



4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 269

[Docket No. FRA-2016-0023; Notice No. 4]

RIN 2130-AC60

Competitive Passenger Rail Service Pilot Program

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule implements a pilot program for competitive selection of eligible petitioners in lieu of Amtrak to operate not more than three long-distance routes operated by Amtrak. The final rule is required by statute.

DATES: This final rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

a. Executive Summary of Final Rule

This final rule implements a pilot program for competitive selection of eligible petitioners in lieu of Amtrak to operate not more than three long-distance routes (as defined in 49 U.S.C. 24102), and operated by Amtrak on the date of enactment of the Passenger Rail Reform and Investment Act of 2015 (title XI of the Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94, 129 Stat. 1312, 1660-1664 (2015)). The final rule establishes a petition, notification, and bid process by which FRA will evaluate, and ultimately select, bids to provide passenger rail service over particular long-distance routes. The final rule also, among other things, addresses FRA's execution of a contract with the winning bidder awarding the right and obligation to provide intercity passenger rail service over the route, along with an operating subsidy, subject to the 49 U.S.C. 24405 grant conditions and such performance standards as the Secretary of Transportation (Secretary) may require.

b. Procedural History

By notice of proposed rulemaking (NPRM) published on June 22, 2016 (81 FR 40624), FRA proposed a competitive passenger rail service pilot program in response to a statutory mandate in section 11307 of the FAST Act. In response to a request for a public hearing, FRA held a public hearing on September 7, 2016. FRA also extended the comment period for the NPRM to October 7, 2016 to allow time for interested parties to submit written comments in response to information provided at the public hearing.

FRA received comments from the American Association of Private Railroad Car Owners, the Association of Independent Passenger Rail Operators, the National Association of Railroad Passengers, Herzog Transit Services, Corridor Capital, Iowa Pacific Holdings, Florida East Coast Industries, Erie Lackawanna Railroad, the North

Carolina Department of Transportation, the National Railroad Passenger Corporation (Amtrak), the Brotherhood of Maintenance of Way Employees Division/International Brotherhood of Teamsters, the Brotherhood of Railroad Signalmen, the International Association of Sheet Metal, Air, Rail, and Transportation Workers/Mechanical Division, the Transportation Trades Department of the American Federation of Labor-Congress of Industrial Organizations, and one individual.

Comments are addressed in the preamble. Some comments were generally supportive of the NPRM, and other comments were generally unsupportive of the NPRM.

c. Timelines Established by the Final Rule

The final rule establishes deadlines for filing petitions, filing bids, and the execution of contract(s) with winning bidders.

As to the filing of petitions, § 269.7(b) of the final rule requires the filing of a petition with FRA no later than 180 days after the effective date of the final rule implementing the pilot program (petition window). In the NPRM, FRA proposed a 60 day petition window from the publication of the final rule. Several commenters stated the proposed 60 day petition window should be extended to 120 or 180 days. Other commenters stated the petition window should remain 60 days. Still other commenters stated the petition window should be eliminated and the pilot program should remain available indefinitely.

After careful consideration of these comments, the final rule establishes a 180 day petition window, balancing the need for sufficient time to produce quality petitions and bids with the desire to encourage competition and efficiently use Federal and Amtrak resources. This extended time period will ensure an eligible petitioner has an adequate

amount of time to file a petition. It is important to also note the final rule establishes the effective date of the final rule as the trigger for the 180 day period (rather than the date the final rule is published, as proposed in the NPRM). This change effectively gives eligible petitioners 60 more days (in addition to the 180 days) to file a petition. The final rule does not adopt the suggestion of some commenters that the pilot program be “evergreen.” First, the FAST Act does not require the pilot program to remain available indefinitely. Second, an evergreen pilot program may unduly burden the FRA and Amtrak by imposing an indefinite regulatory burden to maintain program readiness. Finally, FRA believes competition is best fostered by a limited duration petition window allowing FRA to evaluate multiple bidders competing for the same route.

When an eligible petitioner files a petition, under § 269.9(a) of the final rule, FRA will notify the petitioner and Amtrak of receipt of the petition, and publish a notice of receipt in the Federal Register, not later than 30 days after receipt. See 49 U.S.C. 24711(b)(1)(B)(i).

Section 269.9(b) of the final rule addresses the filing of bids. This section requires both the bidder and Amtrak, if Amtrak so chooses, to submit complete bids to FRA not later than 120 days after FRA publishes a notice of receipt in the Federal Register under § 269.9(a).

As to the award and execution of contracts with winning bidders (who are not or do not include Amtrak), § 269.11(b)(1) of the final rule first requires FRA to publish a notice for public comment for 30 days in the Federal Register announcing the selection. Section 269.13(a) then requires FRA to execute a contract with a winning bidder not later than 270 days after the § 269.9(b) bid deadline.

A commenter stated FRA should notify Amtrak of the date when the winning bidder's service will replace Amtrak's service on the affected route. The commenter recommended requiring a minimum 210-day notice period to allow Amtrak sufficient time to notify impacted employees, suppliers, and passengers. As discussed, § 269.11(b)(1), consistent with the requirements of the FAST Act, requires FRA to publish a notice identifying the winning bidder and the route, among other things, for public comment for 30 days.

In addition, the FAST Act, and this final rule, requires FRA to execute a contract with a winning bidder not later than 270 days after the bid deadline § 269.9 establishes. The NPRM did not specifically address when a winning bidder would assume operation of a route. The precise timing of a new operation will depend upon the winning bidder's readiness to assume operations, the availability and amount of an operating subsidy, as well as the resolution of logistics associated with a change in operator. It may be most appropriate for the new operator to begin operations at the beginning of a new Federal fiscal year, which would facilitate both the payment of the operating subsidy, if one is requested and available, and FRA's efficient administration of the pilot program. FRA will work with the winning bidder and Amtrak to identify a safe, timely, and reasonable date on which the winning bidder will assume operations.

d. Operating Subsidy

The FAST Act requires the Secretary to award an operating subsidy to a winning bidder that is not or does not include Amtrak (although a bidder may elect to not receive an operating subsidy). 49 U.S.C. 24711(b)(1)(E)(ii). Specifically, the operating subsidy, as determined by the Secretary, is for the first year at a level that does not exceed 90

percent of the level in effect for that specific route during the fiscal year preceding the fiscal year the petition was received, adjusted for inflation, and any subsequent years under the same calculation, adjusted for inflation.

In addition, the FAST Act requires FRA to provide to Amtrak an appropriate portion of the applicable appropriations to cover any cost directly attributable to the termination of Amtrak service on the route and any indirect costs to Amtrak imposed on other Amtrak routes as a result of losing service on the route operated by the winning bidder. 49 U.S.C. 24711(e)(2). Any amount FRA provides to Amtrak under the prior sentence would not be deducted from, or have any effect on, the operating subsidy 49 U.S.C. 24711(b)(1)(E)(ii) requires.

