

Questions & Answers on Economic Recovery Issues Raised by State DOTs (1/23/09)

Planning and Environment

Question 1: What should local agencies be doing to ensure their projects are “ready to go” as part of the Economic Recovery Program?

Answer 1: In order for a surface transportation infrastructure project to advance for Federal funding, it must be included in the relevant metropolitan Transportation Improvement Program (TIP) or Statewide Transportation Improvement Program (STIP). Therefore, we strongly encourage you to reach out to your Metropolitan Planning Organization (MPO) or State Department of Transportation (State DOT) to begin work **as soon as possible** to ensure your projects are included in an approved TIP or STIP, so they are ready and available to advance upon the President signing economic recovery legislation. Please note that transit related projects should be coordinated with the relevant transit operating agency as well as relevant MPOs or State DOTs.

Question 2: Can the State and MPOs do public involvement; demonstrate fiscal constraint; determine conformity and other planning process steps that are needed for various scenarios prior to passage by Congress so MPOs can vote approval literally hours after the President signs the bill?

Answer 2: Yes, the State and the MPOs can do the necessary planning work such as model runs; analysis work needed for conformity, if necessary; and public involvement prior to the passage of the recovery bill by Congress. **This work should have already begun. If it has not, it should be started immediately.**

These planning activities are eligible for SPR and PL funds. For purposes of fiscal constraint, it is reasonable to assume a doubling of Federal highway dollars based on last year's program size. Once the planning and necessary conformity work has been completed, the MPO policy boards and State DOTs may amend their plans, TIPs and STIPs even before the recovery bill is passed. FHWA, in coordination with FTA, can make any necessary conformity findings on the amended plans and TIPs, and approve the STIP amendment request prior to the bill's passage.

Question 3: Can the States and MPOs use the funds expected from the economic recovery to demonstrate fiscal constraint?

Answer 3: Yes, the funds expected from the economic recovery can be used to demonstrate fiscal constraint.

Question 4: Can economic recovery funds be used to replace State funds in the first year of the STIP to allow that money to be used on another project?

Answer 4: Yes, provided that the State funds are then used for another transportation project within the total timeframe specified by the economic recovery bill.

Question 5: Can economic recovery funds be substituted for other Federal funds?

Answer 5: Yes, provided that the project on which the funds are to be used has not yet been authorized.

Question 6: Can the actions in Questions 4 and 5 be taken administratively?

Answer 6: Yes, provided that the action involves only a change in the source of the funds.

Question 7: Is it possible for FHWA/FTA to make conditional STIP approvals?

Answer 7: No, FHWA/FTA cannot make conditional STIP approvals, since conditional STIP approvals are not allowed under existing regulations. The planning regulations (23 CFR 450.218(b)) do allow FHWA/FTA to:

- i. Approve the entire STIP;
- ii. Approve the STIP subject to certain corrective actions being taken; or
- iii. Under special circumstances, approve a partial STIP covering only a portion of the State.

However if the States and MPOs complete the steps detailed in question #1, FHWA/FTA can approve the STIP amendments immediately.

Question 8: How should Federal Lands Highway (FLH) Program projects be handled?

Answer 8: FLH projects will need to follow the state STIP process as well. Work with your FLH Division offices as part of your early outreach efforts described in Question #2. In most cases, FLH program projects are in addition to the lists provided by the states. The FLH Divisions, working with the Federal partners, have identified approximately \$400-500 million in potential projects nationally.

Question 9: Can FHWA adopt "Emergency" rules with regard to environmental processing to save time? Can 404/401 permits be expedited or Nationwide or Regional permits be expanded by USACE for these projects?

Answer 9: No, FHWA cannot adopt emergency procedures. The emergency action procedures referred to in 23 CFR 771.131 only apply to emergency circumstances addressed in the Council on Environmental Quality (CEQ) regulations 40 CFR 1506.11. CEQ is unlikely to consider all economic recovery projects as emergency, unless they are true emergencies under unique circumstances.

As for Clean Water Act Section 404 permits and 401 authorizations, many minor projects do not require permits or already qualify under Nationwide permits. Many states have funding arrangements and agreements with the Corps of Engineers and the State environmental agencies, and they can address expedited processes for projects in the recovery package through prioritization. It will not be practical to get Section 404 processes altered solely for the economic recovery package.

Question 10: Can all Categorical Exclusions (CE) be delegated to the States?

Answer 10: No. We will have to stay within the bounds of the statutory provisions. CE delegation is addressed in SAFETEA-LU, and most States did not see an advantage in pursuing such delegation. Many minor projects may already be covered under the Programmatic Categorical Exclusions as per agreements with the States. For the remaining projects, the documentation preparation is more time consuming than the FHWA approvals at the Division office.

