

Predevelopment Costs for Public-Private Partnership Projects – Federal-Aid Highway Program Eligibilities

Frequently Asked Questions

Q1: What are Federal-aid highway funds?

A1: Federal-aid highway funds are authorized by Congress to assist the States in providing for construction, reconstruction, and improvement of highways and bridges on eligible Federal-aid highway routes and for other special purpose programs and projects. The principal statutes establishing the Federal-aid highway program and related regulatory requirements are generally found in Title 23, Highways, of the United States Code (U.S.C.) and Title 23 of the Code of Federal Regulations (CFR).

Q2: What are “predevelopment costs”?

A2: “Predevelopment costs” are those associated with activities that provide decision-makers the opportunity to identify and assess potential infrastructure projects and modifications to existing infrastructure projects, and to advance those projects from the conceptual phase to actual construction. As defined in the Presidential Memorandum on Expanding Federal Support for Predevelopment Activities for Nonfederal Domestic Infrastructure Assets issued on January 16, 2015, predevelopment activities may include, but are not necessarily limited to:

- (i) project planning, feasibility studies, economic assessments and cost-benefit analyses, and public benefit studies and value-for-money analyses;
- (ii) design and engineering;
- (iii) financial planning (including the identification of funding and financing options);
- (iv) permitting, environmental review, and regulatory processes;
- (v) assessment of the impacts of potential projects on the area, including the effect on communities, the environment, the workforce, wages, and benefits, as well as assessment of infrastructure vulnerability and resilience to climate change and other risks; and
- (vi) public outreach and community engagement.

Predevelopment costs include predevelopment activities and associated costs, such as flexible staff, external advisors, convening potential investment partners, and legal costs.

Q3: What Federal-aid highway programs are available to help fund predevelopment activities?

A3: Predevelopment activities, such as those listed above, may be supported using both Planning funds and Program funds under the Federal-aid highway program. FHWA provides Planning funds via formula to States and MPOs under the State Planning and Research (SPR) and Metropolitan Planning (PL) programs. These funds support metropolitan and statewide transportation planning activities required under 23 U.S.C. 134 and 23 U.S.C. 135, including selection of projects for inclusion in transportation plans and programs, and prioritization and the estimation of available revenues and project costs. The focus at this stage is on understanding and anticipating the future performance needs of the transportation system and exploring potential improvements that would address those needs.

Program funds may be used for construction and related project development activities. Key funding programs under the Federal-aid highway program include the Surface Transportation Program (STP); the National Highway Performance Program (NHPP); the Congestion Mitigation and Air Quality Improvement Program (CMAQ); and the Highway Safety Improvement Program (HSIP).

Q4: Are there any special considerations that apply when using Planning funds for predevelopment activities under the Federal-aid highway program?

A4: Yes. Designated SPR and PL funds used to support predevelopment may only be applied to activities conducted during the planning stage, prior to the initiation of project development that occurs with the beginning of an environmental documentation process under the National Environmental Policy Act (NEPA). Activities at the planning stage will address a range of potential strategies and/or funding options, rather than focusing on a specific improvement project and financing strategy.

The total amount of funding available to States for planning under the SPR and PL programs nationwide is relatively small relative to the core funding programs, totaling less than \$1 billion per year. These funds are used for a variety of planning activities in addition to project predevelopment, including public outreach and transportation system modeling and forecasting.

Q5: Are there any special considerations that apply when using Program funds for predevelopment activities under the Federal-aid highway program?

A5: Yes. Projects that receive Program funds must be identified in the Metropolitan/State Transportation Improvement Programs (TIP/STIP) developed through the planning process, and must be consistent with the Long-Range Statewide Transportation Plan and the Metropolitan Transportation Plan(s) (see 23 U.S.C. 134(j)(5)(A) and 23 U.S.C. 135(g)(5)(A)). These plans are subject to fiscal constraint rules, which require that

revenues in transportation planning and programming (both Federal and non-Federal) be identified and "reasonably expected to be available" to implement the long range transportation plan and the TIP/STIP, while providing for the operation and maintenance of the existing highway system (see 23 CFR 450.216(m), 23 CFR 450.322(f)(10)(ii), and 23 CFR 450.324(h)). In addition, revenues must be "available or committed" for the first two years of a TIP/STIP in air quality nonattainment and maintenance areas (see 23 CFR 450.216(m) and 23 CFR 450.324(i)). Projects in air quality nonattainment and maintenance areas are subject to an air quality conformity determination.

Certain pre-construction costs are eligible under all of the key Federal-aid highway programs, based on the broad definition of "construction" found in 23 U.S.C. 101(a)(4), which includes costs for preliminary engineering, engineering, and design-related services directly relating to the construction of a highway project. The costs associated with the preparation of environmental documentation for a construction project are also eligible pre-construction costs under those programs.

Preliminary studies to determine the feasibility of constructing a toll facility are directly eligible for Federal-aid highway program funding under 23 U.S.C. 129(a)(1)(I). Surface transportation planning programs are also eligible under the STP (see 23 U.S.C. 133(b)(10)).

Federal-aid highway program funds used for preliminary engineering must be repaid to the Federal government if on-site construction or right-of-way acquisition for the highway project is not commenced within 10 years. However, if the State is actively working to advance a project, it may also request a time extension beyond the 10-year limit for any preliminary engineering project and the FHWA may approve this request if it is considered reasonable (see 23 U.S.C. 102(b) and 23 CFR 630.112(c)(2)).

The total amount of funding made available to States under the four key programs is over \$36 billion per year. This funding is used to support the full range of eligible activities under these programs, including capital improvements, inspections, and targeted safety and environmental programs, in addition to predevelopment activities.

Q6: How are potential public-private partnership (P3) projects accounted for in State and metropolitan transportation plans?

A6: The requirement that the funding sources identified in the TIP/STIP and long-range transportation plans be "reasonably expected to be available" also applies to potential P3s. Project financing via a P3 may be considered "reasonably available" if there are indications of support by the Governor and/or other appropriate local/regional decision makers and a strategy exists for securing necessary approvals within the time period for

implementing the affected project(s). Other indicators of "reasonableness" for P3 projects include past successes by the State or local jurisdiction in implementing P3s and having State enabling legislation in place.