

DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

Enhancing Highway Workforce Development Opportunities Contracting Initiative

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The FHWA is announcing an initiative to permit, on an experimental basis, recipients and subrecipients of Federal funds for Federal-aid highway projects to utilize geographic, economic, or other hiring preferences or innovative contracting approaches not otherwise authorized by law that have the potential to enhance workforce development opportunities in the transportation construction industry, including for low-income communities. This initiative will be carried out as a pilot program for a period of 4 years (unless extended) under FHWA's existing experimental contracting authority and the legal authority in the Consolidated Appropriations Act, 2021. The purpose of this pilot program is to provide flexibility to utilize hiring preferences and innovative contracting approaches while evaluating the efficacy and equitable impact of such requirements on workforce development and employment opportunities, as well as their impact on competition and project delivery.

DATES: This pilot program is effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. This pilot program will end [INSERT DATE 4 YEARS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*], unless it is extended.

FOR FURTHER INFORMATION CONTACT: For technical information: Mr. James DeSanto, Office of Preconstruction, Construction and Pavements, (614) 357-8515, James.DeSanto@dot.gov, or Mr. Patrick Smith, Office of Chief Counsel, (202) 366-1345,

Patrick.C.Smith@dot.gov, Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the Office of the Federal Register's Website at www.FederalRegister.gov and the Government Publishing Office's Website at www.GovInfo.gov.

Background

The Federal-aid highway program, administered by FHWA, supports State and local governments in the design, construction, and maintenance of the Nation's highway system and Federal-aid eligible public roadways. The program has helped to create and sustain long-term, good-paying jobs in the transportation construction industry. People of color, women, and other underserved groups, however, have historically experienced significant barriers to entry into the transportation construction industry. Further, FHWA-funded projects have prohibited local employment-preferences or workforce development opportunities for individuals residing in economically depressed communities in which projects are often located. While this prohibition was based upon maintaining competition in contract bidding, the consequence was that the workforce on federally-funded projects was often not necessarily representative of all communities where projects were located.

On January 20, 2021, President Biden issued Executive Order (E.O.) 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government." This E.O. provides that the Federal Government should pursue a comprehensive approach to

advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Accordingly, FHWA is now committed to work to redress inequities that resulted from barriers to equal opportunity by announcing an initiative that could result in increased employment and workforce development opportunities for those who have historically been excluded from participation on federally-funded transportation projects.

In the past, FHWA has received requests from States and local agencies to allow the inclusion of local hiring contract requirements in their projects with the goal of improving workforce development and employment opportunities for their residents. As discussed in more detail below, FHWA historically disallowed such requirements out of concern for their potential impact on competition. Generally, Federal law requires Federal-aid highway and roadway projects (apart from a few exceptions) to be awarded on the basis of competitive bidding. However, from 2015 to 2017, DOT conducted a contracting initiative with FHWA and the Federal Transit Administration (FTA) to evaluate the potential impacts to competition from local hiring contracting requirements, as discussed further below.

Today, FHWA announces this initiative to permit and evaluate geographic, economic, or other hiring preferences or innovative contracting approaches not otherwise authorized by law that have the potential to enhance workforce development opportunities in the transportation construction industry, including for low-income communities. This initiative can support programs that provide funding for existing training and registered apprenticeship programs, such as FHWA's On-the-Job Training (OJT) programs, authorized under 23 U.S.C. 140(b) and 23 CFR Part 230, Subpart A, or other similar programs. This initiative is needed to support local

and other workers in overcoming barriers to obtaining successful, long term careers in the transportation construction industry.

Job Opportunity and Workforce Development

Despite training efforts by the States and industry, a survey conducted by the Associated General Contractors of America (AGC) of its members in 2015 found that more than 60 percent of construction firms across the country were struggling to fill open positions. *See* FHWA, Office of Innovative Program Delivery, Center for Accelerating Innovation, Every Day Counts, EDC-6 Innovations. (2021). *Strategic Workforce Development*.

https://www.fhwa.dot.gov/innovation/everydaycounts/edc_6/strategic_workforce_development.cfm. A follow-up survey in 2018 by AGC provided similar results, with 80 percent of contractors reporting difficulty finding qualified craft workers to hire. *Id.*

FHWA has historically supported States' construction workforce development efforts through OJT programs authorized by 23 U.S.C. 140(b), and other training and education programs. FHWA requires full utilization of all available training and skill-improvement opportunities to assure the increased participation of minority groups and disadvantaged persons and women in all phases of the transportation construction industry. 23 CFR 230.107(b). FHWA also encourages States to provide supportive services to increase the effectiveness of OJT programs. *Id.* at 230.113.