Question 11: What if FHWA or the States are challenged on the cumulative impacts of such a large investment package like this? Are we prepared to address this issue?

Answer 11: The recovery package provides funding for delivering the "ready-to-go" projects. The package itself cannot be challenged under NEPA, as it will be an Act of Congress. Individual projects are subject to legal provisions and can be challenged like any other project that is outside of the recovery package.

“Ready-to-go” may have been advanced through environmental processes already or do not require any major environmental review. For these reasons, they are unlikely to be challengeable solely because they are part of a large investment package.

Question 12: To the extent that projects are dependent on permitting to go forward, what can be done from HQ to work with the resource agencies to expedite the permitting process?

Answer 12: FHWA will meet with each of the resource agencies primarily involved in the project level permitting of highway projects, and discuss how they can help expedite the permit process for the potential economic recovery package. We will pass on any advice to the Division offices based on our discussions with the resource agency personnel.

Question 13: Are there any streamlining measures or waivers that can be granted when post-NEPA right-of-way acquisition has not been completed?

Answer 13: Yes. The regulations at 23 CFR 635.309 allows for an authorization to be issued while the State DOT continues to acquire the necessary right-of-way post-NEPA. In those cases where the right-of-way acquisition may not be finalized the bid documents should clearly specify those parcels that may not be available along with estimated dates for possession. State DOTs should consider the actual construction start date to determine when the property will actually be needed. For those parcels that have occupants of residences, businesses, farms or non-profit organizations who have not moved from the right-of-way, the bid proposal must include provisions to protect them from disturbance or inconvenience. The State DOTs are encouraged to consider the use of incentives to assist in right-of-way acquisition and relocation. Such incentives could include administrative settlements, acquisition and relocation incentive payments when allowed by State law, temporary moves or other innovative measures as the State DOT may propose.

Funding and Eligibility

Question 14: Will the economic recovery funds be 100% Federal share?

Answer 14: We will not know the response to this question until the Congress acts. The American Association of State Highway and Transportation Officials (AASHTO) has made it clear that they would like the funds to be 100% Federal share.

Question 15: Is there a problem with the definition of obligation for MPO activities?

Answer 15: Because there is no statutory definition for obligation as it relates to planning, the Divisions should work with the States to be as flexible as possible on this issue based on each MPO's Unified Planning Work Program.

Question 16: Will FHWA have the ability to advance economic recovery funds to States and local governments to accommodate States that don't have the cash up front to proceed?

Answer 16: Federal-aid program funds are provided to the State on a reimbursement basis only.

Question 17: Can States use these funds for winter or other maintenance?

Answer 17: Federal-aid funds may not be used for routine maintenance activities. However, activities considered to be preventative maintenance are eligible for Federal-aid funding. The term "preventative maintenance" is defined as those activities that are a cost-effective means of extending the useful life of a Federal-aid highway

Question 18: If the state wants to take projects that are currently funded with state transportation dollars (in this case state funds that, by law, can only be spent on transportation) and make them economic recovery projects and then move their state transportation funds to other transportation projects is that still considered supplanting state funds?

Answer 18: Under the scenario described, if the State's maintenance of effort is not decreased, the economic recovery funding would be considered to supplement and not supplant the State funds. The use of recovery funds could accelerate the State's program if the relocated State transportation funds are used within the same time frame as the recovery funds will be used.

Question 19: How will the States consider local projects in this identification of economic recovery projects?

Answer 19: In general terms, local projects are eligible for Federal-aid funds. Therefore, the States will need to provide outreach to the local agencies to ensure that their projects are considered and programmed, as appropriate.

Question 20: If these are General Fund dollars, what specific Title 23 requirements apply? Will FHWA "relax" other Title 23 Federal requirements in order to move these projects quickly?

Answer 20: Unless the Economic Recovery bill specifies otherwise, the projects funded under the bill will be required to follow all normal Federal-aid funding requirements.

Question 21: Section 101 of Title 23 provides a specific list of eligible construction activities. Can you provide a similar list for the Economic Recovery Program? Are preliminary engineering and ROW eligible for recovery dollars?

Answer 21: Unless the Economic Recovery bill specifies otherwise, the list of eligible construction activities in Section 101 of Title 23 will apply, including projects for preliminary engineering, right-of-way acquisition, intelligent transportation systems, traffic signalization, and signage.

Question 22: Is there a requirement that last year's special bridge funding be obligated before Economic Recovery funds are used for bridge work?

Answer 22: No.

