



## **DEPARTMENT OF TRANSPORTATION**

### **Federal Transit Administration**

#### **49 CFR Part 650**

**[Docket No. FTA-2016-0008]**

**RIN 2132-AB27**

#### **Private Investment Project Procedures**

**AGENCY:** Federal Transit Administration, Department of Transportation

**ACTION:** Notice of proposed rulemaking (NPRM); request for comments.

**SUMMARY:** The Federal Transit Administration (FTA) is proposing new, experimental procedures to encourage increased project management flexibility, more innovation in project funding, improved efficiency, timely project implementation, and new project revenue streams. A primary goal is to address impediments to the greater use of public-private partnerships (P3s) and private investment in public transportation capital projects (Private Investment Project Procedures or PIPP). FTA anticipates using the lessons learned from these experimental procedures to develop more effective approaches to including private participation and investment in project planning, project development, finance, design, construction, maintenance, and operations.

**DATES:** Comments must be received [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Any comments filed after this deadline will be considered to the extent practicable.

**ADDRESSES:** Please identify your submission by Docket Number (FTA-2016-0008) or RIN number (2132-AB27) through one of the following methods:

- *Federal eRulemaking Portal:* Submit electronic comments and other data to <http://www.regulations.gov>.
- *U.S. Mail:* Send comments to Docket Operations, U.S. Department of Transportation, 1200 New Jersey Avenue S.E., West Building, Room W12-140, Washington, D.C., 20590-0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12-140 of the West Building, Ground Floor, at 1200 New Jersey Avenue S.E., Washington, DC, between 9:00 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations, U.S. Department of Transportation, at (202) 493-2251.
- *Instructions:* You must include the agency name (Federal Transit Administration) and Docket Number (FTA-2016-0008) for this notice or RIN (2132-AB27), at the beginning of your comments. If sent by mail, submit two copies of your comments. Due to security procedures in effect since October 2001, mail received through the U.S. Postal Service may be subject to delays. Parties submitting comments should consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed stamped postcard. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. You may review the complete U.S. Department of Transportation (DOT) Privacy Act Statement published in the **Federal Register** on April 11, 2000, at 65 FR 19477-8 or <http://DocketsInfo.dot.gov>.

- *Electronic Access and Filing:* This document and all comments received may be viewed online through the Federal eRulemaking portal at <http://www.regulations.gov>.

Electronic submission and retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 365 days a year. Please follow the instructions. An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at <https://www.federalregister.gov>.

**FOR FURTHER INFORMATION CONTACT:** For program matters, Tom Yedinak, Office of Budget and Policy, (202) 366-5137 or [Tom.Yedinak@dot.gov](mailto:Tom.Yedinak@dot.gov). For legal matters, Charla Tabb, Office of Chief Counsel, (202) 366-4011 or [charla.tabb@dot.gov](mailto:charla.tabb@dot.gov).

**SUPPLEMENTARY INFORMATION:**

Table of Contents

- I. Background
- II. Section-by-Section Analysis
- III. Regulatory Analyses and Notices

**I. Background**

**A. History**

Over the past decade, Federal legislation has evolved to encourage increased use of public-private partnerships and private investment in public transportation capital projects. Pursuant to section 3011(c) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L 109-59, the U.S. Secretary of Transportation (Secretary) established a pilot program, commonly referred to as "Penta-P," to demonstrate the advantages and disadvantages of public-private partnerships for certain new fixed guideway capital projects. 72 FR 2583-01 (January 19,

2007). SAFETEA-LU also required that the Secretary identify and examine the costs, benefits, and efficiencies of applying P3 delivery approaches to transit projects. The resulting report, entitled “Report to Congress on the Costs, Benefits, and Efficiencies of Public-Private Partnerships for Fixed Guideway Capital Projects”<sup>1</sup>, was transmitted to Congress in December 2007.

In order to facilitate increased private sector participation in project development, finance, design, construction, maintenance, and operations of transit projects, in 2008 and 2009, FTA, along with the National Council of Public-Private Partnerships, sponsored eight public workshops on P3s in transit and a one-day workshop for FTA employees. Each workshop attracted almost 100 participants and provided technical assistance to transit agencies, local officials, and consultants on legal and regulatory issues, financing, and contract matters related to P3s.

