



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**[FHWA Docket No. FHWA-2017-0007]**

**Fixing America's Surface Transportation (FAST) Act; Solicitation for Candidate Projects in the Interstate System Reconstruction and Rehabilitation Pilot Program (ISRRPP)**

**AGENCY:** Federal Highway Administration (FHWA), Department of Transportation (DOT).

**ACTION:** Notice; solicitation for applications.

**SUMMARY:** The FHWA invites State transportation departments to submit applications for candidate projects in the Interstate System Reconstruction and Rehabilitation Pilot Program (ISRRPP), authorized in the Transportation Equity Act for the 21<sup>st</sup> Century and amended by the Fixing America's Surface Transportation (FAST) Act. Under the ISRRPP, FHWA may permit up to three States to collect tolls on a facility on the Interstate System for the purpose of reconstructing or rehabilitating Interstate highway corridors that could not otherwise be adequately maintained or functionally improved without the collection of tolls. This notice describes general program provisions, eligibility and selection criteria, and the application submission and evaluation process.

**DATES:** Applications are due to FHWA Division Offices by **February 20, 2018**. The FHWA will review these submissions and award up to three provisional approvals to States that will be expected to fully satisfy the ISRRPP criteria within 3 years. Should

FHWA award fewer than three provisional approvals, it will re-solicit for applications at a future date.

The FHWA will conduct an information session regarding the ISRRPP in the form of a Webinar on **November 13, 2017** at 2:00 p.m., e.t. For more information, please visit:

[https://www.fhwa.dot.gov/ipd/revenue/road\\_pricing/tolling\\_pricing/interstate\\_rr.aspx](https://www.fhwa.dot.gov/ipd/revenue/road_pricing/tolling_pricing/interstate_rr.aspx).

**FOR FURTHER INFORMATION CONTACT:** For questions about the pilot program: Ms. Cynthia Essenmacher, Center for Innovative Finance Support, Office of Innovative Program Delivery, Federal Highway Administration, 315 West Allegan Street, Room 201, Lansing, MI 48933, (517) 702-1856. For legal questions: Mr. Steven Rochlis, Office of the Chief Counsel, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366-1395. Office hours are from 8:00 a.m. to 4:30 p.m. E.T., Monday through Friday, except for Federal holidays.

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**A. Program Description**

## 1. Tolling Authority under the Interstate System Reconstruction and Rehabilitation Pilot Program (ISRRPP)

The FAST Act section 1411(c) amends the ISRRPP authorized under section 1216(b) of the Transportation Equity Act for the 21st Century (TEA-21). The ISRRPP allows a State to collect tolls on a facility on the Interstate System in order to reconstruct or rehabilitate an Interstate highway corridor that could not otherwise be adequately maintained or functionally improved without the collection of tolls. Up to three facilities may participate in the ISRRPP, and each must be geographically located in a different State.

Since the ISRRPP's establishment in 1998, several States have requested and received what FHWA has termed "provisional approval" of pilot projects, also referred to as the reservation of a "program slot." The purpose of this step has been to enable States to invest the considerable resources needed to fully satisfy the program criteria, which are described below, without fear of being superseded by a subsequent applicant. To date, however, no State has fully satisfied the ISRRPP program criteria.

## 2. Other Interstate Tolling Authority

The ISRRPP is not the only authority available to States to toll facilities on the Interstate System. Today, the 46,730-mile Interstate System includes approximately 2,900 miles of toll roads, most built as turnpikes and incorporated into the system in 1957. Current Federal law provides several options for States to toll Interstate facilities. The authorities in 23 United States Code (U.S.C.) 129(a)(1) now allow for the initial construction of an Interstate toll facility; the conversion of an Interstate high occupancy

vehicle (HOV) lane to a toll facility; the expansion of an Interstate highway and tolling of the new capacity as long as the current number of toll-free non-HOV lanes is maintained; and the reconstruction or replacement of a toll-free Interstate System bridge or tunnel and its conversion to a toll facility.

Additional authorities are provided under 23 U.S.C. 166(c), which allows public agencies to permit toll-paying vehicles that do not meet minimum occupancy standards to use high-occupancy vehicle (HOV) lanes. Such lanes are commonly referred to as high occupancy toll (HOT) lanes. Finally, the Value Pricing Pilot Program (VPPP), initially authorized in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA, Pub. L. 102-240) as the Congestion Pricing Pilot Program and subsequently amended under other laws, encourages implementation and evaluation of value pricing pilot projects to manage congestion through tolling and other pricing mechanisms on facilities both on and off the Interstate System. All these current tolling authorities are separate and distinct from the ISRRPP.