Consistent with the requirements of the FAST Act, § 269.13(b)(1) of the NPRM required FRA to award to a winning bidder that is not or does not include Amtrak an operating subsidy “as determined by FRA” for the first year at a level that does not exceed 90 percent of the level in effect for that specific route during the fiscal year preceding the fiscal year in which the petition was received, adjusted for inflation.

Commenters requested more clarity on FRA’s determination of the operating subsidy amount. Because the operating portion of FRA’s annual grant to Amtrak’s National Network is the authorized source of funding for the operating subsidy, only cost categories associated with the operating portion of Amtrak’s grant are eligible costs for the operating subsidy under this pilot program. Consequently, § 269.13(b)(1) of the final rule states the operating subsidy is based on Amtrak’s publically-reported fully-allocated operating costs of the route for the prior fiscal year, excluding costs related to Other Postretirement Employee Benefits (OPEB’s), Amtrak Performance Tracking System

(APT) Asset Allocations, Project Related Costs, and Amtrak Office of Inspector General activities. This data is publicly available on Amtrak's website in a comprehensive Monthly Performance Report (the final audited September report contains information for the entire fiscal year). Amtrak also reports this data to Congress and the Secretary in the monthly National Railroad Passenger Corporation Progress Report.

To avoid confusion, FRA will post, and update as necessary, the calculation and maximum subsidy amount available for each route based on the most recent full fiscal year data available on its website. For subsequent fiscal years, FRA will award the same operating subsidy, adjusted for inflation, again subject to the availability of Congressional appropriations. FRA will also provide the operating subsidy calculations for each long-distance route on the FRA website for reference by eligible petitioners.

One commenter questioned the accuracy of Amtrak's fully-allocated route costs, favoring instead reporting of variable costs by route at a detailed account level. FRA disagrees. Fully allocated costs are a component of the cost accounting methodology formed by the creation of APT, a statutorily mandated system developed by FRA, in close collaboration with Amtrak. Amtrak has used APT effectively since 2009 to assign costs at a route level. While an untested, non-public measure may provide different detail, the utility of publically available data that best aligns with Amtrak's grant is most appropriate here.

Commenters stated FRA should ensure it is using consistent, accurate financial data and that bidders should have access to actual, fully-allocated route costs for the five most recent years Amtrak operated the service. Amtrak has included the publicly reported fully-allocated operating costs in the Monthly Performance Report for at least

the past five years, though reports are only posted for one year following publication. Using archived copies of these reports, FRA will post on its website Amtrak's fully allocated operating loss for each Long Distance route since FY2012.

Commenters also stated FRA should provide more detail about the costs comprising the total operating subsidy, including route specific costs. Another commenter, on the other hand, objected to the disclosure of Amtrak's route specific information. FRA declines to provide the more detail requested. FRA notes that the summary financial results reported in Amtrak's Monthly Performance Reports list actual costs on a system-wide basis across various revenue and expense categories. In addition, FRA believes a bidder should base its costs on its own needs and business case, rather than Amtrak route specific information.

Some commenters suggested FRA include interest and depreciation costs in the operating subsidy to account for equipment related expenses associated with operating the service. Another commenter stated the operating subsidy should exclude capital costs, depreciation, and other non-cash costs. The final rule does not include depreciation and interest costs in the formulation of the operating subsidy. This approach is consistent with the operating portions of FRA's annual grants to Amtrak for the Northeast Corridor and National Network accounts, which do not include Amtrak rolling stock depreciation or interest-incurring debt.

A commenter stated FRA should ensure any award to a winning bidder is consistent with the objective of reducing Federal funding requirements for long distance routes. FRA will make judicious operating subsidy determinations to ensure the efficient use of Federal funds.

A commenter also stated FRA should address how it will reimburse costs that non-Amtrak service sponsors may incur. FRA is not authorized under the FAST Act to directly reimburse sponsors of Amtrak service. As discussed, the FAST Act directs the Secretary to provide Amtrak an appropriate portion of the applicable appropriations to cover any cost directly attributable to the termination of Amtrak service on the route and any indirect costs to Amtrak imposed on other Amtrak routes as a result of losing service on the route operated by the winning bidder. See 49 U.S.C. 24711(e)(2).

A commenter sought clarity regarding the basis upon which FRA may not provide funding to a winning bidder. FRA is not authorized to provide funding in excess of appropriated levels. The FAST Act authorizes the Secretary to fund the operating subsidy by withholding such sums as are necessary from the amount appropriated to the Secretary for the use of Amtrak for activities associated with Amtrak's National Network. FAST Act sec. 11101(e). However, if Congress does not appropriate funds in a manner so as to allow the Secretary to pay an operating subsidy under this pilot program, then the Secretary cannot award an operating subsidy to a winning bidder. In other words, the award of any operating subsidy to a winning bidder is subject to the availability of funding. Accordingly, the Secretary's contract with a winning bidder will not award an operating subsidy unless the award is authorized by both the FAST Act and the applicable appropriations act. In addition, the Secretary will award the operating subsidy to the winning bidder annually and, again, only as authorized by the FAST Act and the applicable appropriations act (i.e., the Secretary will not award all four years of the operating subsidy at one time).

A commenter expressed concern that, in the event Congress reduces Amtrak appropriations, a winning bidder may receive disproportionately less subsidy as compared to the services remaining with Amtrak. Subject to the availability of funding for long distance services, FRA will award an operating subsidy to a winning bidder that is the same amount, adjusted for inflation, throughout the term of the contract.

e. Agreements with Infrastructure Owners

Under the FAST Act, an entity may only be an eligible petitioner for this pilot program if it owns the relevant rail infrastructure or has a “written agreement” with the relevant rail infrastructure owner (in addition to meeting the other eligible petitioner requirements discussed elsewhere in this preamble). 49 U.S.C. 24711(b)(3). The FAST Act also requires a winning bidder who does not own the relevant infrastructure to enter into a “written agreement governing access issues” with the owners of such infrastructure. 49 U.S.C. 24711(b)(5).

Section 269.9(b)(2)(i) of the NPRM required a bid to include any applicable agreement(s) necessary for the operation of passenger service over right-of-way on the route that is not owned by the bidder. The NPRM did not address the nature of the “written agreement” necessary for an entity to submit a petition under § 269.7(b).

Because a “written agreement” is an eligibility requirement for many potential petitioners, § 269.7(b)(4) of the final rule requires an eligible petitioner to include, in its petition, agreements with all entities that own or control infrastructure on the long-distance route or routes over which the eligible petitioner wants to provide intercity passenger rail transportation. However, these written agreements are not required to

completely address infrastructure access; rather, they must demonstrate the infrastructure owner's support for the petition.

In addition, like the NPRM, § 269.9(b)(2)(i) of the final rule then requires a bidder to submit, in its bid package, executed agreement(s) necessary for the operation of passenger service over right-of-way on the route that is not owned by the bidder.

