

Information Item

DATE: June 7, 2016
TO: TAC Funding and Programming Committee
PREPARED BY: Joe Barbeau, Senior Planner (651-602-1705)
SUBJECT: Draft Policy and Process to Exchange Federal funds on TAB-
Selected Projects

At last month's meeting, the Committee voted to reconvene the Federal Funds Exchange Work Group in light of TAB's concerns over the loss of disadvantaged business enterprise (DBE) goal-setting. Attempts to secure a meeting with an appropriate mix of attendees prior to this Committee meeting proved unsuccessful. Therefore, staff has spent time looking into options and trying to articulate the pros and cons of exchanging federal funds.

The attached background information is meant to:

1. Highlight the benefits of exchanging federal funds
2. Provide general information on the impact of the loss of federal environmental review requirements
3. Provide general information on the impact of the loss of DBE goal-setting requirements
4. Provide options on how to address DBE, if desired by TAB

Committee member input is sought, particularly for items 1 and 4 above. Also sought is direction on whether to make a second attempt at reconvening the Work Group or passing the information item to TAC, with hopes, once again, to move on an action item in the near future.

THE IMPACT OF FEDERAL FUNDS EXCHANGES

TAB programming of Surface Transportation Block Grant Program (STPBG) and Congestion Management and Air Quality (CMAQ) Program funds to regional applications provides regional influence over the spending of federal transportation funds. However, federal funds do carry several requirements. In some places, including Greater Minnesota, State DOTs and MPOs facilitate or allow the moving of federal funds from one project to a larger project able to absorb the funds, rendering the former without federal funds. This practice is not discouraged by USDOT.

BENEFITS TO SPONSORS OF PROJECTS THAT MOVE FEDERAL FUNDS

- Anecdotally, it has been suggested that a local sponsor can save 10 to 30 percent on a project through:
 - Reduced environmental documentation.
 - Avoidance of federal provisions, such as Buy America, the Davis-Bacon Act, and disadvantaged business enterprise (DBE) goal-setting requirements.
- Sponsors would have more flexibility in using local hiring preference and other programs that could conflict with the federal DBE requirement.
- Potentially more spending locally (though not TAB-enforceable).
 - Anoka County complied its DBE participation (not including its TIGER-funded Armstrong project) for a two-year period and found that 8% of the DBEs used were located in Anoka County and 32% were located in the 7-County Metro Area. Of the \$2.9 million in DBE subcontracts that were performed over two years, \$2.0 million went to companies outside of the region.

DISADVANTAGED BUSINESS ENTERPRISE (DBE)

Federal undertakings are subject to DBE requirements. FHWA, working with MnDOT Metro State Aid, establishes a DBE goal for the entire project. The goal is based on availability of DBE firms to provide materials, services, etc. Note that for any project under \$1 million, the policy is for race- and gender-neutrality.

DBE Requirements for Projects without Federal Funds

A project's DBE goal is based on total project cost, not federal funds or the federal portion. When federal funds are removed from a project, DBE requirements are no longer applicable.

Statewide DBE Goal

MnDOT sets a statewide annual DBE goal, for which each federal project is a contributor. While removing federal funds from a project does remove the DBE requirement for it, the statewide goal remains unchanged and is reflected through increased weighting of other projects throughout the state. Note, however, that the annual statewide goal is typically not met.

Local Initiatives

In the absence of a federal DBE target, some sponsors have local hiring programs while others do not. The below summary was generated from responses to Metropolitan Council staff's request for information:

- Small Business Enterprise (SBE) program:

- Hennepin County: The County’s policy includes project-specific goals of up to 25% participation from companies certified as Small Business Enterprises (SBEs). The County is “gender and race-neutral” but does make outreach efforts to DBEs. For non-federal projects, the County uses a Workforce Entry Program (WEP), for which contractors are asked to make an effort to hire graduates of local training programs (e.g., Summit Academy) for up to 5% of the work.
- City of Minneapolis: Small and Underutilized Business Enterprise Program. This program includes a goal-setting process for hiring minority- and women-owned business that is similar to the federal goal but focused on an 11-County area.
- Respondents reporting that they are tied to the low bid: Scott County and Three Rivers Park District.
- Respondents with no hiring program were Dakota County, Washington County, Blaine, Bloomington, Burnsville, Chanhassen, and Maplewood. Maplewood has a prevailing wage ordinance.
- Have not heard from the following Counties: Ramsey, Carver, and Anoka

BUY AMERICA ACT

For stand-alone projects, the Buy America Act no longer applies once the undertaking is not federal. Project sponsors should note that the required contract provisions must be applied to all phases of a project covered by a NEPA document to retain federal funds eligibility for any phase of a project covered by a NEPA document that has yet to be constructed. If a project is being built in phases and an early phase does not follow federal requirements after the NEPA document is completed, subsequent phases are not likely eligible to receive federal funds. Depending on the federal requirement, there are some gray areas. The most black-and-white instance is with Buy America, which, if not followed, renders future phases ineligible to receive federal funds. Other requirements are case-by-case.

