CONTRACT INITIATIVES

QUESTION and ANSWERS
Updated April 2, 2015

I. Generally

1. Why has the U.S. Department of Transportation (DOT) decided to conduct this pilot program?

- Transportation plays a critical role in connecting Americans and communities to economic opportunity. Many recipients and subrecipients at the local governmental level have local hiring or other provisions that they otherwise apply to procurements that do not involve Federal funding, and have urged DOT to permit them to use such provisions for a number of years. Such provisions have a variety of worthwhile objectives, such as ensuring that the communities in which the projects are located benefit from the jobs that result from their investment of their funds, particularly for workers in low income areas.
- This pilot program will enable the DOT to permit the use of these requirements on an experimental basis.

2. What is the goal and intended outcomes of the contracting initiatives pilot program?

- This pilot program will enable DOT to evaluate whether State or local contracting requirements that have traditionally been prohibited on contracts awarded by the Federal Transit Administration (FTA) and Federal Highway Administration (FHWA) recipients and subrecipients, due to concerns that the requirement would restrict competition, may be used consistently with the standard established in a 2013 Office of Legal Counsel (OLC) opinion. The OLC opinion concluded that the Secretary has discretion to

permit contracting requirements as long as they do not "unduly limit competition."

- The DOT will monitor and evaluate whether the contracting requirements approved for use under the pilot program have an undue restriction on competition in order to provide future guidance on their possible broader use under the FTA and FHWA programs.
- This pilot program is limited to contracts awarded under the FTA and FHWA programs because these programs have general statutory provisions requiring competition. Programs administered by other DOT operating administrations are subject solely to the regulatory restriction in the Common Grant Rule at 2 CFR 200.319(b) prohibiting the use of geographic preferences. DOT has issued a separate notice of proposed rulemaking (NPRM) that would modify the DOT's implementation of the Common Grant Rule by permitting recipients and subrecipients of DOT funds to use geographic preferences pertaining to the use of labor (see 80 FR 12092).

3. What legally prohibits DOT from allowing recipients to use local hire provisions?

- First, the Common Grant Rule, which establishes uniform administrative rules for Federal grants and subawards and is applicable to all agencies across the Federal Government, contains a regulation prohibiting the use of geographic preferences. Thus, the DOT has published an NPRM proposing to modify this regulation, as applied to DOT grant programs, in order to expressly allow recipients to use geographic hiring preferences in DOT-assisted projects.
- Second, the FHWA and FTA have general statutory mandates requiring full and open competition in the award of contracts under those grant programs. These statutes have been interpreted and applied as prohibiting all economic and social contracting requirements on FHWA and FTA federally-assisted projects that do not relate to the cost-effective use of Federal funds. Recently, the U.S. Department of Justice (DOJ) clarified the mandate of the FHWA competitive bidding statute (which is similar to the FTA statute) as allowing any contracting requirement that does not unduly

restrict competition. Thus, DOT is implementing a pilot program in order to evaluate the use of these requirements and determine whether they unduly restrict competition.

4. What authorities allow DOT to conduct the contracting initiatives pilot program?

- DOT is using its experimental authorities under 23 U.S.C. 502 (i.e., FHWA's Special Experimental Project No. 14 (SEP-14)) and 49 U.S.C. 5312, 5314 and 5325 to administer this pilot program.

5. What types of projects can be included in the pilot?

- Any project funded by FTA or FHWA can be considered for the pilot program. This includes construction projects, as well as rolling stock procurements. This 1-year period is for contracts that will be advertised during this period.

6. How long will the pilot program last?

- This initiative will be carried out as a pilot program for a period of 1 year (unless extended).

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

- Contracts accepted into the pilot program must be advertised on or before March 6, 2016. Any contracting requirement approved to be utilized under the pilot program will be applicable throughout the life of the contract utilizing such requirement.

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

- 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 systems, career technical education programs, and unions to create skills training and apprenticeship programs that are aligned with current and future transportation industry employment needs.
- It is not the intent of the pilot program, however, to replace or supplement the Equal Employment Opportunity (EEO) goals and requirements of either the US Department of Labor (41 CFR 60) or the FHWA (23 CFR 230).
- DOT will consider (in conjunction with the USDOT Office of General Counsel) requests to pilot preferences for targeted individual classes (women, minority status, disability status, etc.) to the extent that such preferences do not conflict with existing EEO requirements.