Several comments sought further clarity on the meaning of the term "written agreement." One commenter stated a petitioner should submit written agreements with each rail carrier that owns or controls any infrastructure along the route, with their petition filed under § 269.7(b), and such agreements should address the petitioner's ability to access the infrastructure necessary for the operation of the petitioned route. Other commenters stated that negotiating the detailed terms of such access agreements take a long time, and instead proposed that, when submitting a petition, a petitioner should only need to submit a written agreement in which the infrastructure owners express a willingness to enter into a good faith discussion with the bidder.

FRA generally agrees with the latter commenters. Specifically, to ensure the efficient use of FRA and Amtrak resources, and recognizing the challenges executing agreements that completely address infrastructure access, as discussed, the final rule requires a petition to include agreements with all entities that own or control infrastructure on the long-distance route or routes over which the eligible petitioner wants to provide intercity passenger rail transportation. As described, these agreements are not required to completely address infrastructure access; rather, they must demonstrate the infrastructure owner's support for the petition. As noted, the final rule also requires an eligible petitioner to submit, as part of the bid package, executed agreement(s) necessary

for the operation of passenger service over right-of-way on the route that is not owned by the eligible petitioner.

Some commenters expressed concern Amtrak, as an owner of infrastructure on most of the long distance routes, could refuse to enter into access agreements with eligible petitioners. However, in the event of such a dispute, the statute and the final rule make clear the Surface Transportation Board (STB) may require Amtrak to provide access to Amtrak facilities if such access is necessary to operate the pilot route. 49 U.S.C. 24711(g). Access to Amtrak-owned facilities, among other things, is discussed elsewhere in this preamble.

Lastly, several commenters stated an eligible petitioner could develop an operating plan that contracts with Amtrak to provide operating crews and uses Amtrak's existing access agreement, as long as the infrastructure owners agreed with the operating plan. FRA disagrees. First, private partnerships between Amtrak and third parties may of course occur outside of this pilot program, and, are, in fact encouraged by section 216 of PRIIA and 49 U.S.C. 24101. Second, the FAST Act does not authorize an eligible petitioner to use Amtrak's right to access infrastructure owned by a third party. See 49 U.S.C. 11307(b)(5) (requiring a winning bidder to enter into a written agreement governing access with the relevant infrastructure owners); 49 U.S.C. 11307(b)(3) (defining a petitioner as eligible where it owns the infrastructure or has a written agreement with a rail carrier that owns the infrastructure); and 49 U.S.C. 11307(j) (stating that nothing in section 11307 shall affect Amtrak's access rights to railroad rights-of-way and facilities). Finally, the FAST Act states the requirement that the Secretary award an operating subsidy to a winning bidder "shall not apply to a winning bidder that is or

includes Amtrak.” 49 U.S.C. 11307(b)(2). In other words, a bidder who is partnering with Amtrak to provide a service under the pilot program would not be entitled to an operating subsidy award under the pilot program.

f. Level of Service

Section 269.9(b)(1) of the final rule, in part, requires a bidder to provide FRA with sufficient information to evaluate the level of service described in the bid. In addition, § 269.13(b)(4) requires a winning bidder to provide intercity passenger rail transportation over the route that is no less frequent, nor over a shorter distance, than Amtrak provided on the route.

One commenter stated the final rule should provide that, upon request, the Secretary would make available a detailed and specific definition of Amtrak’s level of service for any route subject to the pilot program. FRA disagrees. As described, the final rule requires, at minimum, a winning bidder to provide a level of service that is no less frequent, nor over a shorter distance than Amtrak provided on the route. See 49 CFR 269.13(b)(4). The frequency and distance of Amtrak’s long-distance routes is publically available. It is important to note, as described in § 269.9(b)(1), beyond the frequency and distance requirements, FRA’s bid evaluations will take into account all aspects of service described in the bid.

Several commenters stated the final rule should allow a bidder to operate alternate service alignments between the endpoints of a route. Similarly, a commenter stated the final rule should allow a bidder to vary the schedule and services of the particular train. One other commenter, on the other hand, stated a winning bidder must serve all of the same stations Amtrak currently serves on the route. The final rule does not prohibit a

bidder from proposing to operate an alternate alignment between the endpoints of a route. However, a bid proposing the relocation, elimination, or addition of a station at which the service will stop should be accompanied by evidence of significant support from the communities impacted by such changes so FRA may understand and evaluate the proposed service.

A commenter stated FRA should favorably weight bids that maintain existing connections with other intercity passenger trains and buses to promote the national passenger train and connecting intercity bus network. A commenter also stated the final rule should encourage innovative ideas, including enhanced food and beverage service, and improved connectivity and amenities. As stated, FRA's bid evaluations will take into account all aspects of service described in the bid. 49 CFR 269.9(b)(1).

Finally, one commenter stated the final rule should expand the pilot program to discontinued Amtrak long distance routes. However, the FAST Act limits the pilot program to the long distance routes defined in 49 U.S.C. 24102 and operated by Amtrak on the date of enactment of the FAST Act. See 49 U.S.C. 24711(a).

g. Performance Standards

The FAST Act requires a winning bidder to, at a minimum, meet the performance “required of or achieved by Amtrak on the applicable route during the last fiscal year” and subjects any award to a winning bidder “to such performance standards.” 49 U.S.C. 24711(b)(1)(E)(i) and (b)(4). In addition, the FAST Act authorizes the Secretary to require performance standards above that achieved by Amtrak. 49 U.S.C. 24711(b)(1)(E)(i). The final rule requires bidders to describe how the passenger rail service would meet or exceed the performance required of or achieved by Amtrak on the

applicable route during the last fiscal year, and states that, at a minimum, the description must include, for each Federal fiscal year fully or partially covered by the bid, a projection of the route's expected Passenger Miles per Train Mile, End-Point and All Stations On-Time Performance, Host Railroad and Operator Responsible Delays per 10,000 train miles, Percentage of Passenger Trips to/from Underserved Communities, Service Interruptions per 10,000 Train Miles due to Equipment-Related Problems, and customer service quality. 49 CFR 269.9(b)(9). Likewise, the final rule conditions the operating subsidy rights upon the winning bidder's compliance with performance standards FRA may require, but which, at a minimum, must meet or exceed the performance required of or achieved by Amtrak on the applicable route during the fiscal year immediately preceding the year the bid is submitted. 49 CFR 269.13(b)(5).

Commenters sought additional clarity on the performance standards and, in particular, how FRA would evaluate the performance of a winning bidder. To determine whether a winning bidder has met or exceeded the performance achieved by Amtrak on the applicable route during the last fiscal year, as required by the FAST Act, FRA will require a winning bidder to report the performance standards discussed in the previous paragraph to FRA on a quarterly basis. These performance categories are available publicly in the Quarterly Report on the Performance and Service Quality of Intercity Passenger Train Operations available on FRA's website. Additionally, a winning bidder must also provide a monthly ridership report to FRA. Finally, a bidder must explain in its bid submission how it will achieve and report on these performance standards.