### 3. FAST Act Amendments to the ISRRPP

The FAST Act amendments to the ISRRPP create several changes. First, acknowledging the key role that State legislative authority has in implementing the ISRRPP, the FAST Act adds the specific selection criterion that “a State has the authority required for the project to proceed.” This addresses a common challenge facing those States that have held provisional approvals, i.e., securing legal authority from their State legislatures to collect tolls on a currently toll-free Interstate highway.

Second, the FAST Act specifies timeframes under which States with provisional approvals must complete the program's requirements. Any State receiving a provisional approval as a result of this solicitation will have 3 years from the date of the approval to fully satisfy the program criteria, complete environmental review under NEPA, and execute a toll agreement with FHWA. The FAST Act allows for a 1-year extension of the 3-year provisional approval if the State demonstrates material progress toward implementation of its pilot project.

Third, the FAST Act gave the States holding provisional approvals at the time the FAST Act was enacted 1 year to satisfy the program criteria or request an extension for an additional year. On the date of enactment, December 4, 2015, three States – Missouri, North Carolina and Virginia – held ISRRPP provisional approvals. Since then, all three have relinquished their program slots.

## **B. Program Slots**

In announcing this new ISRRPP solicitation – the first open call for pilot projects since 1998 – FHWA seeks applications from States for candidate projects under the program.

Based on the program's experience, FHWA believes it unlikely that any State would invest the considerable effort to develop an application that fully satisfies the program criteria without assurance that its efforts would not be superseded by a competing applicant. Conversely, FHWA recognizes that provisional approval and the reservation of a program slot – while allowing a State to work in earnest to meet the program's environmental, financial, public support and operational requirements – also

inhibits other States from pursuing similar projects. Therefore, FHWA will review each candidate project thoroughly before making any commitment of provisional approval.

As provided in section 1411(c) of the FAST Act, FHWA may grant provisional approval to up to three projects that will fully implement the ISRRPP (reconstruct or rehabilitate an Interstate segment and convert it to a toll facility) based on an assessment that eligibility and selection criteria can be met. At the present time, all three program slots are available.

This solicitation does not offer any Federal funds for these projects. Formula Federal-aid highway funds may be used toward a candidate project, subject to the eligibility requirements for these funds. In addition, a candidate project may qualify for credit assistance under 23 U.S.C. 601-609, the DOT's TIFIA credit program.

While section 1216(b)(6) of TEA-21 specifically prohibited the use of Interstate Maintenance (IM) funds on the Interstate facility covered by an ISRRPP project during the period tolls are collected, the IM program has since been discontinued. Given the expansion of tolling authority under 23 U.S.C. 129, the restriction on use of IM funds is not applied to the use of eligible funding sources, including the National Highway Performance Program.

### **C. Eligibility Information**

To be selected for provisional approval in the ISRRPP, an applicant must be a State transportation department (State DOT) and the project must be a facility on the Interstate System.

#### **1. Interstate Facility**

A facility on the Interstate System is considered to be a route on the Dwight D. Eisenhower National System of Interstate and Defense Highways as described in 23 U.S.C. 103(c). This is the originally designated Interstate System and includes those Interstate additions under former 23 U.S.C. 139(a).

Each State may propose only a single Interstate facility as its candidate project, and each facility selected by FHWA must be in a different State.

Note that the existing statute in 23 U.S.C. 129(a)(1)(E) already allows for reconstruction or replacement of a toll-free Interstate bridge or tunnel and its conversion to a toll facility. For the purposes of the ISRRPP, the scope of the candidate project must include reconstruction or rehabilitation throughout the Interstate facility (not solely on bridges or tunnels), where estimated improvement costs exceed available funding sources and work cannot be advanced without the collection of tolls.

## 2. Toll Revenue Uses

The ISRRPP's conditions on toll revenue uses reflect the intent that tolls are collected to reconstruct or rehabilitate an Interstate facility, not to pursue other projects. The State must execute an agreement with FHWA specifying that toll revenues received from operation of the facility will be used in accordance with the requirements set forth in section 1216(b)(5) of TEA-21. This section requires that all toll revenues be used only for (1) debt service, (2) reasonable return on investment of any private person financing the project, and (3) any costs necessary for the improvement of and the proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration and rehabilitation of the toll facility. It is important that applicants understand that these

conditions are more restrictive than those that apply to projects authorized under 23 U.S.C. 129 or 23 U.S.C. 166.

Additionally, the toll agreement must include a provision that the State will conduct regular (e.g., annual) audits to ensure compliance with the provisions regarding use of toll revenues, and the results of these audits will be transmitted to FHWA.