9. What is the relationship between the local hire pilot program and the Disadvantaged Business Enterprise (DBE) program?

- The local hire pilot is intended to advance opportunities for hiring local workforce; however, DOT will not approve projects for which recipients wish to alter the requirements of the Disadvantaged Business Enterprise Program.

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

- Yes. PLAs used on Federally funded projects must comply with all applicable Federal requirements. If a recipient or subrecipient wishes to include a geographic hiring provision in a PLA, the recipient or subrecipient may apply to use such provision through the pilot program.

11. Why has DOT also published a notice of proposed rulemaking (NPRM)?

- DOT has published an NPRM to propose amending the DOT's implementation of the Common Grant Rule to permit DOT recipients and subrecipients to utilize geographic hiring provisions for labor on DOT assisted projects.
- Specifically, DOT proposes in the NPRM to modify 2 CFR 200.319(b), as applied to DOT programs, to utilize geographic hiring provisions.
- The NPRM is a proposal and any interested parties should submit comments to the rulemaking docket. Once the comment period has closed, DOT will evaluate all comments. Should the DOT ultimately decide to adopt the proposal in the NPRM, the proposal would not become effective until the publication of a final rule.

12. What is the difference between the pilot program and the NPRM?

- The pilot program is effective only for FTA and FHWA who have general statutory requirements providing for full and open competition. These statutes have historically been interpreted and implemented as prohibiting geographic hiring preferences. The pilot program is being implemented and administered pursuant to those agencies' experimental contracting authorities.
- The pilot program is effective immediately.
- The NPRM is being proposed for DOT programs, which are subject to the Common Grant Rule. The use of geographic hiring preferences in these programs is dependent upon the DOT's adoption of the proposal in the NPRM through a final rule.

13. The Notice says that US DOT is interested in evaluating the use of local or other geographic labor hiring preferences, economic-based labor hiring preferences (i.e., low-income workers), and labor hiring preferences for veterans. How does DOT define these terms?

- Under the pilot program, DOT considers the following approaches to be included within those terms. Example approaches include, but are not limited to the following:

    - Geographic boundaries based on factors such as:
        - state, county, city, or other public boundaries;
        - zip code limits;
        - census tracts; or
        - other geographically-defined borders.

    - Economically defined areas based on factors such as:
        - per capita income levels,
        - unemployment rates, or
        - other criteria that delineate areas of economic disadvantage.

    - Veterans for purpose of the pilot program are defined by 5 U.S.C. 2108.

14. Does the pilot program allow testing of preferences for state or local minority business enterprises?

- No. Pilot programs that may conflict with the administration of Disadvantaged Business Enterprise Program requirements will not be considered. The Notice specifically states that the DOT will not approve pilots for which recipients wish to alter the requirements of the Disadvantaged Business Enterprise Program.

15. Can contracting agencies propose other types of contracting requirements?

- Yes. The pilot program is not limited to hiring preferences. Examples of other types of contracting specifications that contracting agencies may apply to use include pay-to-play provisions and domestic partnership benefits. The use of other contract requirements may be approved after coordination with the DOT Office of General Counsel.

16. Does the pilot 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.

17. Does the pilot allow for the use of disincentives or penalties for not meeting contract requirements?

- Yes. If supported by state or local policy, a contracting agency may propose the use of disincentives or penalties to assist with contract compliance.

18. Does the pilot allow for the use of incentives as a means to encourage contract compliance?

- Yes. If supported by state or local policy, a contracting agency may propose the use of contractual incentives to assist with contract compliance.

19. Does the pilot 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.

II. FHWA

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

- State DOTs may submit a SEP-14 workplan to their respective Division Office for local hiring preferences. Local public agencies should submit all proposed work plans to their State DOT. State DOTs should review and provide appropriate recommendations to their Division Office for consideration. State DOTs or local public agencies may also submit a separate SEP-14 workplan for other contracting requirements that have

previously been prohibited by FHWA as described in Q&A No. 7. These requests will need to be coordinated with the DOT Office of General Counsel. Division Offices should forward the work plans to HIPA-30 for review and approval (contact: John Huyer, (651)291-6111, John.Huyer@dot.gov). HIPA-30 will coordinate the review/approval of work plans, and post the workplans and evaluations on FHWA's web site.