In 2009, the Government Accountability Office (GAO) released a report, “Public Transportation—Federal Project Approval Process Remains a Barrier to Greater Private Sector Role and DOT Could Enhance Efforts to Assist Project Sponsors, (GAO-10-19)”<sup>2</sup> (GAO Report), which recommended that FTA increase efforts to better equip project sponsors by developing guidance and providing technical assistance on P3s. In response to the GAO Report, FTA created a Private Sector Participation web site that provides guidance, technical support and resources to those project sponsors considering P3s.<sup>3</sup>

More recently, Section 20013(b)(1) of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21), Pub. Law 112-141 (July 6, 2012), directed FTA to identify

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<sup>1</sup> [http://www.fta.dot.gov/documents/Costs\\_Benefits\\_Efficiencies\\_of\\_Public-Private\\_Partnerships.pdf](http://www.fta.dot.gov/documents/Costs_Benefits_Efficiencies_of_Public-Private_Partnerships.pdf)

<sup>2</sup> <http://www.gao.gov/new.items/d1019.pdf>

<sup>3</sup> <https://www.transit.dot.gov/funding/funding-finance-resources/private-sector-participation/private-sector-participation-1>

impediments in chapter 53 of title 49 of the United States Code, and any regulations or practices thereunder, to the use of public-private partnerships and private investment in public transportation capital projects, and to develop and implement procedures on a project basis that address such impediments in a manner similar to the Special Experimental Project Number 15 of the Federal Highway Administration (FHWA), commonly referred to as “SEP-15”. Additionally, Section 3005(b) of the Fixing America’s Surface Transportation (FAST) Act, Pub. L. 114-94 (December 4, 2015), authorizes an expedited project delivery program for capital investment projects that requires projects be supported, at least in part, by public-private partnerships.

Moreover, project sponsors have used the Transportation Infrastructure Finance and Innovation Act (TIFIA) (23 U.S.C. 181 – 189, 601 – 609), the private activity bonds (PABs) legislation (26 U.S.C. 141 - 147) and the Railroad Rehabilitation and Improvement Financing (RRIF) program (45 U.S.C. 821 – 823) to help finance public transit capital projects. TIFIA provides Federal credit assistance in the form of direct loans, loan guarantees, and standby lines of credit. The PABs legislation authorized the Department of Transportation to offer PABs allocations to private developers and operators, providing them access to tax-exempt interest rates and potentially more favorable interest rates. The RRIF program provides Federal credit assistance in the form of direct loans and loan guarantees.

FTA also has issued guidance to facilitate private sector participation, such as Circular 7050.1, “Federal Transit Administration Guidance on Joint Development,” which provides guidance on how transit agencies may use FTA funds or FTA-funded real property for joint development with the private sector.

Section 9001 of the FAST Act established the National Surface Transportation and Innovative Finance Bureau (referred to as the Build America Bureau), in the Department which aims to drive transportation infrastructure development projects in the United States by streamlining credit opportunities and grants more quickly and transparently, while providing technical assistance and encouraging innovative best practices in project planning, financing, delivery, and monitoring. The Bureau works with project sponsors to educate them on how they can best utilize innovative project delivery approaches, such as P3s, and offers project-specific technical assistance.

#### **B. Perceived Barriers**

Pursuant to Section 20013(b)(1) of MAP-21, FTA has undertaken research on potential impediments to the greater use of public-private partnerships and private investment in public transportation capital projects. FTA has reviewed a number of Federal agency reports on the use of private investment in public infrastructure projects and has reviewed statements from the private sector, financial institutions, transit agencies, other transit industry organizations and the public about perceived barriers that exist industry-wide and in FTA's policies. FTA also conducted an online dialogue from October 2014 to January 2015 with grantees and stakeholders to help inform this rulemaking process.