The FHWA is concerned that the initiation of new toll collection should not occur until it is evident to the traveling public that tolls will result in investment on the facility. Accordingly, the earliest that tolls may be imposed on an ISRRPP facility is the date of award of a contract for the physical reconstruction or rehabilitation of a significant portion of the facility. In the case of a design-build contract or public-private partnership agreement, this would occur when a notice to proceed for the physical construction has been issued or when the design-builder otherwise becomes contractually obligated to accomplish the physical construction activities of the project.

### 3. Federal-aid Requirements

Regardless of whether Federal-aid funds are to be used in the reconstruction or rehabilitation activities, each ISRRPP project must satisfy the applicable Federal laws, rules and regulations set forth in title 23 U.S.C. and title 23 Code of Federal Regulations.

A State receiving provisional approval must complete the environmental review and permitting process under the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321 et seq.) for the candidate project before it can receive final approval. The NEPA analysis must take into account not only the impacts of the proposed

reconstruction or rehabilitation activities but also consider impacts associated with converting the toll-free facility to a toll facility.

#### **D. Submission Information**

A State that seeks to participate in the pilot program must submit an application that addresses the program's statutory eligibility and selection criteria as described below.

##### **1. Address**

A State DOT must submit the application to its respective FHWA Division Office. Subsequent application tasks will also be coordinated through the Division Office.

##### **2. Content and Form of Application**

Although the State DOT may determine the appropriate form, the application package is limited to no more than 25 pages. The FHWA recommends that the project narrative be prepared with standard formatting preferences (i.e., a single-spaced document, using a standard 12-point font such as Times New Roman, with 1-inch margins). The project narrative may not exceed 25 pages in length, excluding cover pages and table of contents. The only substantive portions that may exceed the 25-page limit are supporting documents to support assertions or conclusions made in the 25-page project narrative. If necessary, FHWA may request supplemental or clarifying information from the State.

The application should include information required for FHWA to assess each of the criteria specified in section E (Review Information). The State should demonstrate the responsiveness of a project to any pertinent selection criteria with the most relevant

information it can provide, regardless of whether such information has been specifically requested, or identified, in this notice. The application should describe all critical project milestones and the State's current progress toward achieving them.

The FHWA recommends that the application adhere to the following basic outline and the project narrative include a table of contents, maps, and graphics as appropriate to inform the review. The specific statutory references from section 1216 of TEA-21 (as amended by section 1411 of the FAST Act) are noted in brackets after each item:

- i. *Project Description:* An identification of the facility on the Interstate System proposed to become a toll facility, including the age, condition, and intensity of use of the facility [1216(b)(3)(A)].
- ii. *MPO Consultation:* In the case of a facility that affects a metropolitan area, a description of the State's current consultations regarding the candidate project with that area's metropolitan planning organization (MPO) established under 23 U.S.C. 134. Full satisfaction of this eligibility criteria requires an assurance that the MPO for the area has been consulted concerning the placement and amount of tolls on the facility [1216(b)(3)(B)].
- iii. *Financial Analysis:* An analysis demonstrating that the facility could not be maintained or improved to meet current or future needs from the State's Federal-aid apportionments and allocations and from revenues for highways from any other source without toll revenues [1216(b)(3)(C)].
- iv. *Facility Management Plan:*

- a) A plan for implementing tolls on the facility [1216(b)(3)(D)(i)]. Note that an approved plan must take into account the interests of local, regional, and interstate travelers [1216(b)(4)(C)].
- b) A proposed schedule and finance plan for the reconstruction or rehabilitation of the facility using toll revenues [1216(b)(3)(D)(ii)]. The plan should give extensive focus to the development phase requirements, including among its milestones the completion of NEPA, the acquisition of tolling authority from the legislature, and the issuance of any debt backed by toll revenues.
- c) A description of the public transportation agency that will be responsible for implementation and administration of the candidate project [1216(b)(3)(D)(iii)].
- d) A description of whether consideration will be given to privatizing the maintenance and operational aspects of the facility, while retaining legal and administrative control of the portion of the Interstate route [1216(b)(3)(D)(iv)]. Note that the ISRRPP selection criteria require the State to give preference to the use of a public toll agency with demonstrated capability to build, operate and maintain a toll expressway system meeting criteria for the Interstate System [1216(b)(4)(E)].
- e) A statement as to whether the State currently has the authority required for the toll project to proceed and, if not, a plan and timetable for when such authority will be obtained [1216(b)(4)(F)].

### 3. Submission Date

A State DOT must submit the application to its FHWA Division Office by local close of business on **February 20, 2018**. States are strongly encouraged to work closely with their respective Division Offices throughout the preparation of the application.