In addition to OJT efforts, FHWA supports innovative and cost-effective means of leveraging relationships between project sponsors and State or local workforce development boards, where applicable, to improve training and skill-improvement opportunities and outcomes for all groups, including low-income communities and other under-represented individuals or

populations. For example, FHWA's Every Day Counts (EDC) initiative encourages States to collaborate with the construction industry, workforce boards, educational entities, and others to identify, train, and place a skilled transportation construction workforce. *See* https://www.fhwa.dot.gov/innovation/everydaycounts/edc_6/strategic_workforce_development.cfm. States can leverage FHWA OJT Supportive Services funds with existing local programs to incorporate training that focuses on construction skills in which there are current or anticipated future workforce gaps.

FHWA has also supported innovative contracting approaches to workforce development, such as authorizing the Michigan Department of Transportation (MDOT), through Special Experimental Project No. 14 (SEP-14), to implement an OJT Voluntary Incentive Program. Participating contractors in southeastern Michigan that exceed their OJT goals earn bid incentives to be used when competing for future work on designated projects. *See* MDOT's SEP-14 work plan, available at www.fhwa.dot.gov/programadmin/contracts/sep14mi171106.pdf. MDOT staff emphasized to FHWA the importance of coordinating their program with members of Michigan's construction industry and attributed that coordination to program successes. MDOT reports the pilot program resulted in increases in apprenticeships, increases in program graduates, increased Equal Employment Opportunity compliance, and increases in contractor participation. MDOT is currently evaluating potential impacts to competitive bidding.

Based on the AGC surveys mentioned above, however, FHWA believes more can be done to further increase workforce development opportunities, by building from existing

programs, such as OJT, or exploring new approaches, to improve fulfillment of successful, long-term careers in the transportation construction industry.

Legal Authority

The initiative set forth in this notice is authorized under Section 199B of the Consolidated Appropriations Act, 2021, Pub. L. 116-260, Dec. 27, 2020, 134 Stat 1182. Section 199B expressly authorizes DOT-assisted contracts under titles 49 and 23 of the U.S.C. to use geographic, economic, or any other hiring preference not otherwise authorized by law, provided that the grant recipient certifies the following:

(1) that except with respect to apprentices or trainees, a pool of readily available but unemployed individuals possessing the knowledge, skill, and ability to perform the work that the contract requires resides in the jurisdiction;

(2) that the grant recipient will include appropriate provisions in its bid document ensuring that the contractor does not displace any of its existing employees in order to satisfy such hiring preference; and

(3) that any increase in the cost of labor, training, or delays resulting from the use of such hiring preference does not delay or displace any transportation project in the applicable Statewide Transportation Improvement Program or Transportation Improvement Program.

Accordingly, recipients and subrecipients using the application process for a pilot program described in this notice below must also include in their applications these required certifications from Section 199B of the FY 2021 Consolidated Appropriations Act.

The initiative described in this notice is also based on FHWA's authority for special experimental projects. In 1988, a Transportation Research Board (TRB) task force, comprising

representatives from all segments of the highway industry, was formed to evaluate innovative contracting practices. This TRB task force requested that FHWA establish a project to evaluate and validate certain findings of the task force regarding innovative contracting practices, which are documented in Transportation Research Circular Number 386, titled, “Innovative Contracting Practices,” dated December 1991. In response, FHWA initiated SEP-14 pursuant to the authority granted to the Secretary, which now is codified at 23 U.S.C. 502(b)(2). Under SEP-14, FHWA has the flexibility to experiment with innovative approaches to contracting. FHWA continues to use this program to test and evaluate experimental contracting practices.

