

# Enhancing Highway Workforce Development Opportunities Contracting Initiative

## QUESTION and ANSWERS

**Updated October 20, 2021**

*On May 21, 2021 (86 FR 27667), the Federal Highway Administration (FHWA) published a Notice in the Federal Register 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. Except for any statutes and regulations cited, the contents of this document do not have the force and effect of law and are not meant to bind States or the public in any way. This document is intended only to provide clarity regarding existing requirements under the law or agency policies.*

### **1. Why has FHWA decided to conduct this pilot program?**

- The Federal-aid highway program has helped to create and sustain long-term, good-paying jobs in the transportation construction industry, providing many Americans and American communities with economic opportunity. However, people of color, women, and other underserved groups have historically experienced significant barriers to entry into the transportation construction industry.
- Some recipients and subrecipients at the local government level have local hiring preferences, such as requiring a portion of a contractor's workforce for a project to reside in a specific community or section of a community, or other provisions that they apply to procurements that do not involve Federal funding. They have urged FHWA to permit them to use such provisions on federally funded transportation projects. Worthwhile objectives of such provisions may include ensuring employment opportunities for the communities in which projects are located, particularly for workers in low-income areas.
- In the past, to maintain competition in contract bidding, FHWA-funded projects have been subject to prohibitions of local hiring requirements aimed at improving workforce development and employment opportunities in communities where projects are located. This focus on securing competition often resulted in workforces on federally funded projects that were not necessarily representative of all communities where they 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” (86 FR 7009, Jan. 25, 2021). 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.

- Through this pilot program, FHWA aims to redress inequities that resulted from barriers to equal opportunity. The pilot program could result in increased employment and workforce development opportunities for those who have historically been excluded from participation in federally funded transportation projects.

## **2. What are the goals and intended outcomes of this pilot program?**

- The pilot program aims to support local and other workers (such as those in low-income, disadvantaged communities) in overcoming barriers to obtaining successful, long-term careers in the transportation construction industry.
- To achieve this, the pilot program will provide flexibility to utilize geographic, economic, or other hiring preferences and innovative contracting approaches not otherwise authorized by law. FHWA encourages the use of hiring preferences and contracting approaches that have the potential to enhance workforce development opportunities in the transportation construction industry, including for low-income communities.
- By allowing these flexibilities, FHWA also aims to evaluate the efficacy and equitable impact of such requirements on workforce development and employment opportunities. FHWA will 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. In addition, FHWA will also assess how the preferences or contracting approaches may affect competition and project delivery.
- FHWA is interested in obtaining this data and information for potential long-term use of contracting requirements under this initiative.

## **3. What is a hiring preference?**

- FHWA considers a hiring preference to be a contract requirement or incentive for a contractor to employ workers from a specified target group or population.

## **4. What is an innovative contracting approach?**

- In this context, FHWA considers an innovative contracting approach to be a requirement, incentive, or other contracting mechanism that differs from the competitive bidding requirements of 23 U.S.C. 112.
- For example, an innovative contracting approach might include enhancing an existing training program by awarding bid incentives to participating contractors that exceed their assigned training goals. This approach engages the construction industry in workforce development and will serve to provide a skilled workforce

to the industry as demand increases for skilled workers required to rebuild surface transportation infrastructure.

**5. How does this pilot program differ from the 2015 Local Labor Hiring Pilot Program (LLHPP)?**

- Consistent with E.O. 13985, the current pilot program includes increased emphasis on workforce development, improving workforce outcomes for historically disadvantaged communities, and advancing equity for all.
- In addition to hiring preferences (geographic, economic, or other hiring preferences), the current pilot program has been expanded to include innovative contracting approaches not otherwise specifically authorized by law that have the potential to enhance workforce development opportunities in the transportation construction industry, including for low-income communities.
- In addition to requiring participants to evaluate competitive bidding criteria, the current pilot program requests participants to evaluate the impacts and benefits to workforce development programs.
- Unlike the original 2015 LLHPP (80 FR 12257, Mar. 6, 2015), the current pilot program relies on legal authority under Section 199B of the Consolidated Appropriations Act, 2021, Pub. L. 116-260, Dec. 27, 2020, 134 Stat 1182, which expressly authorizes DOT assisted contracts under titles 49 and 23 of the United States Code to use geographic, economic, or any other hiring preference not otherwise authorized by law if the grant recipient makes certain certifications.
- Like the original 2015 LLHPP (80 FR 12257), the current pilot program also relies on FHWA's authority for special experimental projects under Special Experimental Project No. 14 (SEP-14) and 23 U.S.C. 502(b)(2). As a pilot under SEP-14, FHWA will continue working with States and local public agencies in the evaluation of their use of hiring preferences and innovative contracting approaches. These evaluations will be critical to obtaining data and information for potential long-term use of contracting requirements under this initiative.