ENVIRONMENTAL REVIEW

Directly, some federal requirements can be removed from a project that has given up its federal transportation funds. In some cases, a federal nexus can exist for other reasons (e.g., adjacent to federally funded park land, Interstate Access Request, USACE Section 404 permit) that maintain some requirements. Further, state requirements sometimes come into play. The below addresses the federal laws most often encountered in project decision-making in the Twin Cities Metropolitan area. It is not an exhaustive list of federal environmental laws.

General Environmental Documentation

- Federal undertakings always require A National Environmental Policy Act (NEPA) document.
- Non-federal undertakings can require an environmental document if certain Minnesota Environmental Policy Act (MEPA) thresholds are met. An Environmental Assessment Worksheet (EAW) is an example of a type of MEPA document. These thresholds are:
 - Construction of a road on a new location over one mile in length that will function as a collector.
 - Construction of additional travel lanes on an existing road for at least a mile.
 - Addition of interchanges to a completed limited access highway.

- Compared to a State EAW, a Federal Environmental Assessment (EA) has a significantly longer completion period and requires more detailed analysis for several items, such as purpose & need, alternatives analysis, and highway noise.
- Items that must be addressed in a federal EA but not in a state EAW include:
 - Environmental justice
 - Social impacts
 - Considerations related to pedestrians and bicycles
 - Economics
 - Relocation
 - Right-of-way
 - Air quality

Public Involvement

Whether a federal undertaking requires public involvement is case-by-case. If a federal EA or EIS is needed, public involvement activities are required. In other cases, some elements of the NEPA process for a federal undertaking may still require public involvement processes (e.g. Section 4f, Section 106). Some agencies have requirements that are more stringent than federal requirements.

Cultural Resources

For FHWA undertakings, FHWA determines whether there is an impact.

- Section 106 applies to any property that is eligible for or listed on the National Register of Historic Places (NRHP). Section 106 of the National Historic Preservation Act applies only when there is a federal undertaking (i.e., can be non-transportation federal money).
- The Minnesota Historic Sites Act applies only to properties already listed on the NRHP. It is generally less onerous than Section 106.

Threatened / Endangered Species

- Federal undertakings are subject to Section 7 of the Endangered Species Act (ESA).
- Non-federal undertakings are subject to Minnesota's Endangered Species Statute and Section 9 of the ESA. This means that the sponsor would still be legally liable for any take of protected species.

Noise

Minnesota's noise laws, while less likely to apply to a project than federal noise laws, are, once applied, more stringent. Some agencies go beyond state or federal thresholds for mitigating noise.

Section 4(f) and 6(f)

- Section 6(f) refers to the federal Land & Water Conservation Fund Act (LAWCON). Any facility funded by the LAWCON is required to be retained and operated solely for outdoor recreation in perpetuity. Any use of Section 6(f) parkland for non-recreation use requires approval by the National Park Service (NPS), which requires review under Section 106 of the National Historic Preservation Act and NEPA. While TAB can

remove FHWA funds, it cannot completely “defederalize” a project to which Section 6(f) applies, as this review is always required.

- Section 4(f) refers to the U.S. Department of Transportation Act of 1966. It requires that any undertaking with USDOT funds include a review for impacts to Section 4(f) resources. Historical properties are under this umbrella. If a project is no longer a USDOT undertaking, the state process through the Minnesota Historic Preservation Office (MnHPO) and MEPA are followed, though they are less onerous than their federal counterparts. The process with MnHPO does not require proactive investigation of resources that are not already listed on the NRHP. The federal process would require a survey to determine whether there are any properties eligible for or listed on the NRHP, while the state process would not require a survey until and unless an artifact is found. MEPA is similar to NEPA but with different requirements, rendering it less onerous.

Environmental Justice

Environmental Justice (EJ) is a part of any FHWA NEPA document and is therefore considered in all federal undertakings. An equity analysis is conducted to better-define the nearby minority and low-income populations. If potential EJ populations are identified, a field inspection is conducted to determine a) whether the data constitute a true EJ population and b) how those populations are impacted in terms of community cohesion, access, and noise. Impact mitigation may be required.

Projects that are not federal undertakings are not subject to an EJ review.

