



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 633

[Docket No. FTA-2009-0030]

RIN 2132-AA92

Capital Project Management

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of withdrawal of proposed rulemaking.

SUMMARY: The Federal Transit Administration is withdrawing its September 13, 2011, Notice of Proposed Rulemaking to revise the agency's project management oversight regulations, in light of the recent, fundamental changes to the statutes that authorize the discretionary and formula capital programs at 49 U.S.C. Chapter 53. Given the repeal of the Fixed Guideway Modernization program, the creation of the Core Capacity Improvement and State of Good Repair programs, and the streamlining of the New Starts and Small Starts project development process, FTA must re-examine its proposed definition of *major capital project* and its policy and procedure for risk assessment. Also, the agency must develop policy and regulatory proposals for addressing several explicit directives in the new surface transportation authorization statute, the Moving Ahead for Progress in the 21st Century Act ("MAP-21"). FTA will reinstate a rulemaking for project management oversight in the near future. Additionally,

FTA may seek to set policy on major capital projects through public notice-and-comment, and provide technical assistance through guidance.

FOR FURTHER INFORMATION CONTACT: For program matters, Carlos M. Garay at (202) 366-6471 or carlos.garay@dot.gov. For legal matters, Scott A. Biehl at (202) 366-0826 or scott.biehl@dot.gov.

SUPPLEMENTARY INFORMATION:

The NPRM on Capital Project Management and the Dear Colleague Letters on Risk Assessment: On September 13, 2011, FTA published a Notice of Proposed Rulemaking (NPRM) to transform the current regulation for project management oversight at 49 CFR Part 633 into a discrete set of managerial principles for sponsors of major capital projects. (76 FR 56363-56381). The NPRM was designed to enable FTA to more clearly identify the necessary management capacity and capability of a sponsor of a major capital project; spell out the many facets of project management that must be addressed in a project management plan; tailor the level of FTA oversight to the costs, complexities, and risks of a major capital project; set forth the means and objectives of risk assessments for major capital projects; and articulate the roles and responsibilities of FTA's project management oversight contractors.

A critical component of the NPRM was the proposed definition of *major capital project*. Under the current regulation, 49 CFR 633.5, a *major capital project* is defined in pertinent part as any project funded with any amount of discretionary New Starts funds, or any Fixed Guideway Modernization (FGM) project, of a total cost of \$100 million or more, receiving funds under the formula FGM program. In the September 2011 NPRM, FTA proposed that a *major capital project* be redefined as either of the following: Any New Starts or FGM project for

which the sponsor sought \$100 million or more under the New Starts or FGM programs, or any capital project the Federal Transit Administrator found would benefit from the FTA project management oversight program, given the size or complexity of the project, the uniqueness of the technology, the previous project management experience of the sponsor, or any other risks inherent in the project. Thus, in the NPRM, the agency suggested that the level of Federal investment in a project is a more appropriate benchmark than the total capital costs of a project, and that \$100 million in Federal grant funds is an appropriate number for that purpose. Also, FTA proposed that in his or her discretion, the Administrator could designate any capital project seeking funds under the discretionary Small Starts program as a *major capital project* subject to the 49 CFR Part 633 regulations. See generally, 76 FR 56365-56368.

Another key element of the NPRM was the proposed rule and guidance on risk assessment. Specifically, under proposed Section 633.23, FTA would have been vested with the discretion to perform or allow a project sponsor to perform a risk assessment at a level commensurate with the size, cost, or complexity of a *major capital project* at any point during project development. Also, under proposed Section 633.23, FTA would have had explicit authority to require a sponsor to develop explicit plans and tools for risk and contingency mitigation, measures for additional management capacity and capability, or financial mechanisms to accommodate the unfunded risks. In an appendix to the proposed rule FTA set forth the agency's basic methodology for conducting risk assessments, at that time. See, 76 FR 56378-56380.

