FIXING AMERICA'S SURFACE TRANSPORTATION (FAST) ACT

Fact Sheets

PREPARED BY: John Hoole, Division of Local Assistance
Office of Project Implementation, South
(916) 653-6220

DATE: March 14, 2016 (original January 15, 2016)

SUBJECT: At-Risk Project Pre-Agreement Authority

PROBLEM STATEMENT/BACKGROUND:

Section 1440 of the FAST Act, entitled At-Risk Project Pre-Agreement Authority states that a subrecipient can incur preliminary engineering (PE) costs for an eligible project under title 23 USC before receiving project authorization from the State. The costs must meet all applicable requirements under 23 USC at the time the costs are incurred, and the Secretary must concur that the requirements have been met.

Subrecipients that elect to use this authority assume all risk for PE costs incurred prior to authorization, and are responsible to ensure and demonstrate to the Secretary that all applicable cost eligibility conditions have been met after the authorization is received.

ALTERNATIVES:

1 – Per the FAST Act, provide mechanisms for local agencies to begin reimbursable PE work prior to obtaining a federal authorization. Use currently available options to reimburse California Transportation Commission (CTC)-Allocated funds prior to allocation.

2 – Per the FAST Act, provide mechanisms for local agencies to begin reimbursable PE work prior to getting a federal authorization AND pursue changes to State Government Code to provide additional and more flexible mechanisms to reimburse CTC-Allocated funds prior to allocation.

ADDITIONAL ISSUES AND ASSUMPTIONS:

Does anything in State Law prohibit doing this with State Funds? Will the CTC allow this "pre-allocation work" to be reimbursed later? For Allocated/Authorized projects, can the local agency start federally reimbursable work prior to CTC Allocation? Can the local agency identify different State/Federal reimbursement dates if both funds are involved? We've identified three main programs that require an individual allocation in addition to a federal authorization: Prop 1B (BOND), STIP, and ATP. There are processes in place that allow agencies to begin reimbursed work ahead of allocation, which are:

- BOND – Letter of No Prejudice (LONP)
- STIP – SB184 and AB3090 processes
- ATP – nothing available to begin reimbursed work early

The processes and requirements are outlined in State Government Code and the various Program Guidelines.

When can an agency begin reimbursable work on the PE phase of a project? Do projects have to be programmed? If so, do they have to be programmed in the current year? Per Section 1440 (c) Eligibility (2), it is assumed the project must be programmed, and if programmed, then EPSP should be available to bring the project forward at authorization. However, we are awaiting Federal Highway Administration (FHWA) clarification.

How long can an agency wait from starting work to actually requesting an authorization? In theory, it would seem the time from starting work to authorizing would be in the 3-12 month range. However, we are awaiting FHWA clarification.

Does the PE>10 "start date" remain the date the funds were authorized, rather than when work commenced? We need FHWA to clarify.

Can an agency move forward with hiring A&E Consultants, and will a pre-award audit still be performed even if the authorization has not occurred yet?

Assumption – any alternative selected will only be available to agencies that have a LOCODE and signed Master Agreement with Local Assistance.

ACTION ITEM FOR IMPLEMENTATION/RECOMMENDATIONS FOR IMPLEMENTATION:

First, FHWA will need to issue guidance and clarification. Then, it is anticipated that the California Department of Transportation (Caltrans) Division of Local Assistance will need to revise forms, databases, and interfaces to accommodate this information for requesting/tracking purposes. Our invoice review process will need to be reviewed and revised to accommodate reimbursable work prior to the authorization date, which is currently not allowed.

No state legislative action is anticipated to implement this new provision of the FAST Act under Alternative 1; however, the Government Code and Program Guidelines would need to be revised if additional CTC Allocation flexibilities are pursued under Alternative 2.

Local Assistance may convene a team to review the full impacts, which could include workload impacts, revisions to our Policy Manual and Program Guidance and related forms, and Standard Operating Procedures (SOP's).

IMPACT OF THE FAST ACT (Pros/Cons):

Pros: Encourages project delivery by allowing local agencies to begin reimbursable work prior to the authorization date.

May help reduce the number of projects reaching/approaching the federal PE>10 rule.

Allows field review and preparation of PES documents to be eligible for reimbursement (NOTE: Need to verify whether this work is eligible).

Allows sponsor to proceed with eligible work before the field review or as the RFA is being processed through Caltrans Local Assistance. This could expedite project delivery by as much as 3 to 6 months.

Could reduce the number of inactive projects, as the sponsor can now wait until there are billable expenditures ready for reimbursement before submitting the RFA.

Allows sponsors to proceed with PE work without Advance Construction Authorization (which has the same documentation requirements as an actual authorization). This could be helpful when the region/state runs out of Apportionment or OA or when FMIS is shut down at the end of the year.

Cons: Increases the risk of local agencies performing and paying for work that is ultimately deemed ineligible.

Confusion on date of reimbursable work on projects requiring both CTC Allocation and Federal Authorization.

May result in adverse findings against agencies; Local Assistance will have to collect federal funds already paid to local agencies.

Additional invoice review may be required.

Under federal requirements, sponsors are not to proceed to final design until NEPA is complete. This could be difficult to monitor if the sponsor does not submit the RFA for the PE phase until the sponsor is ready to proceed to construction.

State statute requires that CEQA be completed prior to the start of final design work. This is why state agencies such as the CTC split out the environmental (ENV/PA&ED) and final design (PS&E) phases when allocating funds. This state requirement may cause challenges when federal funds are allocated by the CTC considering that under federal programming, the ENV and PS&E phases are combined into a single Preliminary Engineering (PE) phase.

MPOs may have additional process/documentation requirements for recording and displaying the first programming date of the funds (assuming FHWA regulations/guidelines tie the effective date to the date the funds are first programmed in the federal TIP for that project).

RECOMMENDATIONS:

Work with FHWA to include the following in the regulations/guidance:

Identify a date certain upon which eligible activities may incur costs. Couple options below (which is preferred?):

1. The date federal funds are included in the TIP/FSTIP (Note: this is consistent with FTA Pre-Award authority – transit operators may incur eligible costs against FTA funds once the funds are programmed in the TIP).

2. The date the governing board responsible for discretionary programming approves the funds (such as the date the CTC approves the STIP or SHOPP or ATP etc. or Caltrans approves the state-managed local program such as the HSIP).

Work with CTC to address potential discrepancies between state and federal guidance. May require legislation to provide an effective date of a CTC allocation to be consistent with federal regulations.