

Information Item

DATE: March 11, 2016
TO: TAC Funding and Programming Committee
PREPARED BY: Joe Barbeau, Senior Planner (651-602-1705)
SUBJECT: Defederalization

One day prior to Funding & Programming recommending approval of 2016-25, a policy and process for defederalization, TAB members had asked questions about the impact of the loss of Disadvantaged Business Enterprise (DBE) requirements along with other Federal Requirements. . TAC voted to send the item back to the Funding & Programming Committee for further consideration to be sure that questions are answered regarding the impact of lost federal requirements.

Some information has been ascertained related to DBE and Environmental Review at this point. It is summarized below.

DISADVANTAGED BUSINESS ENTERPRISE

Any federally-funded project is subject to DBE goal-setting. The DBE goal for a project is based on the total project cost. Therefore, the goal is the same whether it has \$1 or \$10 million of federal funds. This means that the transfer of federal funds from Project A to Project B leaves Project A with no requirement while Project B's goals remain unchanged. There is no State requirement. MnDOT State aid has a DBE program (Targeted Group Business (TGB) Program) for MnDOT-sponsored projects, but this does not apply to City and County sponsors. There is no requirement for sponsors related to DBE or similar programs once a project has been defederalized.

Some local agencies have programs. Staff is still gathering information from other agencies. The following agencies have provided information:

- Hennepin County: The County has a Small Business Enterprise program. Affirmative Action requirements go into effect for contracts over \$100,000; includes goals that are similar to DBE goals. No local hiring preference. However, the County and MnDOT have submitted a joint application to pilot local hiring on three upcoming transportation construction projects that are federally funded.
- Burnsville: No such program and no local hiring preference.
- Chanhassen: No such program and no local hiring preference.
- Maplewood: The City does not have a DBE goal or program. It has a prevailing wage ordinance for all road projects (including local-only). No local hiring preference.

While some cities do have local practices and policies, many do not.

ENVIRONMENTAL REVIEW

Federal projects undergo extensive environmental review and are subject to time and money expenditures by local sponsors. Some federal review points, such as Americans

with Disabilities Act accommodations are to be adhered to regardless of whether there is a presence of federal funds. That is not the case with all elements. The below elements are shown on the attached checklist under “Environmental Document Preparation/Review; there are no federal and state requirements for non-federal projects:

- Public involvement: Most agencies likely have local outreach practices
- Cultural Resources
- Threatened / Endangered Species
- Noise
- Section 4(f) and 6(f) review.
 - 4 (f): FHWA and other DOT agencies cannot approve the use of land from publicly owned parks, recreational areas, wildlife and waterfowl refuges, or public and private historical sites unless the following conditions apply:
 - There is no feasible and prudent avoidance alternative to the use of land; and the action includes all possible planning to minimize harm to the property resulting from such use, or
 - The Administration determines that the use of the property will have a *de minimis* impact
 - 6 (f): Requires that the conversion of lands or facilities acquired with Land and Water Conservation Act funds be coordinated with the Department of Interior. Usually replacement in kind is required.
- Environmental Justice. Federal Review to ensure that no person, on the ground of race, color, or national origin, is excluded from participation in, denied the benefits of, or subjected to discrimination and, if needed, to take action to address this.

Maplewood reported that it addresses public involvement and noise through “an extensive outreach and public process (neighborhood meetings, open houses, public hearings, newsletters) on all issues including noise, traffic concerns, etc.” It addresses cultural resources through its Heritage Preservation Commission, which reviews historical related sites and make comments for mitigation or documentation. It addresses 4 (f) through its Parks Commission, which reviews projects related to park impacts.

Chanhasen reported that it has no local programs. Burnsville reported that on one federal project it had to specify when construction could occur because of an eagle nesting habitat. This may not have happened with a non-federal project.

POLICY AND PROCESS TO DEFEDERALIZE TAB-SELECTED PROJECTS

OVERVIEW

Projects selected through the TAB Regional Solicitation and HSIP processes are awarded federal funds and are therefore subject to federal requirements that can cost an agency considerable time and money. When conditions are right, an agency may consider “defederalizing” a project. Defederalization entails transferring federal funds from one project (“defederalized project”) to another project already subject to federal requirements (“receiving project”), allowing the former project to proceed without adherence to some federal requirements.

POLICY

Project Sponsors:

- Project sponsors must voluntarily agree to participate in the defederalization of a project, be it their own or another sponsor’s.
- One sponsor may defederalize one or more of its projects by shifting federal funds to one or more of its other projects.
- One sponsor may defederalize one or more of its projects by working with other sponsor(s) to absorb federal funds in exchange for local funding.
- TAB will not recognize agreements for “future consideration” (i.e., TAB will not enforce an agreement for one sponsor to “return the favor” to another sponsor at a future time).
- All sponsors involved with a defederalization request must provide a resolution agreeing to be responsible for the project, the project’s timing, and the risks.

Funding:

- All federally funded projects must maintain the federally required minimum local match (usually 20%, but 10% for Highway Safety Improvement Program).
- All funds transfers shall be one-to-one in terms of funding amount. A sponsor may not “purchase” defederalization by exchanging federal funds for a lesser amount of local funding.
- All transferred funds must be eligible to be used on the project they are proposed to fund.
- In cases in which the funds are not eligible to the project proposed to receive funds, the Minnesota Department of Transportation (MnDOT) Metro District State Aid office may “flex” funds through the USDOT.
- If federal funds are transferred to a project with an earlier program year, the sponsor must advance construct (AC) the project and be reimbursed in the year to which the funds are assigned in the TIP. A TIP amendment is required to reflect the use of AC.
- Federal funds cannot be transferred to a future year, as this would put a burden on TAB to redistribute funds.
- If State Aid funds are to be exchanged for federal aid funds, transfers can only occur county-to-county or city-to-city.

