

# Memorandum

Subject: **ACTION**: Procurement of Federal-aid  
Construction Projects Guidance

Date: April 12, 2024

From: Moises Marrero, Acting Director  
Office of Preconstruction, Construction,  
and Pavement

In Reply Refer To:  
HICP-20

To: Division Administrators  
Director of Field Services

This guidance memorandum supersedes our June 26, 2008, memorandum on this subject with the same title. The revision is necessary to provide consistency with statutory revisions under the Moving Ahead for Progress in the 21<sup>st</sup> Century (MAP-21) Act (Pub. L. 112-141), the Fixing America's Surface Transportation (FAST) Act (Pub. L. 114-94), and the [Infrastructure Investment and Jobs Act](#) (Pub. L. 117-58, also known as the Bipartisan Infrastructure Law (BIL)<sup>1</sup>).

Except for the statutes and regulations cited, the contents of this memorandum do not have the force and effect of law and are not meant to bind the States or the public in any way. This memorandum is intended only to provide clarity regarding existing requirements under the law or agency policies.

All Federal awards to non-Federal entities, including those under the Federal-aid highway program, are subject to 2 CFR Part 200 – Grants and Agreements (referred to as the Uniform Guidance). However, additional requirements may apply as provided in Federal law. For projects that are administered under title 23, United States Code, 23 U.S.C. 112 requires that contracts be awarded by competitive bidding where construction is to be performed by the State department of transportation (State DOT) or under its supervision.

Section 1103 of the MAP-21 revised the definition of “construction” in 23 U.S.C. 101(a) to include the phrase “or any project eligible for assistance under this title”. Revised section 101(a)(4) now reads, in part, as follows:

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<sup>1</sup> For more information on FHWA's implementation of BIL, see <https://www.fhwa.dot.gov/bipartisan-infrastructure-law/>.

*“(4) Construction.—The term “construction” means the supervising, inspecting, actual building, and incurrence of all costs incidental to the construction or reconstruction of a highway or any project eligible for assistance under this title, including bond costs and other costs relating to the issuance in accordance with section 122 of bonds or other debt financing instruments and costs incurred by the State in performing Federal-aid project related audits that directly benefit the Federal-aid highway program. Such term includes . . .”*

[\*underlining added for emphasis]

This change revised the previous definition of construction to include any construction project eligible for assistance under Title 23, U.S.C. When read in conjunction with the statutory requirements of 23 U.S.C. 112 – *Letting of Contracts*, the statute requires the application of construction contracting procurement requirements<sup>2</sup> to all Title 23-funded construction projects, except as noted below.

In addition, the FAST Act and BIL included several Treatment of Project provisions that require certain projects to be treated as if they were on a Federal-aid highway. After reviewing the changes to the statutory definition of “construction” and taking into account the Treatment of Project provisions, FHWA requirements applicable to highway construction will be applied to projects regardless of the location of the project. The provisions include:

- FAST Act section 1105 amended 23 U.S.C. to include section 117(k), ensuring that any Nationally Significant Freight and Highway Project (also known as the “Infrastructure for Rebuilding America” Program or “INFRA” project) is treated as if the project is located on a Federal-aid highway;
- FAST Act section 1109 amended 23 U.S.C. to include section 133(i), ensuring that any Surface Transportation Block Grant Program project is treated as if the project is located on a Federal-aid highway. This provision specifically excludes Recreational Trails Projects (RTP) (23 U.S.C. 133(h)(5));
- FAST Act section 1116 amended 23 U.S.C. to include section 167(l), ensuring that any National Highway Freight Program (NHFP) project is treated as if the project is located on a Federal-aid highway;
- BIL section 11116 amended 23 U.S.C. to include section 218(d), ensuring that any Alaska Highway project within the State of Alaska is treated as if the project is located on a Federal-aid highway;
- BIL section 11118 amended 23 U.S.C. to include section 124(m), ensuring that any Bridge Investment Program project is treated as if the project is located on a Federal-aid highway;

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<sup>2</sup> Construction procurement requirements include methods of awarding contracts described in 23 CFR 635.104. Per 23 U.S.C. 109(o), previous determinations in the FHWA Contract Administration Core Curriculum Manual limiting the applicability of certain “construction standards” to National Highway System projects are not affected (e.g., FHWA policy on contract changes, claims, liquidated damages, etc.). FHWA’s Buy America requirements (23 U.S.C. 313 and 23 CFR 635.410) apply to any obligation of funds under Title 23.