Interpretation of Competition Mandate

DOT has historically prohibited recipients and subrecipients from using certain contracting provisions that do not directly relate to the bidder’s performance of work in a competent and responsible manner. In August 2013, at DOT’s request, the U.S. Department of Justice, Office of Legal Counsel (OLC) issued a memorandum opinion interpreting 23 U.S.C. 112. *See Competitive Bidding Requirements Under the Federal-Aid Highway Program*, 37 Op. OLC 33 (2013) (“2013 OLC opinion”). The 2013 OLC opinion is available at <http://www.justice.gov/olc/opinions>. The 2013 OLC opinion clarified that section 112 does not compel DOT’s historic position with respect to contracting requirements that do not directly relate to the bidder’s performance of work. Rather OLC concluded that section 112 provides the Secretary with discretion to permit other types of State or local requirements if they do not “unduly limit competition.” OLC explained that FHWA may reasonably determine that a State or local contracting provision does not unduly limit competition under Section 112 even if it may

have the incidental effect of reducing the number of eligible bidders if it imposes reasonable requirements related to performance of the necessary work. OLC opinion, at 35.

Thus, DOT has discretion under 23 U.S.C. 112 to evaluate whether a State or local law or policy is compatible with the competitive bidding requirement under the statute. The process used to evaluate whether State and local requirements satisfy section 112's requirements is a matter of Agency discretion. OLC opinion, at 54.

Prior Contracting Initiative Pilot Program

On March 6, 2015, DOT published a notice in the Federal Register (March 6, 2015 Notice) announcing a pilot program allowing FHWA and FTA to permit recipients and subrecipients to utilize various contracting requirements that generally have been disallowed due to concerns about adverse impacts on competition. 80 FR 12257. The initiative was to be carried out as a pilot program for a period of 1 year using the experimental authorities of the respective agencies. The DOT stated it was interested in contracts that utilize a local or other geographic labor hiring preferences, economic-based labor hiring preferences (*i.e.*, low-income workers), and labor hiring preferences for veterans. *Id.*, at 12258. The purpose of this pilot program was to determine whether the use of such requirements “unduly limit competition,” as provided in the 2013 OLC opinion.

The DOT extended the pilot program on March 17, 2016 (81 FR 14524) and January 18, 2017 (82 FR 5645). With the extension notices, DOT also amended the pilot program by adding certifications from participants as required in the 2016 and 2017 DOT Appropriations Acts. *See* Pub. L. 114-113, Dec. 18, 2015, 129 Stat 2242, at Sec. 192; and Pub. L. 115-31, May 5, 2017, 131 Stat 135, at Sec. 191.

On October 6, 2017, DOT published a notice in the Federal Register (2017 Notice) rescinding the pilot program announced in the March 6, 2015 Notice as well as a related FHWA and U.S. Department of Housing and Urban Development (HUD) Livability Local Hire Initiative. *See* 82 FR 46716. The 2017 notice also announced the withdrawal of a related Notice of Proposed Rulemaking (NPRM) published on March 6, 2015 (80 FR 12092).

During the two and a half years the Local Labor Hire Pilot Program (LLHPP) was in effect, FHWA approved SEP-14 workplans from 11 State and local agencies, encompassing 18 construction projects. Participants in the LLHPP committed to evaluating and reporting on the effects of the relevant contracting requirements on competitive bidding, effectiveness and efficiency of Federal funds, and integrity of the competitive bidding process. However, only half the participants provided reports to FHWA prior to program termination. From those reports, FHWA was unable to draw conclusions about the impacts of the local contracting requirements on these criteria.

In the LLHPP workplans submitted to FHWA, agencies proposed a range of local contracting requirements. In 11 projects, the agencies mandated the use of local labor, or making good faith efforts to do so, and in 3 of these cases agencies offered an hourly payment to the contractor for local labor hours. In the other seven projects, agencies offered financial incentives to the contractor rather than mandating local hiring. Half of the projects applied local contracting goals on the total number of contract labor hours, while the other half applied the requirements or goals only to newly hired employees. Goals or thresholds set by the agencies varied by whether the target was based on total contract labor hours (ranging from 10% to 20%) or based on new hiring (ranging from 20% to 75%). Agencies proposed hourly payments to

contractors ranging from \$3.50 to \$20.00 per local labor hour, with total incentive not to exceed amounts ranging between \$15,000 and \$500,000, depending on project size.