A commenter stated FRA should define, or otherwise make available, the Amtrak performance standards achieved on each long-distance route. This data is publicly

available on FRA’s website in the Quarterly Reports on the Performance and Service Quality of Intercity Passenger Train Operations.

One commenter stated the final rule should impose performance standards on Amtrak if it submits a bid. Another commenter stated, on the other hand, FRA is not authorized to impose such standards on Amtrak. The FAST Act does not require the imposition of performance standards on Amtrak. However, if Amtrak submits a bid and is selected, then Amtrak should comply with the performance standards described in the bid.

Lastly, a commenter stated the final rule should require Amtrak to identify future savings or new revenues if their counterbid is lower than Amtrak’s current route costs. FRA does not believe the final rule needs to specifically require Amtrak to produce such information. Section 269.9(b) requires bidders and Amtrak to submit bids containing a financial plan, among other requirements, which enables FRA to fully evaluate the bids. Furthermore, if FRA does not receive sufficient information, FRA may request supplemental information from the bidder and/or Amtrak under § 269.9(c).

h. Access

Section 24711(c) of the FAST Act requires Amtrak, if necessary to carry out the purposes of the pilot program, to provide access to the “Amtrak-owned reservation system, stations, and facilities directly related to operations of the awarded routes to the eligible petitioner awarded a contract.” Section 24711(g) further provides, in the event Amtrak and the winning bidder cannot agree upon the terms of such access, either party may petition the STB to determine “whether access to Amtrak’s facility or equipment, or the provisions of services by Amtrak is necessary . . . and whether the operation of

Amtrak’s other services will not be unreasonably impaired by such access.” Section 24711(g) goes on to provide, if the STB determines such access is necessary and Amtrak’s other services will not be unreasonably impaired, then the STB must issue an order requiring Amtrak “to provide the applicable facilities, equipment, and services . . . and determine[] reasonable compensation, liability, and other terms for the use of the facilities and equipment and the provision of the services.”

The final rule provides, consistent with the FAST Act and the NPRM, if an award is made to a bidder other than Amtrak, Amtrak must provide access to the Amtrak-owned reservation system, stations, and facilities directly related to operations of the awarded route(s) to the bidder. 49 CFR 269.15(a). For additional clarity, the final rule added a sentence stating that, if Amtrak and the eligible petitioner awarded a route cannot agree on the terms of access, then either party may petition the STB under 49 U.S.C. 24711(g). 49 CFR 269.15(a).

Commenters sought clarity regarding the meaning of the term “facilities.” One commenter stated “facilities” should include coach yards, repair shops, and Amtrak-owned track. FRA understands the term “facilities” to include Amtrak-owned coach yards, repair shops, and track. A commenter also stated the final rule should require Amtrak to provide access to “Amtrak controlled” track. However, the FAST Act only authorizes access for “Amtrak-owned” facilities. 49 U.S.C. 24711(c)(1).

Several commenters stated the final rule should require Amtrak to provide access to Amtrak-owned rolling stock. As stated, section 24711(c)(1) of the FAST Act specifically requires Amtrak to provide access to the “Amtrak-owned reservation system, stations, and facilities,” but it does not reference rolling stock. However, section

24711(g) states the STB may adjudicate disputes regarding whether Amtrak should be required to provide services or equipment. As such, either party may petition the STB for a determination about the necessity of access to Amtrak-owned equipment (to include rolling stock), among other things.

At least one commenter stated Amtrak's statutory right to access track is a "facility" and, therefore, Amtrak should be required to provide its access rights to a winning bidder. Another commenter stated FRA should invoke Amtrak's statutory right to access track on behalf of a winning bidder. FRA disagrees with both comments. Amtrak's right to access track is not transferrable unless specifically authorized by law. See Application of Nat'l R. Passenger Corp. Under 49 U.S.C. 24308(a)-Springfield Terminal R. Co., Boston & M. Corp. and Portland Terminal Co., 3 S.T.B. 157 (1998) (stating the "access rights that the Act allows us to grant to Amtrak belong only to Amtrak and may not be transferred to a third party 'successor or assign' unless the Act or some other provision of law specifically provides otherwise."). Here, section 24711(j) of the FAST Act states nothing in the pilot program "shall affect Amtrak's access rights to railroad rights-of-way and facilities."

Similarly, a commenter stated the final rule should allow an eligible petitioner to use Amtrak train and engine crews to access track via the existing Amtrak access agreement with the host railroad. A commenter also stated Amtrak should be required to provide Amtrak train crews to a bidder, as it would constitute a "provision of services" allowed under section 24711(g)(1)(A) of the FAST Act. First, as discussed, Amtrak's right to access track may not be transferred under this pilot program. Further, a bidder who is partnering with Amtrak to provide a service under the pilot program would not be

entitled to an operating subsidy award under the pilot program. The FAST Act makes clear that an operating subsidy is only available to a winning bidder who is not or does not include Amtrak. 49 U.S.C. 24711(b)(2).

A commenter stated Amtrak need only provide access if FRA determines the access is necessary. However, section 24711(g) of the FAST Act states the STB, not the FRA, is responsible for determining whether access is necessary.

Some commenters stated the cost allocation policy developed under section 209 of the Passenger Rail Investment and Improvement Act of 2008 should be used to calculate cost for the use of Amtrak's assets. Another commenter stated FRA, not other bidders, should request from Amtrak the cost of providing access to specific facilities and services a bidder wants Amtrak to provide. However, neither approach is required by the FAST Act. Rather, the parties must agree on cost and, if they cannot, either party may petition the STB for a determination. See 49 U.S.C. 24711(g) (stating that, in the event of a dispute, the STB "determines reasonable compensation, liability, and other terms," among other things). It is the bidder's sole responsibility to initiate the request to Amtrak to provide the access, to carry out any resulting negotiations, and to determine impacts on the bid.

A commenter stated the rule should require FRA to publish Amtrak's costs to provide access to its reservation system, stations, and facilities, and FRA should condition Amtrak's receipt of Federal operating funds on Amtrak's participation. Similarly, a commenter stated FRA should set forth minimum conditions of cooperation, along with reasonable ranges of costs for the joint use of facilities and services. Another commenter stated FRA should articulate clear definitions, prior to the submittal of any

bids, of the costs for Amtrak to operate facilities or equipment. Lastly, a commenter suggested there should be a set rate for Amtrak equipment used by a winning bidder. FRA disagrees and does not believe these approaches are necessary or consistent with the FAST Act. As described above, section 24711(g) provides, in the event Amtrak and the winning bidder cannot agree upon the terms of access, either party may petition the STB to resolve the dispute.