Question 23: What happens to Economic Recovery funds that have not been obligated by the due date?

Answer 23: We will not know the response to this question until the Congress acts and the parameters for using and managing the funds are known.

Question 24: Can funds be used to convert advanced construction (AC) balances, particularly when a state is experiencing or anticipating cash flow problems?

Answer 24: No. However, if an AC project was recently established and has not incurred any State costs, the AC authorization may be cancelled by the Division. Any cancellations must be accomplished no later than January 31, 2009. See Question 36 for information regarding how to pursue economic recovery fund projects prior to funds being made available.

Question 25: If the Economic Recovery package extends over multiple years, how will multi-year projects that have construction components set to go in 2009 be treated? Would the recovery funds be eligible to substitute for the State funds (not just a cash strapped situation) – a.k.a. AC conversion – for the 2009 construction or later elements?

Answer 25: We believe that the intent of the bill will be to infuse extra funds into the transportation program (i.e. supplement not supplant existing transportation funding). Therefore, recovery funds may substitute for State funds in those conditions described in Question 18 and 36.

Question 26: Beyond advancing pure construction projects what other types of projects or operational considerations should the States be considering?

Answer 26: The use of operational strategies to mitigate the traffic impacts of the expanded program, and inclusion of ITS or other operational elements in larger infrastructure-oriented projects are important considerations which should be examined during the identification and development of recovery projects.

The investment in recovery projects will likely result in a significant increase in work zones over the next couple of years. We should make every effort to avoid degrading the safety and operations of the system and assure that the economic benefits of the recovery are not offset by work zone delays. The Divisions should be advocating the concepts and tools of the Work Zone Mobility Final Rule, use of Traffic Incident Management techniques, and improvements in traveler information systems. These can significantly reduce the potential network congestion which might occur when a large number of projects are on the system at the same time.

There is also an opportunity to include operational elements in larger projects or advance them as stand alone projects. Examples include traffic signal upgrades, traffic monitoring and weigh-in-motion equipment, ramp metering, dynamic message signs, road weather information systems, and similar projects. Many operational investments require limited or no environmental review time, making them very attractive for quick deployment.

The HQ Offices of Transportation Operations and Transportation Management are prepared to assist the Division offices in advancing these operational investments.

Project Authorization and Contracting

Question 27: What design elements or standards can be waived or streamlined?

Answer 27: Unless the Economic Recovery bill specifies otherwise, the projects funded under the bill will need to be developed and designed in a manner that complies with the design standards adopted by the State DOT and approved by FHWA. Current law and regulations does not allow for design standards or design exceptions to be waived.

All new construction, reconstruction and resurfacing, restoration, and rehabilitation (3R) type of projects that use Federal-aid funding on multilane limited access freeways, including Interstates on the National Highway System (NHS) must comply with the FHWA adopted design standards. The design standards adopted by the FHWA can be found in 23 CFR 625. Non-freeway 3R projects may be constructed in accordance with FHWA-approved AASHTO standards for new and reconstruction projects, or in accordance with FHWA-approved individual State standards developed pursuant to 23 U.S.C. 109(o) and 23 CFR 625. For projects that are not on the NHS, Title 23 USC 109 provides that these projects shall be designed, constructed, operated, and maintained in accordance with State laws, regulations, directives, safety standards, design standards, and construction standards. Americans with Disabilities Act requirements are applicable.

Question 28: Will FHWA consider waiving or expediting any steps in the consultant contracting process to help States move these projects more quickly?

Answer 28: Unless the Economic Recovery bill specifies otherwise, the projects funded under the bill will need to be procured, negotiated and managed in a manner that complies with the Federal laws and FHWA regulations. In addition these projects will also need to comply with the adopted State laws and procurement policies and procedures (as per the provisions specified in the Uniform Administration Requirements for Grants and Cooperative Agreements to State and Local Governments (49 CFR 18)) as previously approved by FHWA. Current Federal laws and FHWA regulations do not allow for the normal waiving of procurement and contracting requirements.

Question 29: Can we assume by the answer to Question 28 that the Brooks Act, Simplified Acquisition and other requirements would be applied as they are currently?

Answer 29: Yes. That was our intent in the "... in a manner that complies with the Federal laws and FHWA regulations" and other portions of the original answer.

Question 30: How should recipients respond to the potentially large increases in funding that may become available as the result of the proposed economic recovery package with respect to DBE program requirements, including overall and contract goals?

Answer 30: *Note: Response is pending.*

Question 31: What is the most expeditious timeframe that the States can use to advertise projects?