At the time the LLHPP was rescinded, FHWA had received information from 5 of the 18 pilot projects about the impacts of the local-hiring contracting requirements on workforce outcomes. On four of the projects, agencies reported the number of local hires made by contractors were zero, two, six, and nine, respectively. In addition, one agency reported the impact as a percentage, reporting 17.4 percent of total contract labor hours were by local residents at the time of the report. In each of these cases, the outcomes reported to FHWA appeared to fall short of the numeric project goals. However, other benefits were realized from these collaborative efforts. For example, on Colorado's Central 70 project, a total of 156 employees were placed or received services through the employment platform created by the project partners.

In another case, based on a recently submitted report from Minnesota DOT (MnDOT), contractors reported the geographic and economic-based incentives on their projects improved job opportunities for local residents. However, one of the contractor participants cautioned that the MnDOT program could incentivize hiring for a single job and promote short-term work opportunities rather than a career. MnDOT concluded that planning, communication, marketing, education, and training are all critical for program success.

The reports FHWA received emphasized the importance of planning and coordination between project sponsor and stakeholders, such as workforce development agencies, pre-apprenticeship and registered apprenticeship programs, construction contractors, contractor

associations, trade unions, community outreach groups, and others to achieve buy-in, participation, and success at meeting project goals.

In addition, sponsors identified best practices and challenges in project selection. Some sponsors found that goals on smaller contracts and subcontracts offered limited hiring opportunities due to the short duration of work. Two sponsors mentioned challenges union contractors faced meeting local hiring goals due to their inability to select workers based on the workers' residency. One sponsor found they needed to revise the geographic scope of their targeted area to ensure that a sufficient pool of workers would be available to meet their goal.

Based on this experience, FHWA is interested in additional data and information to assess the use of such requirements on job and workforce development opportunities that build sustainable, long-term career success for target populations, and to assess potential impacts on competition and project delivery. In addition, while some States may be reluctant to incorporate geographic-based local preferences, many States may be interested in proposing other innovative methods to promote workforce development opportunities.

Current Pilot Program

FHWA is interested in permitting State and local recipients of FHWA financial assistance to utilize geographic, economic, or other hiring preferences or innovative contracting approaches not otherwise authorized by law that have the potential to enhance workforce development opportunities in the transportation construction industry.

FHWA's objective is to assess how such hiring preferences or innovative contracting approaches are used to support job opportunities and workforce development for those who may otherwise have significant barriers to entry while also assessing how the preferences or

contracting approaches may affect competition and project delivery. Assessing impacts on competition may include assessing whether the hiring preferences or contracting approaches promote efficiency in connection with the letting of a particular contract, further the efficient and effective use of Federal funds in the long run, or protect the integrity of the competitive bidding process. FHWA is interested in obtaining this data and information for potential long-term use of contracting requirements under this initiative.

Examples of hiring preferences that may be utilized under this pilot program include local or other geographic labor hiring preferences, economic-based labor hiring preferences (*e.g.*, for low-income workers or economically disadvantaged communities), and other labor hiring preferences. Hiring preferences or contracting approaches may work in coordination with existing authorities designed to enhance workforce development, such as 23 U.S.C. 114(d) (requiring recipients, to the extent practicable, to encourage contractors to make a best faith effort to hire veterans on Federal-aid highway projects), 23 U.S.C. 140(d) (authorizing States to implement a preference for employment of Indians on projects near Indian reservations), and FHWA OJT programs that focus on the recruitment of minorities, women, and other disadvantaged groups. *See* 23 CFR 230.107, 230.111, and 230.113. Appropriations Act certifications, as discussed above, preclude FHWA from approving projects with requirements that would cause a contractor to displace its existing employees to satisfy the local contracting requirements.