In general, commenters suggested that FTA grant processes should be further streamlined in order to encourage greater use of public-private partnerships and private investment in public transportation capital projects. In addition, some commenters suggested that the timing of grant awards can discourage lender interest because it is perceived to be incompatible with the timing of private financing schedules, public

agency procurement schedules and DOT financing programs, such as TIFIA, RRIF and PABs. Commenters recommended that the level of Federal oversight could be more flexible and dependent upon the experience of the project sponsor, terms of agreements, and the existence of concurrent, independent oversight, such as state or regulatory agencies, and type of financing. Commenters also suggested that FTA rely more heavily upon approvals of third parties with jurisdiction over a project, rather than replicate certain reviews, and questioned whether any necessary FTA reviews could be expedited by having them performed by an independent third party selected by FTA, but paid for by the project sponsor. Some comments were unrelated to the subject matter of the online dialogue or provided only opinions as to the benefits or disadvantages of private investment in public projects, without offering any suggestions that FTA could apply to draft this proposed rule.

This proposed rule aims to address the comments received during the online dialogue as well as other potential impediments identified in FTA's research. Under the proposed rule, recipients funding a public transportation capital project subject to 49 U.S.C. chapter 53 with FTA, RRIF, TIFIA or other Federal financial assistance could request a modification or waiver, in whole or in part, of a specific FTA regulation, practice, procedure or guidance document (including a circular) that may be an impediment to the use of P3s or private investment in that project. For example, an applicant could propose that FTA rely upon approvals of third parties with jurisdiction over an eligible project, rather than replicate certain FTA oversight reviews.

### **C. Purpose of Regulatory Action**

Section 20013(b)(1) of MAP-21 required FTA to identify any provisions of 49 U.S.C. chapter 53, and any regulations or practices thereunder, that impede greater use of P3s and private investment. FTA must develop and implement on a project basis procedures and approaches that address such impediments in a manner similar to FHWA's SEP-15 and protect the public interest and any public investment in public transportation capital projects that involve P3s or private investment. Section 20013(b)(5) of MAP-21 requires the issuance of a rule to carry out the procedures and approaches developed under section 20013(b)(1).

In 2004 FHWA initiated SEP-15, pursuant to authority granted the Secretary by 23 U.S.C. 502(b), to create a procedure to waive the requirements of title 23 of the United States Code and implementing regulations on a case-by-case basis in order to encourage tests and experimentation in the entire project development process, specifically aimed at attracting private investment, leading to increased project management flexibility, more innovation, improved efficiency, timely project implementation, and new revenue streams. 69 FR 59983 (October 6, 2004). SEP-15 permits FHWA to experiment in four major areas of project delivery – contracting, right-of-way acquisition, project finance, and compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.*, and other environmental requirements. SEP-15 enables FHWA to actively explore changes in the way it approaches the oversight and delivery of highway projects to further the Administration's goals of reducing congestion and preserving transportation infrastructure. A key feature of SEP-15 is that it allows FHWA to identify current FHWA laws, regulations, and practices that inhibit greater use of P3s and private



investment in transportation improvements and allows FHWA to develop procedures and approaches that address these impediments.

FHWA currently administers several projects under SEP-15, including the two examples provided below.<sup>4</sup>

#### FHWA SEP-15 Projects

1. The Pennsylvania Department of Transportation (PennDOT) is replacing 558 bridges throughout the State as a single P3 project. At PennDOT's request, FHWA allowed the private partner in the P3 to be responsible for preparing, in coordination with the overall replacement schedule, the NEPA supporting documentation and draft environmental decision documents for each bridge. In addition, the private partner was allowed to select the consultant that prepares the NEPA document and retain exclusive control over the consultant. These are deviations from FHWA design-build regulations codified at 23 CFR part 636. FHWA's acceptance of the PennDOT proposal was conditional and contingent on the inclusion of specific safeguards to protect the integrity of the environmental decision-making process. FHWA and PennDOT remain responsible for issuing the final environmental determinations under NEPA, and FHWA and PennDOT remain responsible for the scope and contents of the NEPA documents.

2. The Idaho Transportation Department (ITD) recently completed a ten-year capital program that added 120 miles to Idaho's highway system, including many new or improved bridges and interchanges. The program was funded primarily through a series of grant anticipation bonds, or GARVEEs, and delivered by a private sector program manager. FHWA allowed ITD to initiate final design and acquire right of way (by voluntary sale only)

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<sup>4</sup> [http://www.fhwa.dot.gov/ipd/p3/tools\\_programs/sep15.aspx](http://www.fhwa.dot.gov/ipd/p3/tools_programs/sep15.aspx)

prior to conclusion of the NEPA process, through deviations from multiple provisions of 23 CFR parts 710 and 771. FHWA's acceptance of these waivers required ITD to put in place specific safeguards to, for example, avoid the appearance of undue influence on property owners and perceptions of unfavorable treatment for those properties not acquired. ITD was also required to show that the acquisition of properties did not influence the NEPA decisions.