A commenter stated that, if a dispute between Amtrak and a bidder is submitted to the STB for resolution, then a bidder may use the Amtrak-owned facilities during the period of time the dispute is with the STB. FRA disagrees. Indeed, the dispute may involve whether the bidder is in fact entitled to access the facilities at issue. Further, a bidder should not need to access the facilities because the terms of access would have to be resolved in advance of bidder operations.

A commenter also stated the final rule should require Amtrak to provide access to its data relating to operations, costs, facilities, ridership and other information to enable a bidder to develop an informed business plan and proposal. The FAST Act does not authorize this approach. As discussed, the bidder is responsible for collecting the information necessary to prepare their business plan and proposal.

i. Employee Protections

The FAST Act subjects winning bidders to the grant conditions in 49 U.S.C. 24405. See 49 U.S.C. 24711(c)(3) (“If the Secretary awards the right and obligation to provide intercity rail passenger transportation over a route described in this section to an eligible petitioner . . . the winning bidder . . . shall be subject to the grant conditions under section 24405.”).

The NPRM and this final rule likewise subject winning bidders to these grant conditions. See 49 CFR 269.13(b)(6) (“[T]he contract between FRA and a winning bidder that is not or does not include Amtrak must . . . [s]ubject the winning bidder to the grant conditions established by 49 U.S.C. 24405.”). Section 24405(c), among other things, states the Secretary shall require, and “the applicant agrees to comply with . . . the protective arrangements that are equivalent to the protective arrangements established under section 504 of the Railroad Revitalization and Regulatory Reform Act of 1976” (4R Act). 49 U.S.C. 24405(c)(2)(B). The protective arrangements established under the 4R Act are set forth in a Secretary of Labor letter and appendix dated July 6, 1976.

Several commenters sought clarification about the 49 U.S.C. 24405 grant condition concerning employee protections. One commenter stated the 4R Act employee protections should not apply to this pilot program. FRA disagrees. The FAST Act subjects a winning bidder to the grant conditions of section 24405, which include the 4R Act equivalent employee protections. See 49 U.S.C. 24711(c)(3).

Several commenters stated the FRA should adopt employee protections equivalent to those established under the 4R Act but adjusted to fit the pilot program, and should issue guidance on the adjusted protections. FRA declines to use this rulemaking to adopt employee protections equivalent to the almost forty-year old 4R Act employee protections set forth by the Secretary of Labor for the purpose of resolving imprecisions in the application of those protections to this pilot program. The FAST Act subjects winning bidders, some of whom may not be railroads, to the grant conditions under section 24405. In so doing, the FAST Act recognizes the possibility that a non-railroad winning bidder may directly provide the 4R Act equivalent employee protections.

A commenter also stated FRA should issue guidance on a winning bidder's responsibility to employees under the FAST Act, while also stating such employee costs should be included in any petition filed with FRA under the pilot program. If needed, FRA may issue pilot program guidance. However, FRA disagrees with the suggestion to include employee costs in the petition. The petition requirements under § 269.7 require basic information from eligible petitioners; it is premature to require detailed cost information in the petition. It is in the bid where an eligible petitioner provides FRA with the information necessary to evaluate a bid, including the submission of a required staffing plan that addresses the terms of work for prospective and current employees for the proposed service, among other things. See §269.9(b)(5).

Commenters also stated the NPRM did not indicate how FRA would apply the employee protections. FRA disagrees. Consistent with the FAST Act requirement, the NPRM and the final rule require compliance with section 24405 in the contract between FRA and a winning bidder. See 49 CFR 269.13(b)(6). FRA declines to adopt the suggestion of some commenters to require a winning bidder to directly provide the 4R Act equivalent employee protections. As discussed, a winning bidder must comply with section 24405, which includes the 4R Act equivalent employee protections. However, the FAST Act does not require this obligation to take the form of an agreement directly between the winning bidder and the relevant union. Although that approach is certainly permissible, a winning bidder may also by agreement bestow the obligation to provide the employee protections on another appropriate entity (such as the applicable railroad). In other words, a winning bidder may comply with the 4R Act equivalent employee protections requirement of section 24405 directly or by agreement.

Lastly, one commenter suggested costs associated with providing the 4R Act equivalent employee protections should not be deducted from the operating subsidy awarded to a winning bidder. The 4R Act equivalent employee protection costs are the responsibility of a winning bidder that is not or does not include Amtrak and do not impact the calculation of the operating subsidy.

II. Section-by-Section Analysis

Section 269.1 Purpose.

This section provides that the final rule carries out the statutory mandate in 49 U.S.C. 24711 requiring FRA, on behalf of the Secretary, to implement a pilot program to competitively select eligible petitioners in lieu of Amtrak to operate not more than three long-distance routes, as defined in 49 U.S.C. 24102, and operated by Amtrak on the date of enactment of the FAST Act.

A commenter stated an eligible petitioner should be able to decide the route(s) on which they bid and should be able to bid on inactive routes. The pilot program does not apply to inactive routes. The FAST Act limits the pilot program to the long-distance routes, as defined in 49 U.S.C. 24102, operated by Amtrak on the date of enactment of the FAST Act. 49 U.S.C. 24711(a).

A commenter also stated FRA should take primary responsibility in any contract with a winning bidder to “launch” the service. FRA disagrees. The FAST Act directs FRA to implement the pilot program for the competitive selection of eligible petitioners in lieu of Amtrak to operate not more than three-long distance routes. The FAST Act does not require the FRA to take primary responsibility for a winning bidder’s execution of the service.

Section 269.3 Application.

Paragraph (a) of this section provides the pilot program is not available to more than three Amtrak long-distance routes, as defined in 49 U.S.C. 24102. This paragraph is based on the statutory directive in 49 U.S.C. 24711(a).

Paragraph (b) of this section provides that any eligible petitioner awarded a contract to provide passenger rail service under the pilot program can only provide such service for a period not to exceed four years from the date the winning bidder commenced service and, at FRA's discretion on behalf of the Secretary, FRA may renew such service for one additional operation period of four years. This paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(A).

A commenter stated FRA should address the transition of service from a successful winning bidder back to Amtrak. Although there may be challenges that arise in such a situation, the FAST Act does not require FRA to address this issue in the rulemaking, nor is it prudent in this rulemaking to attempt to address possible outcomes that may occur many years from now.

Commenters also stated the length of the contract should be longer than four years, for various reasons. However, the FAST Act requires one four year term, and allows for one four year renewal term at the discretion of the Secretary.

Section 269.5 Definitions.

This section contains the definitions for the final rule. This section defines the following terms: Act; Administrator; Amtrak; Eligible petitioner; File and Filed; Financial plan; FRA; Operating plan; and Long-distance route.