Shortly after the issuance of the NPRM, on September 30, 2011, the Federal Transit Administrator and his Associate Administrators for Planning & Environment and Program Management issued *Dear Colleague* letters to the transit industry which announced a more

streamlined process for conducting risk assessments for New Starts projects.

http://www.fta.dot.gov/newsroom/12910_13883.html. In brief, the *Dear Colleague* letters announced an approach whereby the risk assessment for a New Starts project would be tailored to the unique capabilities of the project sponsor, the sponsor's experience in construction of transit infrastructure, the size and complexity of the project, and the total amount of New Starts funding requested for the project, and that, in some instances, a sponsor would be allowed to conduct its own risk assessment, in lieu of an assessment by FTA. It must be emphasized, however, that the *Dear Colleague* letters of September 30, 2011, were based on the New Starts project development process under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), the authorization statute that preceded MAP-21. Under MAP-21, the New Starts project development process is designed to be considerably quicker and less onerous for the project sponsor.

Changes to the FTA Capital Programs under MAP-21: MAP-21 took effect on October 1, 2012. Of the many changes to the FTA capital programs under MAP-21, two of the most important are the repeal of the longstanding formula program for Fixed Guideway Modernization (FGM) and the creation of the State of Good Repair (SGR) program. In one respect, the SGR program, now codified at 49 U.S.C. 5337, is the successor to the FGM program, in that the SGR program will support many of the same types of projects that were funded under the FGM program. It is clear, however, that in establishing the new SGR program under MAP-21, the Congress has raised its expectations of both FTA and the public transportation industry as compared to the previous FGM program. Specifically, through the mandate of a national Transit Asset Management ("TAM") system at 49 U.S.C. 5326, the Congress is requiring FTA to establish systematic means for transit asset management by all

operators of public transportation, for all modes of public transportation, throughout the United States. This national system of TAM will be based on a definition of the term *State of Good Repair*—to be developed through rulemaking—and performance measures for making improvements in the condition of transit agencies' facilities and equipment. Moreover, through the tiered formula of the SGR program at Section 5337, the Congress is targeting the largest amounts of Federal financial assistance to the operators of public transportation most in need of that assistance, for the express purpose of improving the condition of those operators' existing assets. In light of these fundamental changes to the principal formula program for capital assistance, FTA must consider whether, and if so, under what circumstances an SGR project should be defined as a *major capital project* subject to the oversight rules at 49 CFR Part 633.

Another change of utmost importance under MAP-21 is the establishment of the new competitive, discretionary Core Capacity Improvement (“CCI”) program, codified at 49 U.S.C. 5309(e). The single purpose of the CCI program is to provide Federal financial assistance for capital projects that will increase the capacities of existing fixed guideway systems in discrete corridors by at least ten percent—but explicitly, the statute excludes any elements of a project designed to maintain the *State of Good Repair* of the existing fixed guideway system. Here again, FTA must consider whether, and if so, under what circumstances a CCI project should be defined as a *major capital project* subject to the oversight rules at 49 CFR Part 633.

Yet another change of utmost importance is the streamlining of the New Starts project development process. Under the authorization statutes that preceded MAP-21, the New Starts process entailed the discrete, sequential phases of “alternatives analysis,” “preliminary engineering,” and final design,” prior to the construction of a project under a Full Funding Grant Agreement (FFGA). Under MAP-21, however, there are now only two sequential steps that

preceded the construction of a project under an FFGA: The phases of “project development” and “engineering.” *See*, 49 U.S.C. 5309(d)(1), (2). No longer will there be an analysis of alternatives other than the evaluation of alternatives necessary for compliance with the National Environmental Policy Act. No longer will there be a requirement that FTA approve a New Starts project for entry into project development, as there was, for example, during SAFETEA-LU, when FTA had to approve a project for entry into preliminary engineering. Under MAP-21, a project sponsor must complete all activities required to obtain a rating and evaluation against the New Starts criteria for project justification, supportive land use policy and patterns, and local financial commitment, within two years from the date the sponsor’s project enters “project development,” absent a waiver from the deadline. All of these changes to the New Starts program will affect FTA’s project management oversight, and in particular, the agency’s policy and procedure for risk assessment.