Having concluded its research, and pursuant to Section 20013(b)(5) of MAP-21, FTA is proposing the PIPP, which would be similar to FHWA's SEP-15, and would help address impediments to the greater use of public-private partnerships and private investment in public transportation capital projects identified by FTA. The PIPP are intended to encourage project sponsors to seek modifications of Federal requirements that will accelerate the project development process, attract private investment and lead to increased project management flexibility, more innovation, improved efficiency, and/or new revenue streams.

A key goal of the PIPP would be to identify provisions of current FTA regulations, practices, procedures, and guidance documents that may be impediments to the greater use of public-private partnerships and private investment in public transportation capital projects, and, where possible, modify such requirements while ensuring protection of the public interest and any public investment in the project. In accordance with Section 20013(b)(6) of MAP-21, the PIPP could not be used to waive any requirement under NEPA, 49 U.S.C. chapter 53 (including 49 U.S.C. 5333), or any other provision of Federal statute. Thus, the PIPP would allow for innovations in project delivery while maintaining FTA's stewardship responsibilities. The lessons learned from

projects approved under the PIPP would aid FTA in developing more effective approaches to project planning, project development, finance, design, construction, maintenance, and operations.

As with the SEP-15 program, a recipient could apply to FTA to request modification or waiver of specific FTA requirements that the recipient contends make a project unattractive from the P3 or private investment standpoint. The FTA Administrator would have discretion to grant a modification or waiver of a requirement under certain circumstances. Applications would be required to include specific information in order to be considered for the PIPP; FTA is considering creating a standard format for applications that would assist applicants in ensuring the completeness of their applications, and allow for electronic submission of applications via the FTA web site. FTA recognizes that PIPP project proposals could include multi-modal components. FTA would coordinate the review of multi-modal project proposals with the appropriate DOT modal administration(s). In addition, if PIPP project proposals anticipate financing under TIFIA, RRIF or PABs, FTA would coordinate with the Bureau.

## **II. Summary of Provisions**

The proposed rule would add a new part 650, “Private Investment Project Procedures,” to title 49 of the Code of Federal Regulations. The rule proposes to implement the statutory requirements of section 20013(b)(1) of MAP-21. The rule would be composed of four subparts.

Subpart A, sections 650.1 through 650.5, would contain the definitive terms of the rule: the purpose, applicability and defined terms.

Subpart B, section 650.11, would describe who may submit an application, the type of project eligible for consideration, and factors that the applicant must demonstrate in order for FTA to consider waiving or modifying its requirements. The proposed section 650.13 would provide limitations on FTA's ability to waive or modify certain requirements despite implementation of the proposed rule.

Subpart C, section 650.21 would require successful applicants to submit a report following completion of the project that would analyze the impact of the experimental procedures on project delivery.

Subpart D, section 650.31, would describe the application process, including the minimum requirements for applications. One of the minimum requirements is evidence of committed financing for the project, including from private partners or investors in a proposed project. FTA seeks comment on whether requiring evidence of committed financing would be premature at the time of application.

### **III. Regulatory Analyses and Notices**

#### **Executive Order 12866 and 13563; USDOT Regulatory Policies and Procedures**

Executive Orders 12866 and 13563 direct Federal agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits—including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Also, Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The proposed rule would encourage tests and experimentation in the project development process and is specifically aimed at attracting public-private partnerships and private investment.

Public-private partnerships of capital projects are rare in the U.S. transit industry, although they are common in other countries. The proposed rule would provide an avenue to address existing impediments to P3 projects with the aim of increasing their use, but it is unlikely, on its own, to significantly increase the level of P3 activity in the U.S. transit industry.