Answer 31: Although the States may have their own laws that require a longer period, under Federal regulation, Division Administrators have the discretion to allow States to use a reduced timeframe, based on the provision, as follows:

23 CFR 635.112 Advertising for bids and proposals.

(b) The advertisement and approved plans and specifications shall be available to bidders a minimum of 3 weeks prior to opening of bids except that shorter periods may be approved by the Division Administrator in special cases when justified.

In most circumstances, a time period of less than 14 days is not reasonable to gain responsible bids.

Question 32: Will FHWA provide assistance to the States to address the need to use consultants to do materials testing Quality Assurance (QA)/Quality Control (QC) without detailed State oversight?

Answer 32: Funding for consultant services should be from the State's Federal-aid dollars related to each project. As always, States have been able to hire consultants to manage their QA program, however, 23 CFR 637 requires that the States are ultimately responsible. As such, the State has to sign off on the materials conformance document at the end of the project. The State's consultant lab must meet the same requirements as the state lab and the State has to provide oversight of the consultant lab and review their data. In addition, these labs have to be included in the states IA program. The state will need someone responsible for QA but they themselves do not have to do the testing or the analysis only the review.

Question 33: Does FHWA have Design/Build procedures ready and in place that States could use to help deliver projects using this mechanism, especially for States that have little or no experience in this area?

Answer 33: The FHWA removed the design-build project delivery method from the experimental status in December 2002. It is now fully operational and it is no longer necessary to request FHWA Headquarters' approval under Special Experimental Project No. 14 - Innovative Contracting. The AASHTO and the

Design-Build Institute of America have both published guidance for developing design-build procurement documents and contracts. Approximately 40 of the 50 states have some level of design-build experience and the use of design-build continues to grow at a steady pace.

Question 34: How will FHWA view a design-build project as meeting the timing requirements? Will it be when an RFP is advertised?

Answer 34: In design-build, some phases of construction (clearing, grubbing, earthwork, etc.) start shortly after the notice to proceed is issued. As design proceeds, construction also continues. Depending on the type of project, the availability of permits, the percent of design furnished in the RFP, and similar issues, there may not be a significant time period between the contract notice to proceed and the start of construction. The length of time for the abundance of jobs to materialize on a design-build project may not be as much of an issue as perceived. As with other methods of construction contracting, there will be some lag time during the procurement phase, i.e. advertising, assessing responses, and award. The lag time may be a bit longer with design-build. However, construction contract procurement using the design-build method should remain a viable option in delivering projects with the economic recovery or recovery funding.

Question 35: Under what scenario would design-build be viewed as expediting the delivery of an economic recovery project?

Answer 35: Under a design-build scenario, construction is awarded when a design-build contract is awarded. Design is also awarded at that same time. The expectation is that some portion of the construction will get underway immediately. The design-build method of procurement will result in time savings with the concurrent advancement of design and construction activities. This expectation is reduced on a design-build project if the construction portion of the project is to await completion of the design portion after contract award. Under that scenario, the use of the design-build procurement method would not be productive or efficient, since the project would then represent a more traditional design-bid-build type project.

Question 36: Can the State utilize the AC provisions in order to advertise a project at their own risk while retaining the ability to "Federalize" the project when the recovery funds become available?

Answer 36: No. It is anticipated that the Recovery bill will contain a prohibition from use of those funds on AC projects. See Question 37 for the process to use to pursue the recovery projects before funding becomes available.

Question 37: How can the State advertise a project at their own risk while retaining the ability to "Federalize" the project when the recovery funds become available?

Answer 37: The State can proceed at its own risk to advertise a project without Federal authorization in anticipation that the recovery funds will be provided. When the legislation is enacted and the recovery funds are made available, the State could convert the project into a Federal-aid project funded with recovery funds, provided the project meets all requisite Federal requirements. The State would be reimbursed for costs incurred from the point at which the project received Federal authorization. In order to address the requirements of 23 CFR 635.112(a), the Division offices should provide prior written concurrence (by letter or memo) of the State's intent to proceed with advertisement of the projects. This approach does not permit Federal-aid reimbursement for costs incurred prior to obligation of the Economic Recovery funds.

Question 38: Almost 50% of the proposed projects from the State are design build. For design build projects the normal time period from advertisement/release of the RFP until award is 3 to 6 months. Receipt of technical proposals is 2 to 4 months depending on the jobs complexity. After receipt of proposals a technical committee reviews/grades the proposals, the state then opens the price proposals to determine the award. Since the states will want to reduce this time, the Divisions

need guidance for how much this response period can be reduced. Reducing the time will affect proposal quality and increase cost so the appropriate balance is important.