21. How may an FHWA recipient or subrecipient participate in the pilot program?

- State and local recipients and subrecipients should request prior approval from the FHWA to use a specific contracting requirement under SEP-14. In order 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. The work plan should include the following information:
    1) Describe the project(s), including the amount of FHWA funding involved in the as well as the estimated total project cost.
    2) Describe the proposed contracting requirement that may otherwise be found to be inconsistent with the general requirement for full and open competition.
    3) Describe how the applicant will evaluate the effects of relevant contracting requirements on competitive bidding. In doing so, the applicant should, at a minimum, provide comparisons of bids 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. If a reduction in the pool of bidders is evident, explain the potential offsetting benefits resulting from the use of the requirement.
    4) Describe and quantify how the proposed contracting requirement would lead to increases in the effectiveness and efficiency of Federal funding for the project(s).

5) Describe and quantify how the proposed experimental contracting technique would protect the integrity of the competitive bidding process either in connection with the particular contract or when considered over the long term for that agency's program.

6) Describe whether or not the proposed contracting requirement has been the subject of litigation or whether litigation surrounding the use of the requirement has been threatened.

22. Does the FHWA have any criteria or requirements for project selection for the pilot program?

- No. Contracting agencies may propose to evaluate labor hiring preferences on any Federal-aid construction project funded under Title 23.

23. 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.

24. 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, 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 encouraged where the agency wants to use labor hiring preferences on more than one Federal-aid project during the pilot evaluation period. In such cases, contracting agencies should plan to provide an evaluation of their program of projects at end of each calendar year in which the pilot projects are active. Contracting agencies should be prepared to provide project information upon request.

III. FTA

25. How may an FTA recipient or subrecipient participate in the pilot program?

- State and local recipients and subrecipients should request prior approval by submitting an application to their FTA Regional Office, and include:

    1) Description of the contracting opportunity, including the type of project or asset, the schedule for the project delivery, the amount of FTA funding involved in the project as well as the estimated total project cost.
    2) Description of the proposed contracting requirement that otherwise may be found to be inconsistent with the general requirement for full and open competition.
    3) Description of how the grantee will evaluate the effects of relevant contracting requirements on competitive bidding, including how it will compare bids received under the proposed procurement with other procurements of similar size and scope and in the same geographic area not utilizing such requirements. It should describe how it would evaluate potential offsetting benefits if the proposed contracting requirements result in a reduction in the pool of bidders.
    4) Description of how the relevant contracting requirement could lead to increases in the effectiveness and efficiency of Federal funds for the project.
    5) Description and quantification of how the experimental contracting technique would protect the integrity of the competitive bidding process either in connection with the particular contract or when considered over the long term for that agency's program.

- An evaluation committee comprised of FTA staff will evaluate applications for inclusion in the pilot program. The FTA Administrator will provide a final written determination to each applicant, on a rolling basis, regarding whether an application has been accepted into the pilot program.

26. What will FTA consider when deciding whether to approve my application?

- Primary considerations will be (1) the anticipated effect of the proposed contracting provision on the pool of potential bidders; (2) the relationship of the proposed provisions to the performance of work under the contract; (3) the extent to which the proposed provisions promote efficiency in connection with the letting of a particular contract; (4) the extent to which the proposed provisions promote the efficient and effective use of Federal funds in the long run; and (5) the extent to which the proposed provision protects the integrity of the competitive bidding process.

27. What is Section 418 of the Consolidated and further Continuing Appropriations Act, 2015, Public Law No. 113-235 ("Section 418")?

- Section 418 prohibits FTA from using FY2015 funds to implement, administer, or enforce 49 CFR 18.36(c)(2) for construction hiring purposes. Section 18.36(c)(2) prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals.

28. Does Section 418 apply to grants obligated on or after December 26, 2014, given that Section 18.36 (c)(2) was replaced by 2 CFR part 200 for grants obligated after that date?

- Yes. Effective December 26, 2014, 49 CFR part 18 will apply only to grants obligated on or before December 25, 2014. Grants obligated on or after December 26, 2014 will be subject to 2 CFR part 200. This provision (18.36(c)(2)) is codified at 2 CFR 200.319(b) and is substantively the same as 18.36(c)(2). Although Congress did not address the change in codification in Section 418, FTA believes that Congress intended to apply section 418 to grants obligated on or after December 26, 2014 and subject to

2 CFR 200.319(b). FTA will administer Section 418 in accordance with this intent.

29. Does Section 418 apply to construction contracts funded by grants under the Hurricane Sandy Emergency Relief and TIGER programs?