FTA has determined this rulemaking is a non-significant regulatory action within the meaning of Executive Order 12866 and is non-significant within the meaning of the U.S. Department of Transportation's regulatory policies and procedures. FTA has examined the potential economic impacts of this rulemaking and has determined that this rulemaking is not economically significant because it will not result in an effect on the economy of \$100 million or more. The proposals set forth in today's rule will not adversely affect the economy, interfere with actions taken or planned by other agencies, or generally alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

### **Executive Order 13771**

This proposed rule is expected to be an EO 13771 deregulatory action because FTA believes it would reduce the cost of complying with FTA's requirements. However, FTA is unable at this time to quantify the cost savings due to the lack of information about 1) the types of waivers that would be requested, 2) the number of waivers that would be requested, and 3) the difference in cost between complying with FTA's existing requirements and complying with the requirements of a waiver and this proposed rule. FTA requests public comments on estimating the cost savings of this proposed rule.

### **Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354; 5 U.S.C. 601-612), FTA has evaluated the likely effects of the proposals set forth in this NPRM on small entities, and has determined that the NPRM would not have a significant economic impact on a substantial number of small entities.

#### **Unfunded Mandates Reform Act of 1995**

This proposed rulemaking would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; 109 Stat. 48).

#### **Executive Order 13132 (Federalism)**

This proposed rulemaking has been analyzed in accordance with the principles and criteria established by Executive Order 13132 (Aug. 4, 1999). FTA has determined that the proposed action would not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. FTA has also determined that this proposed action would not preempt any State law or State regulation or affect the States' abilities to discharge traditional State governmental functions. Moreover, consistent with Executive Order 13132, FTA has examined the direct compliance costs of the NPRM on State and local governments and has determined that the collection and analysis of the data are eligible for Federal funding under FTA's grant programs.

#### **Executive Order 12372 (Intergovernmental Review)**

The regulations effectuating Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this proposed rulemaking.

#### **Paperwork Reduction Act (PRA)**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for

each collection of information they conduct, sponsor, or require through regulations. FHWA has received an average of less than one application per year for the SEP-15 program since its inception. Therefore, FTA believes that this proposed rule will not generate collection of information requirements that impact ten or more applicants. FTA seeks comment on whether FTA should anticipate ten or more applications to the PIPP on an annual basis.

### **National Environmental Policy Act**

NEPA requires Federal agencies to analyze the potential environmental effects of their proposed actions in the form of a categorical exclusion, environmental assessment, or environmental impact statement. This proposed rulemaking is categorically excluded under FTA's environmental impact procedure at 23 CFR 771.118(c)(4), pertaining to planning and administrative activities that do not involve or lead directly to construction, such as the promulgation of rules, regulations, and directives. FTA has determined that no unusual circumstances exist in this instance, and that a categorical exclusion is appropriate for this rulemaking.

### **Executive Order 12630 (Taking of Private Property)**

This rulemaking will not affect a taking of private property or otherwise have taking implications under Executive Order 12630 (March 15, 1998), Governmental Actions and Interference with Constitutionally Protected Property Rights.

### **Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations)**

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a) (77 FR 27534) require DOT agencies to achieve environmental justice (EJ) as part of their

mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies and activities on minority and/or low-income populations. The DOT Order requires DOT agencies to address compliance with the Executive Order and the DOT Order in all rulemaking activities. In addition, on July 17, 2014, FTA issued a circular to update its EJ Policy Guidance for Federal Transit Recipients ([www.fta.dot.gov/legislation\\_law/12349\\_14740.html](http://www.fta.dot.gov/legislation_law/12349_14740.html)), which addresses administration of the Executive Order and DOT Order.

FTA has evaluated this rule under the Executive Order, the DOT Order, and the FTA Circular and has determined that this rulemaking will not cause disproportionately high and adverse human health and environmental effects on minority or low income populations.

**Executive Order 12988 (Civil Justice Reform)**

This action meets the applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988 (February 5, 1996), Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

**Executive Order 13045 (Protection of Children)**

FTA has analyzed this proposed rulemaking under Executive Order 13045 (April 21, 1997), Protection of Children from Environmental Health Risks and Safety Risks. FTA certifies that this proposed rule will not cause an environmental risk to health or safety that may disproportionately affect children.

**Executive Order 13175 (Tribal Consultation)**



FTA has analyzed this action under Executive Order 13175 (November 6, 2000), and believes that it will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal laws. Therefore, a tribal summary impact statement is not required.

#### **Executive Order 13211 (Energy Effects)**

FTA has analyzed this proposed rulemaking under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). FTA has determined that this action is not a significant energy action under the Executive Order, given that the action is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not requirement.

