve a SEP-14 request from the State DOT to deviate from the allowable methods of construction (such as low-bid, design-build, construction manager/general contractor and indefinite delivery/ indefinite quantity contracting) as set forth in 23 CFR 635.104 and 23 CFR part 636, and instead utilize the state's own

competitive policies and procedures when procuring EV charging infrastructure projects, so long as the requested proposal satisfies each of the following:

1. Competitive policies and procedures
  - a. The State DOT may propose to follow the same policies and procedures it uses for non-Federally-assisted procurements, as described in 2 CFR 200.317, and in 2 CFR 1201.317 for subrecipients. However, the State DOT's proposal must also include a competitive selection process with price being a component of the selection criteria.
  - b. The State DOT's proposal must include:
    - i. a brief description of its competitive policies and procedures, as permitted by state law,
    - ii. an assessment of how its competitive policies and procedures deviate from the methods of construction otherwise allowable in 23 CFR 635.104 and 23 CFR part 636, and
    - iii. a statement as to why FHWA's SEP-14 experimental authority is necessary and clarifying its benefits when compared to traditional procurement methods.
2. Required assurances
  - a. The State DOT's proposal must include assurances that provisions will be in place to ensure compliance with all applicable Federal requirements.
  - b. The State DOT's proposal may include a provision that allows subrecipients to carry out all or a portion of the program in accordance with State procedures or other procedures approved by the State, with assurances related to monitoring the performance of the subrecipients for compliance with Federal requirements.
  - c. The State DOT's proposal must provide assurances that it will provide sufficient documentation to support the evaluation of the proposed contracting method.

### **Other Considerations**

The delegation of authority to Division Administrators to approve SEP-14 requests for EV charging procurement may not be further delegated to the State DOT. The Division Administrator may require additional assurances and supporting documentation beyond what is listed above to support their decision. The FHWA may decline to participate if it finds the State's procurement process is unduly affecting competition; if it finds that the State DOT or its subrecipient has inadequate internal controls; or if there is evidence of fraud, waste, or abuse from either the State DOT, the subrecipient or the contractor(s).

As part of its SEP-14 request, a State DOT may also propose to deviate from the standardized changed conditions clauses (23 CFR 635.109), and the minimum contractor self-performance requirements (23 CFR 635.116(a)).

The request to utilize SEP-14 will need to originate from or be endorsed by the State DOT in writing and may be made by the State DOT on behalf of its subrecipient(s).

After approval, please send the following to the Construction Team in the Office of Preconstruction, Construction and Pavements (HICP-20): a copy of the State DOT's request and FHWA Division Office approval, identification of the Division Office point of contact, and the projected due date for the first annual evaluation submission.

A State DOT proposal that does not include price as a component of the competitive selection criteria or is not otherwise within the limitations of this memorandum will require a more detailed SEP-14 work plan. In this situation the Division Office is to coordinate with the HICP-20 office for evaluation and SEP-14 approval.

### **Evaluation of Contracting Method**

As a condition of SEP-14 approval, information on the impact of this contracting method on competition, costs and project development is to be shared by the State DOT with the FHWA Division Office on an annual basis. The timing of this evaluation may coincide with other annual data submittals associated with EV charging infrastructure programs. The State DOT's final evaluation is due once all the associated EV charging infrastructure projects covered under the SEP-14 approval have been commissioned and are in the operation and maintenance phase.

The approving FHWA Division Office is requested to work with the State DOT to develop the evaluations and to ensure copies of the evaluations are forwarded to HICP-20 on an annual basis.

### **Why This Memorandum is Necessary**

EV charging infrastructure projects may differ from the traditional highway construction projects that FHWA's construction procurement statutes, regulations, and policies were written to deliver. Some State DOTs have encountered challenges when developing procurement strategies and solicitation documents for this new work type that also conform to FHWA's highway construction contracting requirements. This may be due in part to limitations in state legislative authorities, such as design-build or public-private partnership (P3) authority. As a result, State DOTs have sought flexibility when procuring EV charging infrastructure projects.

The FHWA is using SEP-14 to evaluate whether states' utilization of their own competitive policies and procedures when procuring EV charging infrastructure projects, rather than the allowable methods of construction (23 CFR 635.104 and 23 CFR part 636), can improve project delivery while maintaining competition, cost effectiveness and compliance with other Federal requirements. FHWA may use the findings from this experimental effort to inform future requests for technical assistance and to support future regulatory or policy actions.

Should you have questions related to this memorandum, please contact Brian Hogge at (202) 366-1562 or Jim DeSanto at (614) 357-8515 in the Office of Preconstruction, Construction, and Pavements.