This section defines “eligible petitioner” to mean: A rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route, or another rail carrier that has a written agreement with a rail carrier or rail carriers that own such infrastructure; a State, group of States, or State-supported joint powers authority or other sub-State governance entity responsible for providing intercity rail passenger transportation with a written agreement with the rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route and that host or would host the intercity rail passenger transportation; or a State, group of States, or State-supported joint powers authority or other sub-State governance entity responsible for providing intercity rail passenger transportation and a rail carrier with a written agreement with another rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route and that host or would host the intercity rail passenger transportation.

A commenter stated the final rule should amend the definition of the term “eligible petitioner” to make clear it is not necessary for a petitioner to obtain a written agreement with Amtrak for Amtrak-owned infrastructure prior to submitting a petition. However, the definition used in the final rule is taken directly from the FAST Act. 49 U.S.C. 24711(b)(3). With that said, Amtrak is required to provide access to Amtrak-owned facilities, among other things. 49 U.S.C. 24711(c)(1). As such, FRA will take both of these FAST Act directives into account when reviewing petitions received under this program.

This section defines “financial plan” to mean a plan that contains, for each Federal fiscal year fully or partially covered by the bid: an annual projection of the

revenues, expenses, capital expenditure requirements, and cash flows (from operating activities, investing activities, and financing activities, showing sources and uses of funds, including the operating subsidy amount) attributable to the route; and a statement of the assumptions underlying the financial plan's contents.

In addition, this section defines "operating plan" to mean a plan that contains, for each Federal fiscal year fully or partially covered by the bid: a complete description of the service planned to be offered, including the train schedules, frequencies, equipment consists, fare structures, and such amenities as sleeping cars and food service provisions; station locations; hours of operation; provisions for accommodating the traveling public, including proposed arrangements for stations shared with other routes; expected ridership; passenger-miles; revenues by class of service between each city-pair proposed to be served; connectivity with other intercity transportation services; compliance with applicable Service Outcome Agreements, and a statement of the assumptions underlying the operating plan's contents. The final rule added "connectivity with other intercity transportation services" and "compliance with applicable Service Outcome Agreements" in response to comments. The final rule requires bidders to include a financial plan and an operating plan – as those terms are defined here – in their bids. These definitions ensure that bids contain sufficient information for evaluation.

A commenter stated the final rule should specifically state that, for purposes of the operating plan, a bidder may assume access to Amtrak facilities and stations. This revision is not necessary. The final rule requires a bidder to describe the assumptions underlying the operating plan's contents. And, as discussed elsewhere in this preamble, the final rule states that Amtrak must provide access to the Amtrak-owned reservation

system, stations, and facilities directly related to operations of the awarded route(s) to the bidder.

This section also defines “long-distance route” to mean those routes described in 49 U.S.C. 24102(5) and operated by Amtrak on the date the FAST Act was enacted. This definition is based on the statutory directive in 49 U.S.C. 24711(a).

Section 269.7 Petitions.

Paragraph (a) of this section provides an eligible petitioner may petition FRA to provide intercity passenger rail transportation over a long-distance route in lieu of Amtrak for a period of time consistent with the time limitations described in § 269.3(c). This paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(A).

Paragraph (b) of this section provides a petition submitted to FRA under this rule must: be filed with FRA no later than 180 days after the effective date of the competitive passenger rail service pilot program final rule; describe the petition as a “Petition to Provide Passenger Rail Service under 49 CFR part 269”; describe the long-distance route or routes over which the petitioner wants to provide intercity passenger rail transportation and the Amtrak service the petitioner wants to replace; and, if applicable, provide an executed copy of all written agreements with all entities that own infrastructure on the long-distance route or routes over which the eligible petitioner wants to provide intercity passenger rail transportation. This paragraph is intended to ensure a petition provides clear notice to FRA and the petitioner is statutorily eligible to participate in the program.

Section 269.9 Bid Process.

Paragraph (a) of this section provides that FRA would notify the eligible petitioner and Amtrak of receipt of a petition filed with FRA by publishing a notice of

receipt in the Federal Register not later than 30 days after FRA receives a petition. This paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(B)(i).

Paragraph (b) of this section describes the bid requirements, including that a bid must be filed with FRA no later than 120 days after FRA publishes the notice of receipt in the Federal Register under § 269.9(a). Paragraph (b) further provides the detailed information such bids must include. This paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(C).

A commenter stated a bidder should not be constrained due to their prior experience with passenger rail service. The final rule's bid requirements apply to all bidders and Amtrak, regardless of experience in passenger rail service.

A commenter also stated the final rule should require a bidder to provide written documentation that any state(s) providing funding for a route concur with a bid to provide service over the route. Another commenter, on the other hand, disagreed and stated FRA should be responsible for obtaining concurrence from a state providing funding for a route. For routes receiving funding from a state or states, section 24711(b)(1)(D) of the FAST Act requires for each bid received, "the Secretary have the concurrence of the State of States that provide funding for that route." FRA understands this requirement to be the obligation of the bidder, not FRA. The bidder is in the best position to obtain such concurrence, and, of course, the support of the state or states is critically important to the bidder's ability to operate the service. The final rule incorporates this requirement in § 269.9(b)(12).

A commenter stated the description of the capital needs for the planned service under § 269.9(b)(6) should include projected capital expenditures for each Federal fiscal

year fully or partially covered by the bid. FRA agrees, and the final rule, like the NPRM, requires this information. Specifically, § 269.9(b)(2)(i) requires a bid to include a financial plan, and § 269.5 defines the term “financial plan” as a plan that contains, for each Federal fiscal year fully or partially covered by the bid, an annual projection of the capital expenditure requirements attributable to the route, among other things.

A commenter also stated a bid should include a breakdown of the projected capital expenditures required to comply with the Americans with Disabilities Act, applicable FRA safety regulations, and other applicable laws and regulations. In response to this comment, FRA amended: (1) § 269.9(b)(11) of the final rule to require an eligible petitioner to describe its compliance with all applicable Federal, state, and local laws; and (2) § 269.9(b)(6) of the final rule to make clear that an eligible petitioner’s description of the capital needs for the passenger rail service include in detail any costs associated with compliance with Federal law and regulations. These revisions will help FRA evaluate the bid and whether the bid credibly assesses the capital expenditures required to lawfully operate service on the route.

Lastly, a commenter stated the final rule should specify the documentation requirements and procedures applicable to bidders who are new passenger rail service operators to ensure compliance with all applicable safety requirements. Section 269.9(b)(7) of the final rule requires an eligible petitioner in its bid package to describe in detail the bidder’s plans for meeting all FRA safety requirements. It is not necessary for this rulemaking to fully describe the regulatory process a new operator will use to initiate service.

Paragraph (c) of this section provides FRA may request supplemental information from a bidder and/or Amtrak if FRA determines it needs such information to adequately evaluate a bid. Such a request may seek information about the costs related to the service Amtrak would still incur following the cessation of service, including the increased costs for other services. FRA will establish a deadline by which the bidder and/or Amtrak must submit the supplemental information to FRA.