#### **Privacy Act**

Anyone is able to search the electronic form of all comments received into any of FTA's dockets by the name of the individual submitting the comment or signing the comment if submitted on behalf of an association, business, labor union, or any other entity. You may review USDOT's complete Privacy Act Statement published in the *Federal Register* on April 11, 2000, at 65 FR 19477-8.

#### **Statutory/Legal Authority for This Rulemaking**

This rulemaking is issued under the authority of section 20013(b)(1) of MAP-21, which requires the Secretary to issue rules to carry out procedures and approaches for alleviating impediments to P3s or private investment in public transportation.

## **Regulation Identifier Number**

A Regulation Identifier Number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN set forth in the heading of this document can be used to cross-reference this action with the Unified Agenda.

## **List of Subjects**

### **49 CFR Part 650**

Grant programs – transportation, Mass transportation.

For the reasons set forth in the preamble, and under the authority of Section 20013(b)(1) of The Moving Ahead for Progress in the 21st Century Act (Public Law 112-141) and the delegations of authority at 49 CFR 1.91, FTA hereby proposes to amend Chapter VI of Title 49, Code of Federal Regulations by adding Part 650 to read as follows:

## **PART 650—PRIVATE INVESTMENT PROJECT PROCEDURES**

### **Sec.**

#### **Subpart A—General Provisions**

650.1 Purpose.

650.3 Applicability.

650.5 Definitions.

#### **Subpart B—Private Investment Project Procedures**

650.11 Private investment project procedures.

650.13 Limitation.

### **Subpart C—Reporting**

650.21 Lessons learned report.

### **Subpart D—Application Process**

650.31 Application requirements.

Authority: Sec. 20013(b)(5), Pub. L. 112-141, 126 Stat 405; 49 CFR 1.91.

### **Subpart A—General Provisions**

#### **§ 650.1 Purpose.**

This part establishes private investment project procedures that seek to identify and address Federal Transit Administration requirements that are impediments to the greater use of public-private partnerships and private investment in public transportation capital projects, while protecting the public interest and any public investment in such projects.

#### **§ 650.3 Applicability.**

This part applies to any recipient subject to 49 U.S.C. chapter 53 that funds a public transportation capital project with Federal financial assistance under 49 U.S.C. chapter 53, the Transportation Infrastructure Finance and Innovation Act (TIFIA) (23 U.S.C. 181 – 189, 601 – 609), the Railroad Rehabilitation and Improvement Financing (RRIF) program (45 U.S.C. 821 – 823), or with any other Federal financial assistance.

#### **§ 650.5 Definitions.**

All terms defined in 49 U.S.C. chapter 53 are applicable to this part. The following definitions also apply to this part:

*Administrator* means the Administrator of the Federal Transit Administration.

*Application* means the formal documentation of an applicant's request to modify FTA requirements for an eligible project.

*Eligible project* means any surface transportation capital project that is subject to 49 U.S.C. chapter 53 and that will be implemented as a public-private partnership, a joint development, or with other private sector investment.

*FTA* means the Federal Transit Administration.

*FTA requirements* means, for purposes of this part, existing FTA regulations and mandatory provisions of practices, procedures or guidance documents, including circulars.

*Joint development* has the meaning ascribed to it in FTA Circular 7050.1 "Federal Transit Administration Guidance on Joint Development" and, for purposes of this part, includes private sector contributions, whether in the form of cash investment, capital construction contributed at the private sector's cost or other contribution determined by the Administrator to qualify.

*Other private sector investment* means a financial or capital contribution to an eligible project from a private sector investor that is not provided through a public-private partnership or joint development.

*Private investment project procedures* means the procedures by which applicants may propose, and the Administrator may agree, subject to the requirements of this part, to modify or waive existing FTA requirements for an eligible project.

*Private sector investor* means the private sector entity that proposes to contribute funding to an eligible project.

*Public-private partnership (P3)* means a contractual agreement formed between a public agency and a private sector entity that is characterized by private sector investment and risk-sharing in the delivery, financing and operation of a project.

*Recipient* means an entity that proposes to receive Federal financial assistance for an eligible project under 49 U.S.C. chapter 53, RRIF, TIFIA or other Federal financial assistance program.