**6. What authorities allow FHWA to conduct this pilot program?**

- FHWA is using its Special Experimental Project No. 14 (SEP-14) experimental authority under 23 U.S.C. 502(b)(2), as well as DOT's statutory authority provided in Section 199B of the 2021 Appropriations Act.

**7. What types of projects may be included in this pilot program?**

- Any construction project funded by Title 23 can be considered for the pilot program.

**8. How long will this pilot program last?**

- This initiative will be carried out as a pilot program for a period of four years (unless extended).

**9. If approved, by when do I need to advertise my contract?**

- Per the May 21, 2021 Federal Register Notice, contracts must be advertised during the four-year pilot program period (unless extended). Requests to participate in this pilot program should be made no more than 12 months prior to advertisement for bids.

**10. What is the role of workforce skills training, on-the-job training (OJT), apprenticeships, and career pathway programs in this pilot program?**

- It is important that local communities have skilled and qualified workers available to fill the employment needs for specific types of transportation projects. States and local entities are encouraged to work in close coordination with workforce organizations, career technical education programs, and unions to create skills training and registered apprenticeship programs that are aligned with current and future transportation industry employment needs.
- It is not the intent of the pilot program to replace the Equal Employment Opportunity (EEO) goals and requirements of either the U.S. Department of Labor (41 CFR 60) or the FHWA (23 CFR Part 230). However, States may propose to pilot an innovative approach to workforce skills training, on-the-job training (OJT), apprenticeships, or career pathway programs. For example, a State may propose an innovative approach to their current FHWA OJT program.

**11. What is the relationship between this pilot program and the Disadvantaged Business Enterprise (DBE) program?**

- This pilot program aims to support local and other workers (such as those in low-income, disadvantaged communities) in overcoming barriers to obtaining successful, long-term careers in the transportation construction industry. The DBE program's purpose is to provide contracting opportunities to small, disadvantaged *businesses*. DBE contractors would be subject to pilot program requirements in the same manner as all other contractors and subcontractors.

**12. Does this pilot program allow preferences for State or local DBEs, minority, women, or veteran-owned business enterprise firms?**

- No. Pilot programs that may conflict with the administration of DBE Program requirements will not be considered. The Notice specifically states that the DOT will not approve pilot programs for which recipients wish to alter the requirements of the DBE Program. See also the answer to question 24 below.

**13. If a recipient or subrecipient will utilize a project labor agreement (PLA) for a project, may the recipient or subrecipient apply to this pilot program to use a hiring preference as part of that PLA?**

- Yes. PLAs (sometimes known as Community Workforce Agreements or CWAs) used on federally funded projects must comply with all applicable Federal requirements. If a recipient or subrecipient wishes to include a hiring provision in

a PLA, the recipient or subrecipient may apply to use such provision through the pilot program, in addition to securing FHWA approval for the use of a PLA on the project.

**14. Section 199B of the 2021 Appropriations Act authorizes DOT to permit geographic, economic, or other hiring preferences. How does FHWA define these terms?**

- Under the pilot program, FHWA considers the following approaches to be included with those terms. Example approaches include, but are not limited to, the following:
  - i. Geographic boundaries based on factors such as:
    - 1. State, county, city, or other public boundaries;
    - 2. zip code limits;
    - 3. census tracts; or
    - 4. other geographically defined borders.
  - ii. Economically defined factors such as:
    - 1. per capita income levels;
    - 2. unemployment rates; or
    - 3. other criteria that delineate economic disadvantage.
  - iii. Other hiring preferences such as:
    - 1. Veterans, as defined by 5 U.S.C. 2108.

**15. Does this pilot program allow for the use of good faith efforts to meet contract requirements?**

- Yes. Contracting agencies may propose the use of good faith effort provisions as a means of encouraging contractors to meet local hiring requirements or other innovative trainee requirements.