- Yes, Section 418 will apply to all construction contracts funded by FTA through any program, including the Hurricane Sandy appropriation and the TIGER program.

30. What is meant by "construction hiring purposes"?

- "Construction hiring purposes" means hiring of the construction labor workforce for a construction project.

31. Does Section 418 prohibit FTA from enforcing compliance with section 49 CFR 18.36(c)(2) on existing construction contracts?

- Yes. If an existing construction contract has a local or geographic preference, FTA cannot enforce 49 CFR 18.36(c)(2). However, the recipient continues to be bound by the provisions of the contract if already awarded.

32. Pursuant to Sectoin 418, can I include a geographic or local hiring preference in a construction contract that is advertised before September 30, 2015, but not awarded until after September 30, 2015?

- Yes. Under Section 418, FTA will not enforce the prohibition against local or geographic preferences on procurements for construction contracts that are advertised on or before September 30, 2015.

33. Pursuant to Section 418, can I amend an existing construction contract to add a geographic or local hiring preference?

- Whether you can amend an existing construction contract to add a local or geographic preference will depend on state and local contract law. FTA grantees also must follow the requirements of FTA Circular 4220.1F, Third Party Contracting Guidance.

34. Pursuant to Section 418, can I convert a previously non-FTA funded construction contract with geographic or local preferences to an FTA-funded contract?

- Yes, if the procurement process and contract otherwise complies with all other federal requirements. This determination that will be made on a case-by-case basis. FTA recipients should consult with their FTA Regional Office.

35. I have a Triennial Review or Procurement System Review scheduled in FY2015. Can FTA make a deficiency finding that construction contracts entered into before FY2015 contained a geographic preference?

- No. Section 418 prohibits FTA from enforcing 49 CFR 18.36(c)(2). FTA, however, will ask recipients if they have any contracts with geographic preferences for information purposes only.

36. Does Section 418 apply to Project Labor Agreements (PLAs)?

- PLAs entered into in FY2015 can note that there is flexibility for construction contracts entered into or advertised on or before September 30, 2015 to contain geographic or local hiring preferences, but that that flexibility may not be available in subsequent years.

37. What is the relationship between Section 418 and participation of FTA recipients and subrecipients in DOT Contracting Initiative Pilot Program?

- Section 418 is limited to construction labor hiring and applies only to contracts advertised on or before September 30, 2015.
- The pilot program is an opportunity for any FTA recipient or subrecipient to submit a request to FTA to include provisions within their contracts that under prior interpretations of "full and open competition" may have been considered non-competitive.. The pilot program can be used for any type of procurement and applies to contracts advertised before March 6, 2016.
- Given that Section 418 prohibits FTA from using FY 2015 funds to implement, administer, or enforce 49 CFR 18.36(c)(2) (which has been recodified at 2 CFR 200.319(b)) for construction hiring, prior FTA approval is not required to use in-state or local geographic preferences, and FTA recipients and subrecipients may impose such requirements for their federally funded construction contracts at their discretion if such contracts are awarded or advertised on or before September 30, 2015. Such contracts will receive automatic admission into the pilot program, but FTA requests that recipients and subrecipients notify their FTA Regional Office if they intend to use in-state or local geographic hiring preferences. This notice will permit FTA to evaluate the effects of these provisions on competition, as well as to ensure that FTA oversight contractors are aware of the utilization of such preferences authorized by Section 418.
- In contrast, FTA recipients and subrecipients that wish to impose local hiring preferences for federally funded contracts other than for construction, or for construction contracts that will be advertised after September 30, 2015, can do so only if FTA grants permission under the pilot program.

38. Does the prohibition on procurements that use exclusionary or discriminatory specifications (49 USC 5325(h)) still apply?

- Yes, this statutory provision still applies. In reviewing an application FTA will consider the extent to which proposed specifications are exclusionary or discriminatory, and their effect on full and open competition.

39. Does the prohibition on State-law requirements for in-State bus dealers (49 USC § 5325 (i)) still apply?

- Yes, this statutory prohibition remains in effect.

40. Can I apply to use requirements for the procurement of rolling stock?

- Yes, an applicant may submit an application to request permission to use a specification for a rolling stock procurement, but FTA cautions applicants that in reviewing proposed contract specifications it must ensure that there is still sufficient competition, including that the proposed specifications are not so restrictive as to be considered exclusionary or discriminatory.