## **Subpart B—Private Investment Project Procedures**

### **§ 650.11 Private investment project procedures.**

(a) A recipient may, subject to the requirements of this part, submit applications to modify or waive existing FTA requirements for an eligible project. For projects with multiple recipients, recipients may, but are not required to, submit an application for a project jointly; however, only one application per project may be submitted. All applications shall comply with the requirements of § 650.31.

(b) Subject to § 650.13, the Administrator may modify or waive FTA requirements if the Administrator determines that the recipient has demonstrated that-

(1) The FTA requirement proposed for modification discourages the use of a public-private partnership, a joint development, or other private sector investment in a Federally assisted public transportation capital project,

(2) The proposed modification or waiver of the FTA requirements is likely to have the effect of encouraging a public-private partnership, a joint development, or other private sector investment in a Federally-assisted public transportation capital project,

(3) The amount of private sector participation or risk transfer proposed is sufficient to warrant modification or waiver of FTA requirements, and

(4) Modification or waiver of the FTA requirements can be accomplished while protecting the public interest and any public investment in the proposed Federally assisted public transportation capital project.

**§ 650.13      Limitation.**

(a) Nothing in this part may be construed to allow the Administrator to modify or waive any requirement under-

(1) 49 U.S.C. § 5333;

(2) The National Environmental Policy Act of 1969 (42 U.S.C. 4321, *et seq.*) or

(3) Any other provision of Federal statute.

(b) The Administrator's consideration of an application under this part does not commit Federal-aid funding for the project.

**Subpart C—Reporting**

**§ 650.21      Lessons learned report.**

No later than one year after completion of a project for which the Administrator has modified or waived any FTA requirement pursuant to this part, the recipient shall submit to FTA a report that evaluates the effect of the modification or waiver of Federal requirements on the delivery of the project. The report shall describe the modification or waiver applied to the project; evaluate the success or failure of the modification or waiver; evaluate the extent to which the modification or waiver addressed impediments to greater use of public-private partnerships and private investment in public transportation capital projects; and may include any recommended statutory, regulatory or other

changes with an explanation of how the changes would encourage greater use of public-private partnerships and private investment in public transportation capital projects.

## **Subpart D—Applications**

### **§ 650.31 Application process.**

(a) Applications must be submitted to the FTA Private Sector Liaison at the Federal Transit Administration, 1200 New Jersey Avenue S.E., Washington, D.C. 20590.

(b) To be considered, an application submitted under this part must-

(1) Describe the proposed project with respect to anticipated scope, cost, schedule, and anticipated source and amount of Federal financial assistance,

(2) Identify whether the project is to be delivered as a public-private partnership, as a joint development or with other private sector investment,

(3) Describe in detail the role of the private sector investor, if any, in delivering the project,

(4) Identify the specific FTA requirement that the recipient requests to have modified or waived and a proposal as to how a requirement should be modified,

(5) Provide a justification for the modification or waiver, including an explanation of how the FTA requirement presents an impediment to a public-private partnership, joint development, or other private sector investment,

(6) Explain how the public interest and public investment in the project will be protected and how FTA can ensure the appropriate level of public oversight and control, as determined by the Administrator, is undertaken if the modification or waiver is allowed,

(7) Provide other recipients' concurrence with submission of the application and waiver of the right to submit a separate application for the same project, where a project has more than one recipient at the time of application,

(8) Provide a financial plan identifying sources and uses of funds committed to the project, and

(9) Explain the expected benefits that the modification or waiver of FTA requirements would provide to address impediments to the greater use of public-private partnerships and private investment in the project.

(c) The Administrator shall notify the recipient in writing if the application fails to meet the requirements of § 650.31(b). If the recipient does not supplement an incomplete application within thirty days of the date of the Administrator's notification, the application will be considered withdrawn without prejudice. The Administrator will not consider an application until the application is complete. The Administrator reserves the right to request additional information beyond the requirements in 650.31(b) upon determining that more information is needed to evaluate an application.



(d) For applications that have been deemed complete, the Administrator will notify the recipient in writing as to whether the request for modification or waiver is approved or denied. Any approval may be given in whole or in part and may be conditioned or contingent upon the recipient satisfying the conditions identified in the approval.

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Matthew J. Welbes

Executive Director

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