A commenter stated this section should require FRA to seek such information from Amtrak, including information from Amtrak about the feasibility of the proposed service, the potential impairment to Amtrak's other services, or the cost of providing access to Amtrak's facilities or equipment. FRA agrees that, when evaluating a bid, additional information may be needed, and FRA may request supplemental information under § 269.9(c). However, requiring FRA to request supplemental information is not necessary, and would overly burden FRA when it does not need supplemental information to evaluate a bid.

Section 269.11 Evaluation.

Paragraph (a) of this section provides that FRA will select a winning bidder by evaluating the bids based on the requirements of part 269.

A commenter stated the evaluation criteria should include the impact of an award on the Federal funding requirements for intercity passenger rail. Another commenter, on the other hand, stated that any claimed increase in Amtrak's cost, or other negative financial performance impacts, should not be evaluated under § 269.11 (and referenced 49 U.S.C. 24711(e)(2)). As stated above, FRA will evaluate the bids based on the requirements of part 269, and § 269.9(b)(10) of the final rule requires a bidder, as part of

the bid package, to analyze the reasonably foreseeable effects, both positive and negative, of the passenger rail service on other intercity passenger rail services. Section 24711(e)(2) of the FAST Act is not relevant to the evaluation of bids. Rather, section 24711(e)(2) concerns the calculation of attributable costs that may be provided to Amtrak if there is a winning bidder other than Amtrak (and states these attributable costs “shall not be deducted from” the operating subsidy awarded to the winning bidder).

Commenters also stated low cost, or high cost, should not drive the evaluation, but rather overall bid quality should be the basis for selection. FRA will evaluate all aspects of a bid in making its determination.

A commenter stated DOT/FRA may have a conflict of interest in administering the pilot program because the Secretary is a member of the Amtrak Board of Directors. The Secretary’s roles administering the pilot program and as a member of the Amtrak Board of Directors are mandated by statute. With that said, FRA will administer the pilot program fairly, in good faith, and consistent with the FAST Act.

Paragraph (b) of this section provides that, upon selecting a winning bidder, FRA will publish a notice in the Federal Register identifying the winning bidder, the long-distance route the bidder would operate, a detailed justification of the reasons why FRA selected the bid, and any other information the Secretary determines appropriate. FRA will request public comment for 30 days after the date FRA selects the bid. This paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(B)(iii).

Section 269.13 Award.

Paragraph (a) of this section provides that FRA will execute a contract with a winning bidder that is not or does not include Amtrak, consistent with the requirements

of § 269.13, and as FRA may otherwise require, not later than 270 days after the bid deadline § 269.9(b) establishes. This paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(E).

Paragraph (b) of this section discusses required elements of the contract between FRA and the winning bidder that is not or does not include Amtrak. This paragraph is based on the statutory directives in 49 U.S.C. 24711(b)(1)(E), (b)(4), and (c)(3).

Commenters stated FRA must ensure that any construction work contractors of a winning bidder perform complies with Davis-Bacon prevailing wage requirements. Section 269.13(b)(6) subjects winning bidders to the section 24405 grant conditions, including section 24405(c)(2)(A), which addresses prevailing wage requirements. Commenters similarly stated FRA must ensure a winning bidder complies with the applicable Buy America requirement. Likewise, § 269.13(b)(6) subjects winning bidders to the section 24405 grant conditions, including section 24405(a), which addresses the Buy America requirement.

A commenter also stated the NPRM did not address how FRA will ensure winning bidders comply with the requirement of the FAST Act subjecting winning bidders to the grant conditions in section 24405. FRA disagrees. Section 269.13(b)(6) of the NPRM and the final rule provides that any contract between FRA and a winning bidder that is not or does not include Amtrak must subject the winning bidder to these grant conditions. And, § 269.17(a) of the final rule states the FRA Administrator shall take any necessary action consistent with title 49 of the United States Code to enforce the contract where a winning bidder fails to fulfill its obligations under the contract required under § 269.13. See 49 U.S.C. 24711(d).

A commenter stated the contract should require the winning bidder to comply with all statutory and other legal requirements that apply to Amtrak's use of the appropriated funds. FRA agrees. For purposes of clarity, FRA added another element to the final rule stating a contract between FRA and a winning bidder must make the winning bidder subject to the requirements of the appropriations act(s) funding the contract. See 49 CFR 269.13(b)(7).

A commenter stated the award of the contract must also be conditioned on the bidder's demonstration, prior to the initiation of service, of compliance with all applicable Federal and state laws and regulations as well as the maintenance of adequate liability coverage for claims through insurance and self-insurance required by 49 U.S.C. 28103(c). First, as stated above, § 269.9(b)(11) of the final rule requires a bid to describe the bidder's compliance with all applicable Federal, state, and local laws. Furthermore, § 269.13(a) makes clear FRA has the discretion to not award a contract if the winning bidder is not in compliance with the law. Second, as to mandatory insurance, 49 U.S.C. 28103(c) applies to Amtrak; it does not apply to other railroads. Nor does the FAST Act impose mandatory insurance beyond that required by 49 U.S.C. 28103. Consequently, the final rule does not impose mandatory insurance beyond what is already required by law. FRA also notes that 49 U.S.C. 28103(a)(2) establishes a rail passenger transportation liability cap, which is currently set at \$294,278,983. See 81 FR 1289 (Jan. 11, 2016).

A commenter also stated the contract should be conditioned on the winning bidder's payment of penalties, specified in its contract with FRA, should the winning bidder fail to meet performance standards. FRA did not intend for the final rule to fully

address all aspects of the contract between FRA and a winning bidder. As such, contract details concerning penalty payments are not addressed in this final rule and, instead, may be addressed at the time a winning bidder is selected.

A commenter stated that a winning bidder would be subject to the requirement in 49 U.S.C. 24321 prohibiting the use of Federal funds to cover any operating loss associated with providing food and beverage service on a route. The requirements of section 24321 apply to a winning bidder under this pilot program. See 49 U.S.C. 24321(d).

Lastly, a commenter stated any non-Amtrak winning bidders should be required to deal with private rail car owners in a positive manner. FRA disagrees. The FAST Act imposes no such requirement, and FRA declines to regulate how a non-Amtrak winning bidder addresses contracting with private rail car owners.

Paragraph (c) of this section provides that the winning bidder would make their bid available to the public after the bid award with any appropriate confidential or proprietary information redactions. This paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(C)(ii).

Section 269.15 Access to facilities; employees.

Paragraph (a)(1) of this section provides, if an award under § 269.13 is made to a bidder other than Amtrak, Amtrak must provide access to the Amtrak-owned reservation system, stations, and facilities directly related to operations of the awarded route(s) to the bidder. For additional clarity, the final rule added a new paragraph (a)(2) stating that, if Amtrak and the eligible petitioner awarded a route cannot agree on the terms of access,

then either party may petition the STB under 49 U.S.C. 24711(g). This paragraph is based on the statutory directive in 49 U.S.C. 24711(c) and (g).