- BIL section 11119 amended 23 U.S.C. to include section 208(i), ensuring that any Safe Routes to School project is treated as if the project is located on a Federal-aid highway;
- BIL section 11123 amended 23 U.S.C. to include section 171(i), ensuring that any Wildlife Crossing Safety project is treated as if the project is located on a Federal-aid highway;
- BIL section 11129 amended 23 U.S.C. to include section 109(s)(2), ensuring that any Electric Vehicle Charging Station project is treated as if the project is located on a Federal-aid highway;
- BIL section 11132 amended 23 U.S.C. to include section 173(o), ensuring that any Rural Surface Transportation Grant Program project is treated as if the project is located on a Federal-aid highway;
- BIL section 11134 amended 23 U.S.C. 206 to include section 206(j), which requires that funds apportioned to a State under section 104(b) that are obligated for a recreational trail or a related project must be administered as if the funds were made available to carry out the Recreational Trails Program under section 206;
- BIL section 11401 amended 23 U.S.C. to include section 151(b)(9)(A), ensuring that any project funded by the Grants for Charging and Fueling Infrastructure program is treated as if the project is located on a Federal-aid highway;
- BIL section 11402 requires the Secretary to establish a grant program for the Reduction of Truck Emissions at Port Facilities. Section 11402(b)(5) requires that any project funded by a grant under this program shall be treated as if the project is located on a Federal-aid highway;
- BIL section 11403 amended 23 U.S.C. to include section 175(g), ensuring that any Carbon Reduction Program project is treated as if the project is located on a Federal-aid highway;
- BIL section 11405 amended 23 U.S.C. to include section 176(h), ensuring that any Promoting Resilient Operations for Transformative, Efficient, and Cost-Saving Transportation (PROTECT) project is treated as if the project is located on a Federal-aid highway;
- BIL section 11406 requires the Secretary to establish a discretionary grant program for the “Healthy Streets Program.” Section 11406(j) requires that any project assisted under this section is treated as if the project is located on a Federal-aid highway;
- BIL section 11502 requires the Secretary to establish a competitive grant pilot program for “Stopping Threats on Pedestrians.” Section 11502(g) requires that any project assisted under this program is treated as if the project is located on a Federal-aid highway;
- BIL section 11509 requires the Secretary to establish a “Reconnecting Communities Pilot Program.” Section 11509(g) requires that any project assisted under this program is treated as if the project is located on a Federal-aid highway;
- BIL section 11529 requires the Secretary to establish a competitive grant program for the “Active Transportation Infrastructure Investment Program.” Section 11529(k) requires that any project assisted under this program is treated as if the project is located on a Federal-aid highway; and

- BIL division J, under the Highway Infrastructure Program heading in title VIII, requires that \$27,500,000,000 be used for a “bridge replacement, rehabilitation, preservation, protection, and construction program” which includes the requirement that any project funded under this program is treated as if the project is located on a Federal-aid highway.

BIL section 11134 enacted an exception for recreational trail projects. Funds that are obligated for a recreational trail or a related project using Federal-aid highway program funds apportioned under 23 U.S.C. 104(b)<sup>3</sup> must be administered as if made available under the Recreational Trails Program (23 U.S.C. 206(j)). This provision is not limited to projects carried out using funds apportioned under 23 U.S.C. 133(h)(5). Therefore, 23 U.S.C. 133(i) does not apply to recreational trail projects. Regardless of project location, States may procure recreational trail or related projects carried out using funds apportioned under 23 U.S.C. 104(b) using their own procurement procedures (2 CFR 200.317) and subrecipients of States shall follow such policies and procedures allowed by the State (2 CFR 1201.317).

In addition, please note that the BIL establishes several new discretionary grant programs that are administered under Title 23, U.S.C., and also allows direct recipients other than State departments of transportation (State DOTs) to administer the grants. We note that 23 U.S.C. 112 has language that specifies that the provision applies whenever the project is administered by a State DOT, which includes where the State DOT serves as a pass-through entity for a subrecipient. As a result, non-State DOT direct recipients must follow the applicable procurement requirements in 2 CFR part 200 but may follow 23 U.S.C. 112(a) and (b) to meet those requirements.

In summary, all Federal-aid construction projects that are eligible for Title 23 assistance (with the exception of recreational trail or related projects and as previously noted) are subject to FHWA’s construction contracting procurement requirements.<sup>4</sup> The location of the project is no longer a criterion in determining the applicability of FHWA’s construction contracting procurement requirements.

Please note that FHWA’s September 25, 2019, memo titled: “Procurement and Authorization of Federal-aid Operational Improvements (Non-Construction Projects)” also provides guidance regarding intelligent transportation systems and operations projects that are not construction projects.

<sup>3</sup> Programs funded under 23 U.S.C. 104(b) are the: (1) National Highway Performance Program, (2) Surface Transportation Block Grant Program (including the Transportation Alternatives Set-Aside), (3) Highway Safety Improvement Program, (4) Congestion Mitigation and Air Quality Improvement Program, (5) National Highway Freight Program, (6) Metropolitan Planning, (7) Carbon Reduction Program, and (8) the Promoting Resilient Operations for Transformative, Efficient, and Cost-Saving Transportation Formula program.

<sup>4</sup> FHWA Order 4551.1 specifies that other Federal agencies may utilize their own construction contracting requirements whenever Funds are transferred to other Federal agencies. This provision applies only where the Federal agency is serving as the contracting agency, except whenever funds are flexed to the Federal Transit Administration. In the case of FTA, funds are administered under 49 U.S.C. ch. 53.

This guidance will be effective for all Federal-aid construction projects authorized 60 days after the date of this memo. Please also consult the specific guidance for the programs discussed above (see, e.g., <https://www.fhwa.dot.gov/resources/legsregs/> and <https://www.fhwa.dot.gov/pgc/>).

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