## **E. Review Information**

### 1. Review and Selection Process

The FHWA will perform an initial eligibility review of an application received by the submission date. Based on its knowledge of the proposed project and the State's highway program, FHWA will evaluate the project's technical and financial feasibility, risks, planning approvals, NEPA and other environmental reviews/approvals, tolling authority, agreements to operate and maintain a toll expressway system, and other implementation agreements. The FHWA staff will review and compare all applications received from the States. Candidate projects will be rated as Not Recommended, Recommended, or Highly Recommended. The projects will be advanced to the FHWA Administrator who will select projects to award provisional approvals.

### 2. Rating Criteria.

The FHWA Headquarters evaluation team will use the information in the application to assess the State's readiness and capability to fully satisfy the ISRRPP program criteria in order to deliver the candidate project. Based upon this evaluation, FHWA will provide up to three provisional approvals to States that will be expected to fully satisfy the following selection criteria within 3 years. These criteria are set forth (*in*

*italics*) in section 1216(b)(4) of TEA-21 as amended by section 1411(c)(1) of the FAST Act:

- A. *The State is unable to reconstruct or rehabilitate the proposed toll facility using existing apportionments.* Because Federal-aid formula apportionments can support municipal bond issues (i.e. GARVEEs), the State must demonstrate that toll revenue financing (whether through the TIFIA program or another capital market source) is essential to raising the needed funds.
- B. *The facility has a sufficient intensity of use, age, or condition to warrant the collection of tolls.* A State should use its asset management process or life cycle planning analysis to support this criterion. This effort should include conducting a performance gap analysis to identify deficiencies hindering progress toward improving or preserving the facility and achieving and sustaining the desired state of good repair. The FHWA will give preference to those facilities with a greater gap between current/projected and target performance.
- C. *The State plan for implementing tolls on the facility takes into account the interests of local, regional, and interstate travelers.* The FHWA will give priority consideration to candidate projects that have already been considered for tolling as a strategy in their State and MPO long-range plans, which should also take into account the impact of tolling on local, regional, and interstate freight movement.
- D. *The State plan for reconstruction or rehabilitation of the facility using toll revenues is reasonable.* A reasonable plan will balance the estimated sources and uses of funds in accordance with the requirements on toll revenue use set forth in section

1216(b)(5) of TEA-21. Likewise, the estimated cost of the candidate project must be matched by a financial plan that includes traffic and revenue projections sufficient to secure the needed debt component.

- E. The State has given preference to the use of a public toll agency with demonstrated capability to build, operate, and maintain a toll expressway system meeting criteria for the Interstate System. Should a State determine that its public toll agencies lack the capability or resources to take on the candidate project, a public-private partnership may well provide a viable alternative.
- F. The State has the authority required for the project to proceed. The lack of such authority has previously prevented provisionally approved projects from fully satisfying the program criteria. The FHWA will give priority consideration to candidate projects that have already obtained statutory authority to toll the candidate project or, lacking that, demonstrate the likelihood of obtaining the authority to toll the candidate project as evidenced by expressions of support for the project from State and local governments, community interests, and the public. The FHWA will also give priority consideration to candidate projects that demonstrate the likelihood of completing the environmental review and permitting process under the NEPA within 3 years of provisional approval.

In addition, the FHWA Headquarters evaluation team will also consider the geographic distribution of candidate projects selected and will give priority consideration to projects critical to the national and regional movement of people and goods.

#### **F. Requirements for Provisionally Approved Projects**

Should FHWA provisionally approve a candidate project, a State will have 3 years from the date the provisional approval is granted in which to:

- Submit a complete application that fully satisfies the eligibility and selection criteria noted above [1216(b)(6)(A)(i)].
- Complete environmental review and permitting process under the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321 et seq.) for the project [1216(b)(6)(A)(ii)].
- Execute a toll agreement [1216(b)(6)(A)(iii)].

Further, FHWA may allow for a 1-year extension of the provisional approval if the State demonstrates material progress toward implementation of the project as evidenced by:

- Substantial progress in completing the environmental review and permitting process for the pilot project under NEPA [1216(b)(6)(B)(i)].
- Funding and financing commitments for the project [1216(b)(6)(B)(ii)].
- Expressions of support for the project from State and local governments, community interests, and the public [1216(b)(6)(B)(iii)].
- Submission of a facility management plan as noted under the eligibility criteria above [1216(b)(6)(B)(iv)].

Given the extensive State DOT and FHWA collaboration needed to implement a project under the ISRRPP, FHWA will regularly assess the progress of each provisionally approved project. Should it become evident that the project will not meet the statutory

deadline, FHWA reserves the right to revoke the provisional approval prior to the deadline and re-offer the program slot to other State DOTs.

**Brandye L. Hendrickson,**

*Acting Administrator,*

*Federal Highway Administration.*

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