Also, under MAP-21, there are a number of explicit directives for FTA’s management of the New Starts, Small Starts, and Core Capacity Improvement programs that will affect FTA’s oversight of *major capital projects* under the rules at 49 CFR Part 633. Among them are the following:

- In accordance with 49 U.S.C. 5309(c)(3), FTA is obliged to “use an expedited technical capacity review process” for any sponsor that has “recently and successfully completed” a New Start or CCI project, provided the budget, cost, and ridership outcomes for the previous project were consistent with or better than the projections, and the sponsor demonstrates that it “continues to have the staff expertise and other resources necessary to implement” the New Start or CCI project.

- In accordance with 49 U.S.C. 5309(g)(3), “to the maximum extent practicable” FTA is obliged to use “warrants” in making a determination of project justification for a New Start or CCI project for which the Federal share will be less than \$100 million or 50 percent of the total project costs, and the sponsor has certified that its existing public transportation system is in a *State of Good Repair*.
- In accordance with 49 U.S.C. 5309(g)(4), “to the maximum extent practicable” FTA is obliged to issue Letters of Intent and enter into Early Systems Work Agreements to “expedite” a New Start or CCI project towards construction.
- In accordance with 49 U.S.C. 5309(f)(2)(F), in assessing the stability, reliability, and availability of proposed sources of local financing for a New Start or CCI project, FTA must consider “private contributions to the project, including cost-effective project delivery, management or transfer of project risks, expedited project schedule, financial partnering, and other public-private partnership strategies.”
- In accordance with 49 U.S.C. 5309(h), in rating and evaluating a Small Start project, FTA must assess “the benefits of the project as compared to the Federal assistance to be provided and the degree of local financial commitment.”
- In accordance with 49 U.S.C. 5309(i), a federally funded New Start or CCI project in a “program of interrelated projects” may advance through the New Start or CCI process provided the entire program of interrelated projects, as a whole, meets the requirements for project justification and local financial commitment; each project within the entire program of interrelated projects enters construction “within a reasonable time frame”; and the entire program of interrelated projects “is supported by an acceptable degree of local financial commitment.”

Next Steps: FTA intends to reinitiate the rulemaking proposed on September 11, 2011, at 76 FR 56363-56381, for the same purposes as stated in that NPRM. There is no change in the objective to attain stronger capital project management by project sponsors. Moreover, the agency is committed to developing more effective means of overseeing the *major capital projects* in which it invests taxpayer funds. Currently, FTA expects to issue a new Notice of Proposed Rulemaking to transform the project management oversight regulations at 49 CFR Part 633 into rules for Capital Project Management in fall 2013. In the interim, FTA will issue guidance to the public transportation industry on the use of risk assessments for major capital projects.

Additionally, over the next several months, FTA will propose a number of policies and rulemakings on the New Starts, Small Starts, Core Capacity Improvement, and State of Good Repair programs, and a rulemaking on Transit Asset Management, all of which, as noted above, have implications for the future rulemaking on Capital Project Management. The agency must carefully coordinate these various policy and regulatory initiatives, in balance with the agency's obligation to stand up the new Public Transportation Safety Program authorized at 49 U.S.C. Section 5329, which the agency's single highest priority. Accordingly, the Notice of Proposed Rulemaking to amend the regulations at 49 CFR Part 633 is hereby withdrawn.

REGULATORY IMPACT:

Since this action is a withdrawal of a proposed rulemaking it is neither a proposed nor a final rule, therefore, it is not subject to Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act, or the U.S. Department of Transportation's Regulatory Policies and Procedures (44 FR 11034; February 26, 1979).

List of Subjects in 49 CFR Part 633

Transportation, Mass transportation, Project management oversight, Major capital projects, Fixed guideway projects, Risk assessment, Project management plans.

Accordingly, the Notice of Proposed Rulemaking, Docket No. FTA-2009-0030, published in the Federal Register on September 13, 2011 (76 FR 56363) is withdrawn.

Issued in Washington, D.C. on March 8, 2013 _____.

Peter Rogoff
Administrator

[FR Doc. 2013-06082 Filed 03/14/2013 at 8:45 am; Publication Date: 03/15/2013]