FHWA will not approve projects for which recipients wish to alter the requirements of the State's approved Disadvantaged Business Enterprise (DBE) Program or in any way require DBE firms to have any specific geographic location. In addition, we note that even though

hiring preferences may be utilized under this pilot program, State and local contracting agencies are responsible for ensuring that the establishment and implementation of its hiring preference is otherwise consistent with applicable Federal, State, and local laws.

This pilot program will be carried out for a period of 4 years from the date of publication of this notice. As such, FHWA is only interested in contracts that will be advertised during this time frame. Requests to participate in this pilot program should be made no more than 12 months prior to advertisement for bids.

Based upon receiving timely reports from participants, FHWA will monitor and evaluate whether hiring preferences or innovative contracting approaches positively impact workforce development and employment opportunities. FHWA will also assess what impact the requirements may have on competition and project delivery. While FHWA's current plan is to conduct this pilot program for 4 years, FHWA may extend or terminate this period at its discretion.

Pilot Program Requests

For contracts to be funded by FHWA, State and local recipients and subrecipients must request prior approval from FHWA to use a specific contracting requirement under SEP-14. To receive SEP-14 approval, States and local recipients and subrecipients would follow the normal process that includes submitting work plans to the appropriate FHWA Division Office. For more information on the SEP-14 process, please see: http://www.fhwa.dot.gov/programadmin/contracts/sep_a.cfm.

In developing requests to FHWA to use contracting requirements under SEP-14, recipients and subrecipients should address certain project specific factors that will help FHWA

evaluate the use of the particular hiring preference for the proposed project. These factors include, but are not limited to, the following:

(1) Describe the project(s), including the amount of FHWA funding involved as well as the estimated total cost of the project(s).

(2) Describe the hiring preference or innovative contracting approach not otherwise authorized by law. For example, is the requirement an incentive or mandatory? Does it apply to all labor on the project, or only to new hires, and how will the preference comply with the certifications required by Section 199B of the FY 2021 Consolidated Appropriations Act? Does it apply to subcontractors? What is the estimated cost of applying the requirement?

(3) Describe how the project will or will not work as part of the recipient's or subrecipient's current FHWA-approved OJT Program, if applicable.

(4) Describe how the hiring preferences or innovative contracting approaches will impact workforce development and employment opportunities, and how this will be monitored and evaluated. Include one or more numeric goals of success, and describe what data will be collected to measure performance in achieving the goal(s).

(5) Describe how they will evaluate the effects of relevant contracting requirements on competition and project delivery. In doing so, the recipient or subrecipient should, at a minimum, explain how it will provide comparisons of bids and unit prices received for the projects utilizing the relevant contract requirements to other projects of similar size and scope and in the same geographic area not utilizing such requirements. Also explain the potential offsetting benefits resulting from the use of the requirement, which may be relevant if a reduction in the pool of bidders or an increase in unit prices becomes evident.

(6) Describe and quantify how the experimental contracting technique would promote the efficient and effective use of Federal funds in connection with the particular contract, when considered over the long-term for that agency's program, or by serving to protect the integrity of the competitive bidding process.

(7) Describe how recipients and subrecipients will evaluate the effects of relevant contracting requirements on participation by DBE contractors and subcontractors (for example, evaluating whether DBE project goals were attained and whether the requirements acted as a barrier to DBE firms based on the composition of DBE firms' workforce).

(8) Describe whether the proposed contracting requirement has been the subject of litigation or whether litigation surrounding the use of the requirement has been threatened.

(9) Provide the required certifications from Section 199B of the Consolidated Appropriations Act, 2021, Pub. L. 116-260.

FHWA requests previous SEP-14 LLHPP participants that intend to participate in this program conduct the evaluations and complete the reporting for earlier projects they committed to do in their previously approved SEP-14 LLHPP workplan.

For contracts involving the use of local and other preferences as described above, FHWA may approve, at the request of the recipient or subrecipient, the use of such requirements for a specific contract, a specific group of contracts, or on a more general programmatic basis.

AUTHORITY: 23 U.S.C. 502(b); Section 199B of the Consolidated Appropriation Act, 2021.

Issued in Washington, DC, on May 18, 2021.

Thomas D. Everett
Executive Director
Federal Highway Administration