**16. Does this pilot program allow for the use of incentives, disincentives, or penalties as a means to encourage contract compliance or goal attainment?**

- Yes. If supported by State or local policy, a contracting agency may propose the use of reasonable contractual incentives, disincentives, or penalties to assist with contract compliance or goal attainment.

**17. Does this pilot program allow agencies to make compliance with the local hiring requirements to be a condition of bid responsiveness?**

- Yes. If supported by State or local policy, a contracting agency may propose to require the submittal of local hiring information as a condition of bid responsiveness.

**18. What is the process for submitting a SEP-14 request?**

- State DOTs interested in participating in this pilot program may submit a SEP-14 workplan to their respective Division Office. Local public agencies should submit all proposed workplans to their State DOT. State DOTs should review and

provide appropriate recommendations to their Division Office for consideration. Division Offices should forward the workplans to the Office of Infrastructure for review and approval (contact: Jim DeSanto, (614) 357-8515, James.DeSanto@dot.gov). The Office of Infrastructure will coordinate the review/approval of workplans and post the workplans and evaluations on FHWA's web site.

**19. What should a participant include in a SEP-14 workplan?**

- Per the May 21, 2021 Federal Register Notice, the workplan should address certain project-specific factors that will help FHWA evaluate the use of the particular hiring preference or innovative contracting approach for the proposed project. These factors include, but are not limited to, the following:
  - i. Describe the project(s), including the amount of FHWA funding involved as well as the estimated total cost of the project(s).
  - ii. 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?
  - iii. 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.
  - iv. 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).
  - v. 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.
  - vi. 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.

- vii. 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).
- viii. Describe whether the proposed contracting requirement has been the subject of litigation or whether litigation surrounding the use of the requirement has been threatened.
- ix. Provide the required certifications from Section 199B of the Consolidated Appropriations Act, 2021, Pub. L. 116-260.

**20. What are the required certifications from Section 199B of the 2021 Appropriations Act?**

- Pilot program participants will be required to certify to the following:
  - i. 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;
  - ii. 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
  - iii. 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.

**21. Does the FHWA have any criteria or requirements for the types of projects that may participate in this pilot program?**

- No. The FHWA does not specify project types, project sizes, or project delivery methods that may be appropriate for this pilot program. Contracting agencies may propose (and FHWA will consider) proposals to evaluate labor hiring preferences or innovative contracting approaches on any Federal-aid construction project funded under Title 23, United States Code.

**22. The Notice says that State and local applicants must request SEP-14 approval. Should local public agencies submit requests through their State DOTs?**

- Yes. All SEP-14 requests must be submitted by or through a State DOT consistent with 23 CFR 1.3, or through a direct recipient consistent with 2 CFR 200.332.

**23. Will FHWA consider SEP-14 approvals for multiple pilot projects?**

- Yes. The Notice states that requests will be considered for "a specific contract, a specific group of contracts, or on a more general programmatic basis." The

FHWA encourages the use of programmatic approvals where an agency wishes to use an existing labor hiring preference that is required by State or local law, regulation, ordinance, executive order, or policy. Programmatic approvals are also encouraged where the agency wants to use labor hiring preferences on more than one Federal-aid project during the pilot program evaluation period. In such cases, contracting agencies should plan to provide an evaluation of all projects within their program at end of each calendar year in which the pilot projects are active. Contracting agencies should also be prepared to provide project information upon request.

**24. Does this pilot program apply to procurement of local firms?**

- No. The pilot program is focused on individuals. Hiring preferences in this pilot program must be employee- and/or new-hire based. This program does not permit local preferences related to the procurement of firms based on criteria that is specific to the firm (such as location of firm, past experience, etc.).

**25. Does FHWA anticipate receiving evaluations and reporting for this pilot program that better allow FHWA to draw conclusions about the impacts of the program than it could for the 2015 LLHPP?**

- Yes. This pilot program is scheduled to last four years (unless extended), which provides FHWA a longer period of time to evaluate projects, including workforce development-related outcomes and other data such as impacts on competition. FHWA will conduct appropriate outreach to ensure recipients and subrecipients are aware of program expectations, and will share examples of approved and relevant workplans as they become available. This pilot program will also consider both qualitative and quantitative data on workforce enhancements as well as impacts on bidding.