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4910-9X

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Contracting Initiative

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The DOT is extending the contracting initiative pilot program for a period of 5 years.

DATES: This pilot program became effective on March 6, 2015.

FOR FURTHER INFORMATION CONTACT: For technical information: Mr. Michael Harkins, Deputy Assistant General Counsel for General Law, Office, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, 202-366-0590 (telephone), Michael.Harkins@dot.gov (email).

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at http://www.archives.gov/federal_register and the Government Printing Office's Web page at <http://www.gpoaccess.gov>.

BACKGROUND

On March 6, 2015, DOT published a notice in the *Federal Register* (80 Fed. Reg. 12257) establishing a contracting initiative pilot program under which, Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) recipients and subrecipients could utilize

various contracting requirements that generally have been disallowed due to concerns about adverse impacts on competition. The purpose of the pilot program is to determine whether the use of such requirements “unduly limit competition,” as provided in an August 23, 2013, opinion from the Department of Justice’s Office of Legal Counsel (OLC). DOT established the pilot program for a period of 1 year unless extended. On March 17, 2016, DOT extended this pilot program for a period of 1 additional year, until March 6, 2017 (81 Fed. Reg.14524). To date, DOT has received only limited data from the program. As a result, DOT has decided to extend the pilot program until March 6, 2022, so that it can gather additional data from more projects to better assess the effect of local hire preferences on competition. The extension of this pilot program will provide FHWA and FTA recipients and subrecipients flexibility to continue operating under the pilot program while DOT conducts its evaluation as well as provide DOT with additional projects to consider in evaluating the impacts on competition.

Please note that Section 415 of the Consolidated Appropriations Act, 2016, Public Law 114-113 (FY 2016 Appropriations Act), extended by Public Law 114-223 and Public Law 114-254, continues the restriction on the Federal Transit Administration (FTA) from using FY 2016 funds to implement, administer or enforce 49 CFR 18.36(c)(2) for construction hiring. Accordingly, FTA recipients and subrecipients do not need to submit applications for participation in the pilot program for contracts awarded or advertised on or before September 30, 2016.

Additionally, we note that Section 192 of the FY 2016 Appropriations Act (also extended by Public Law 114-223 and Public Law 114-254) expressly authorizes DOT assisted contracts

under titles 49 and 23 of the United States Code utilizing geographic, economic, or other hiring preferences not otherwise authorized by law if the grant recipient certifies the following:

- 1) That except with respect to apprentices or trainees, a pool of readily available but unemployed individuals possessing the knowledge, skill, and ability to perform the work that the contract requires resides in the jurisdiction;
- 2) That the grant recipient will include appropriate provisions in its bid document ensuring that the contractor does not displace any of its existing employees in order to satisfy such hiring preference; and
- 3) That any increase in the cost of labor, training, or delays resulting from the use of such hiring preference does not delay or displace any transportation project in the applicable Statewide Transportation Improvement Program or Transportation Improvement Program.

Accordingly, recipients and subrecipients should follow the application process described in the March 6, 2015, *Federal Register* notice (80 FR 12257), except that recipients and subrecipients must also include the required certifications from Section 192 of the FY 2016 Appropriations Act as discussed above.

Issued in Washington, DC, on December 28, 2016

Anthony R. Foxx,
Secretary of Transportation.

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