Other Reviews and Impacts

- *Farmland Policy Projection Act* is not applicable once a project is no longer a federal undertaking.
- *Air quality* analyses (MSAT) are not applicable once federal funds are removed.
- *Wetland impacts* may or may not be impacted upon removal of federal funds. Both FHWA and United States Army Corps of Engineers (USACE) have requirements. The latter’s could apply even if federal transportation funds are removed. Minnesota State law also has the Wetland Conservation Act (<http://www.bwsr.state.mn.us/wetlands/wca/>).
- *Right-of-way relocation impacts*. Any federal undertaking has rules on property purchase and reimbursement via the Uniform Act.
- *Tribal lands*. FHWA nexus involves procedures on reservations and exterior trust lands, which are less likely to apply to a non-federal undertaking.
- *Flood plains, national wild & scenic rivers, Migratory Bird Treaty Act (MBTA), and economic impacts (such as access and business relocation)* could have reduced review scrutiny.
- *Bald and Golden Eagle Protection Act of 1940, as amended*. This still applies even when a project is not a federal undertaking.

POTENTIAL SOLUTIONS TO THE LOSS OF DBE-GOAL-SETTING

TAB has expressed concern with the loss of DBE goal-setting that would be brought about by removing federal funds from some project. Members have asked whether the DBE goal-setting process can remain but MnDOT has reported that this is not an option for a project not going through the rest of the federal processes.

1. Use the Metropolitan Council's Office of Equal Opportunity (OEO) to set and Enforce Goals

OEO is capable of setting DBE goals similarly to MnDOT's process. OEO Could use:

- a) Its MCUB program: This program only includes Minnesota DBEs. It also includes certified [Targeted Business Program](#) (TGB) firms, and veteran-owned Minnesota firms.
- b) The DBE program: this is essentially the same program as MnDOT administers for federal projects. Out-of-state DBEs are included in the pool of potential contractors.

NOTE: Currently, OEO is unsure of whether it is able to enforce its goals on a non-Council project. State statute does not provide the right to enforce goals on such projects. OEO is working with Council legal staff to make a determination.

OEO would not charge applicants for this service.

2. Use OEO to Play an Advisory Role

In that role, OEO would continue to set goals but it would not enforce them or "fail" an applicant. While this is essentially an "encouragement" to try to meet goals, OEO would be able to provide a report to TAB on whether the applicant made a good faith effort.

3. Allow Project Sponsors to use Local Hiring Programs while one of the Above Options is used

TAB would have to determine what constitutes an adequate program.

4. Approve the Policy with no Inclusion of DBE Goals

POLICY AND PROCESS TO EXCHANGE FEDERAL FUNDS BETWEEN 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 approach TAB to request a federal funds exchange. This entails transferring federal obligation authority from one project to another project that already has federal obligation authority, allowing the former project to proceed without adherence to some federal requirements.

POLICY

Project Sponsors:

- Project sponsors must voluntarily agree to participate in the funds exchange, be it on their own or another sponsor.
- One sponsor may facilitate an exchange of by shifting federal funds from one or more of its projects to one or more of its other projects.
- One sponsor may trade federal funds from 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 federal funds exchange request must provide a resolution agreeing to be responsible for the projects, the projects’ 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.
- All transferred funds must be eligible to be used on the project they are proposed to fund.
- 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.

Projects with Federal Funding Removed:

- All TAB-selected projects must be completed with all elements, and in the time frame, shown in the original application for funding, notwithstanding a deviation approved by the TAB Scope Change Consultation and Evaluation processes. This process accounts for changes (which are products of the applicable environmental process) to the scope of project elements as portrayed 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 the application and with policy.

- All TAB-selected projects, even if federal funds have been removed, 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.
- All TAB-selected projects, even if federal funds have been removed, 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 for regional redistribution. The sponsor's resolution must state that the full funding amount will be provided to the region.

PROCESS

1. Applicant submits a federal funding exchange request. While it is encouraged, and to the sponsor's advantage to submit a request as early as possible, the deadline for requests is December 31 of the state fiscal year prior to the program year associated with the earliest-programmed project involved in the transfer. For example, an exchange involving a project programmed in fiscal year 2019 must be requested by December 31, 2017.
2. Applicant provides a proposal to Metropolitan Council and MnDOT Metro State Aid. The proposal must include the following:
 - Description and funding table showing projects giving up and absorbing the federal funds. Amount and source of funds must be shown as well.
 - Resolution from the governing board of any agencies involved with the exchange. The resolution must include:
 - Identification of any projects proposed to be involved in the exchange. Funding 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.