Answer 38. The design-build solicitation, procurement and review process should be adjusted based on the size, complexity and level of detail that is necessary to respond to the RFP requirements. Each project should be viewed on a case-by-case basis. There is no rule of thumb or guidance for this issue. It is simply a matter of trade-offs between adequate time for the industry to review, analyze and respond to solicitations versus the owner's need to review proposals and ensure that it is receiving the best value for the available competition. After the August 1, 2007 collapse of the I-35W Bridge, the Minnesota DOT went through the RFQ, RFP, proposal evaluation and selection process in approximately 50 calendar days and selected the successful firm on September 19, 2007; however, this was truly an exceptional emergency situation.

Question 39: Based on past practices of authorizing funds for large and significant projects with multiple conditions, we have obligated funds on prior "high priority" projects with conditions such as not having an approved finance plan, an approved project management plan, incomplete design exceptions, typical sections, and incomplete portions of the RFP to be added later thru addendums. How far are we willing to go with the recovery projects?

Answer 39: It is not appropriate to provide a blanket waiver of FHWA project requirements for recovery projects. Again, case-by-case situations should be considered and programmatic waivers of requirements should be avoided.

Question 40: Can FHWA authorize funds after RFP's have been released for bid for design build projects, or after the PS&E has been advertised for low bid? Or, can FHWA authorize funds if the project has been awarded but notice to proceed has not been issued and no costs incurred?

Answer 40: See Question 36 for information related to this question.

Project Management and Oversight

Question 41: Do MPOs have the capacity to help with the oversight and management of these projects if funding is provided directly to the locals within MPO boundaries without passing through the State?

Answer 41: The MPOs in nearly all cases do not have the capacity to help with the oversight and management of projects as the MPO's primary function is almost always limited to planning and programming, not project management. They simply don't have the experience or expertise. The responsibility for oversight and management of individual projects resides with the State DOT and the designated recipient transit agencies. In some cases, a larger local government may have some ability to oversee and administer a Federal-aid highway project; however it is ultimately the responsibility of the State DOT to see that Federal requirements are being met on a highway project.

Question 42: Will there be any implications from the Economic Recovery Package on how indirect costs are allocated?

Answer 42: For those divisions whose State DOTs recover indirect costs via approved indirect cost allocation plans (ICAP), we recommend you begin discussions with your State to identify and mitigate potential effects the proposed Economic Recovery Package (ERP) may have on your indirect cost allocations. By regulation, 2 CFR 225 Attachment E points out the need to properly account for "extraordinary or distorting expenditures" (see paragraphs B and C of Attachment E) in order to ensure an equitable distribution of indirect costs to all benefiting cost objectives (Federal and non-Federal awards/activities).

Not making allowances for the one-time infusion of significant amounts of Federal dollars into the

Federal-aid Highway Program will likely result in a significant over-recovery of indirect costs in FY 2009 that will have to be recovered at a later time.

Even if your State does not use an ICAP, the ERP may have an effect on local public agency (LPA) indirect cost recovery, and you may wish to also discuss this issue with your State for their consideration in reviewing, negotiating and approving rates of LPAs.

Question 43: Are there specific actions that States should be considering related to tracking these economic recovery/recovery funded projects in case of audit?

Answer 43: In addition to the normal stewardship and oversight that is applied to the administration of projects, Division offices and States should engage in discussions about the plan of actions each will take to pay special attention to the economic recovery funds. We suggest that attention is given to tracking the use of funds on projects from start to finish, e.g. types of projects (with some detail regarding the description or scope of work), when various project activities (like advertising, award, notice to proceed, etc.) begin and/or end, how many people are employed during the various of phases where these funds are used, etc. For this administrative effort, details are suggested versus streamlining. There will probably be requests for many different cuts of information regarding use of the economic recovery funds and benefits to the economy. In addition, the Division offices and States should include the locally-administered projects in tracking the projects that use the economic recovery funds.

Question 44: Within what timeframe will State funds need to be spent to demonstrate the "maintenance of effort" requirement?

Answer 44: The definitive answer to this question will depend on the final language in the economic recovery bill, however, as currently drafted, the State's certification requirement would be a one-time action by the Governor within 30 days of enactment. The report would be for funding from the date of enactment through September 30, 2010. The method/makeup of the Governor's certification of maintenance of effort has not been determined. This includes the identification of the support documentation which provides the basis for the certification and the timeframe for spending the State funds to honor the maintenance of effort requirement.

In addition, the required reports at one, two, four, six, twelve, and thirty-six months are for the funds, projects bid, contracts awarded, projects with work begun, projects with work completed, jobs, and non-Federal funds.

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