Defederalized Projects:

- Defederalized projects must be completed with all elements, and in the time frame, shown in the original application for funding. MnDOT Metro District State Aid or Metropolitan Council Transit Grants, depending on the project, will continue to monitor all TAB-selected projects to assure that they are completed consistent with policy.

- Defederalized projects are subject to TAB's Scope Change Consultation and Evaluation processes. Project sponsors must consult with MnDOT Metro District State Aid or Metropolitan Council Transit Grants, depending on the project, in order to seek permission to deviate from the approved scope.
- Defederalized projects are subject to TAB's Program Year Policy.
- Should a TAB-selected project be withdrawn or otherwise unable to be completed, the project sponsor must return its federal funding to the region. If the federal funding has already been committed to a local project, the sponsor must provide local funds to TAB. This will be reflected in the resolution provided by the sponsor.

PROCESS

1. Applicant submits a project defederalization request. Requests must be made by December 31 of the state fiscal year prior to the program year associated with the earliest-programmed project involved in the transfer. For example, defederalization of a project programmed in fiscal year 2018 must be requested by December 31, 2016.
2. Applicant provides a proposal to Metropolitan Council and MnDOT Metro State Aid. The proposal must include the following:
 - Description and funding table showing proposed defederalized project(s) and receiving project(s) will absorb the federal funds. Amount and source of funds must be shown as well.
 - Resolution(s) from the governing board of any agencies involved with the defederalization. The resolution must include:
 - Identification of any proposed defederalized project(s) and receiving project(s). Amounts must be included
 - Source(s) of non-federal funds.
 - Commitment to authorizing all TAB-selected projects in the program year identified in the TIP.
 - Acknowledgement that all TAB-selected projects will comply with all MnDOT State Aid or Metropolitan Council Transit Grants project requirements.
 - Acknowledgement that all TAB-selected projects will be completed with the scope and timing proposed in the original application and that MnDOT State Aid and/or Metropolitan Council Transit Grants will monitor the project to assure that this happens.
 - Acknowledgement that all TAB-selected projects are subject to TAB's scope change policy.
 - Guarantee that should they fail to deliver part or all of the TAB-funded projects, federal funding will be turned back to the region for distribution to other regional projects.
 - Acknowledgment of any project advancement and advanced construction that needs to occur.
 - Guarantee that the project will be delivered using the local State Aid process or Metropolitan Council Transit Grants process.

TASK	STATE AID FUNDING	FEDERAL AID FUNDING
Project in the STIP (State Transportation Improvement Program)		X
PPMS (MnDOT Scheduling Software)		X
Project of Divisional Interest (PODI) - if applicable - required full FHWA oversight/approvals of environmental, construction plans and construction		X
Kickoff Meeting (project sponsor & State Aid)		X
Advance Construct (AC) Agreement if applicable		X
DCP Agency Agreement		X
Environmental Impacts	X (State Process)	X (Federal Process)
Environmental Document Preparation/Review (Environmental Assessment or Project Memorandum)	(1)	X
- Public Involvement	(1)	X
- Cultural Resources/SHPO		X
- Threatened and Endangered Species		X
- Noise Analysis		X
- 4 (f)/6 (f)		X
- Environmental Justice		X
Delegated Contract Process (DCP)		X
Construction Plans	X	X
- Design complies with State Aid Rules	X	X
- ADA Compliance	(1)	X
- Traffic Control Plan	(1)	X
- Erosion Control Plan	(1)	X
- State Aid Force Account for work by local forces	X	
- Federal Aid Force Account for work by local forces - requires review/approval and federal funding authorization by FHWA prior to the work being done.		X
Right of Way Acquisition	(1)	X
Right of Way Review/Certificate		X
Utility Relocation Certificate		X
Disadvantaged Business Enterprise (DBE)/On the Job Training (OJT) Goals/Determination		X
Equal Employment Opportunity (EEO)	X	X
Local Hiring Preferences allowed	X	
Specifications/Proposal Preparation	X	X
Specifications Review		X
- Federal documents included		X
- Federal Wage Rates		X
- State Wage Rates	X	X
- Schedule of Materials Control	X	X
- Buy America		X

TASK	STATE AID FUNDING	FEDERAL AID FUNDING
Proprietary Items	X	
- Proprietary Items not allowed unless a Public Interest Statement is provided/approved		X
Required Permits (DNR, COE, NPDES, etc.)		X
Federal Authorization of funding by FHWA		X
Advertisement for Bid		
- Add language Review/Approval (required federal language)		X
- Local agency publishes advertisement	X	X
Bid Opening	X	X
- Project Sponsor consults with State Aid to set bid opening date (must follow federal requirements)		X
- DBE Review/Clearance from Office of Civil Rights		X
- Bid Abstract Review		X
- Bid Justification Review/Approval if bids +/- 10% of Engineers Estimate		X
Project Award	X	X
- Project Award Concurrence		X
POST- AWARD		
Payment Requests submitted	X	X
- 95% of bid paid following contract award and required documentation	X	
- Federal funds are reimbursed up to the participation level as costs are incurred.		X
Independent Assurance Testing		X
DBE/OJT Monitoring		X
Supplemental Agreement (SA) and Change Order (CO) Submittals/Review/Approval	X	X
Materials Exception Summary Review/Approval by MnDOT Materials		X
Final Inspection	X	X

(1) Project sponsor follows local process. Not reviewed by State Aid or FHWA.