Paragraph (b) of this section implements 49 U.S.C. 24711(c)(2), which states that an employee of any person, except as provided in a collective bargaining agreement, used by such eligible petitioner in the operation of a route under this section shall be considered an employee of that eligible petitioner and subject to the applicable Federal laws and regulations governing similar crafts or classes of employees of Amtrak.

A commenter stated the final rule should specifically subject a winning bidder to the same rail laws as Amtrak. Section 269.15(b) of the final rule clearly provides, as stated above, that employees are subject to the applicable Federal laws and regulations governing similar crafts or classes of employees of Amtrak. Moreover, a winning bidder is subject to the section 24405 grant conditions. That includes the section 24405(b) provision that a person conducting rail operations shall be considered a rail carrier under section 10102(5). A commenter also stated the final rule should allow an eligible petitioner to contract with Amtrak for Amtrak to provide train and engine personnel. As noted above, the FAST Act limits the availability of the pilot program to a winning bidder that is not or does not include Amtrak. Furthermore, the FAST Act does not require Amtrak to provide personnel services to an eligible petitioner.

Paragraph (c) of this section states a winning bidder must provide hiring preference to qualified Amtrak employees displaced by the award of the bid, consistent with the staffing plan the winning bidder submits and the grant conditions 49 U.S.C. 24405 establish. This paragraph is based on the statutory directive in 49 U.S.C. 24711(c)(3).

Some commenters stated FRA should incorporate the FAST Act's hiring preference requirements in 49 U.S.C. 24711(c)(3) and 24405(d) into the final rule. To alert eligible petitioners of these related requirements of the FAST Act, FRA revised § 269.15(c) of the final rule to reference the section 24405 grant conditions. In addition, § 269.13(b)(6) of the NPRM and final rule incorporate the section 24405 requirements. A commenter also stated FRA must ensure that winning bidders comply with these hiring preference requirements. Section 269.13(b)(6) of the final rule provides that any contract between FRA and a winning bidder that is not or does not include Amtrak must subject the winning bidder to the section 24405 grant conditions. And, § 269.17(a) of the final rule states the FRA Administrator shall take any necessary action consistent with title 49 of the United States Code to enforce the contract where a winning bidder fails to fulfill its obligations under the contract required under § 269.13.

Section 269.17 Cessation of service.

This section provides under paragraph (a) that, if a bidder awarded a route under this rule ceases to operate the service, or fails to fulfill its obligations under the contract required under § 269.13, the Administrator, in collaboration with the STB, would take any necessary action consistent with title 49 of the United States Code to enforce the contract and ensure the continued provision of service, including installing an interim service rail carrier, providing to the interim rail carrier an operating subsidy necessary to provide service, and re-bidding the contract to operate the service. This section further provides under paragraph (b) that the entity providing interim service would either be Amtrak or an eligible petitioner under § 269.5. This section is based on the statutory directive in 49 U.S.C. 24711(d).

III. Regulatory Impact and Notices

1. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

FRA evaluated this final rule consistent with Executive Orders 12866 and 13563 and DOT policies and procedures. See 44 FR 11034 (Feb. 26, 1979). FRA prepared and placed in the docket a regulatory impact analysis addressing the economic impact of the final rule.

FRA does not expect any regulatory costs because this final rule is voluntary and does not require an eligible petitioner to take any action. In addition, the final rule is limited to not more than three long-distance routes as defined in 49 U.S.C. 24102 and operated by Amtrak on the date the FAST Act was enacted. Furthermore, the current market conditions and the investment necessary to operate a long-distance service may further serve to limit the number of eligible petitioners submitting petitions under the pilot program. Of course, if no eligible petitioners participate in the pilot program, then no costs or benefits would be incurred because of the final rule. However, FRA is estimating the costs and benefits generated when three eligible petitioners submit bids to operate long-distance rail service.

As discussed above, FRA assumed three entities will submit bids to estimate costs for the bidding scenario. The costs are solely due to preparing and filing a bid to operate service. Amtrak may submit a bid only if another entity submitted a petition to bid on a route. To estimate the cost for preparing and submitting a bid, FRA estimated the time and cost for FRA to review each bid. FRA estimates its review cost would be approximately \$49,834 per bid. Based on the costs of collecting and analyzing data, drafting a bid, and gaining approval within the organization, FRA estimates a railroad or

other entity that bids on a route would incur a cost of approximately three times as much as FRA’s review cost— approximately \$149,503 per bid. If an entity bids on a route, for this analysis, we assumed Amtrak would also submit a bid for the same route. Amtrak should have some of the data necessary to prepare the bid available. Therefore, their cost should be lower than another entity. Based on the costs of analyzing data, drafting a bid, and gaining approval within the organization, FRA estimated Amtrak’s cost to prepare and submit a bid would be twice FRA’s review cost —approximately \$99,669. All bid costs would be incurred during the first year. The table below shows the estimated cost for an entity and Amtrak to bid on one long-distance route.

	FRA Review Cost	Railroad/Other Entity Bidder Cost (FRA Cost * 3)	Amtrak Cost (FRA Cost * 2)
Total Cost per Bid	\$49,834	\$149,503	\$99,669

As stated above, FRA’s total burden estimate assumes three bids are submitted for long-distance routes. The total cost to entities other than Amtrak would be approximately \$448,509. The total cost to Amtrak would be approximately \$299,007. The sum of these two costs is \$747,516. Since all petitions and bids would occur during the first year, the total cost would be approximately \$747,516 over the four-year period (which could become 8 years if the Secretary renews a contract).

Some benefits are possible from this final rule. FRA cannot quantify the benefits but discussed them qualitatively in the regulatory impact analysis. If no eligible petitioners submit a bid for operating service, Amtrak would continue to operate service as it currently does. Therefore, no benefits would occur because of this final rule. However, if other entities are awarded contracts, those entities may be able to operate the service in a manner that would be beneficial to passengers.

Possible benefits include better service and lower cost. The introduction of competition in the bidding process may increase passenger rail efficiency and generate public benefits by lowering the operational subsidy, and possibly leading to better service and/or lower operating costs to society. FRA expects no change to railroad safety due to this regulation.

2. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare a Final Regulatory Flexibility Analysis (FRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FRA is certifying this final rule will not have a significant economic impact on a substantial number of small entities.

FRA published an Initial Regulatory Flexibility Analysis (IRFA) in the NPRM to discuss the potential small business impacts of the requirements in this final rule. FRA requested comments from interested parties regarding the potential economic impact on small entities that would result from the adoption of the proposals in this regulation. FRA received no comments to the NPRM on the economic impact on small entities.

Statement of the Need for and Objective of the Rule

FRA is revising 49 CFR part 269 to comply with a statutory mandate requiring the Secretary to promulgate a rule to implement a pilot program for competitive selection of eligible petitioners in lieu of Amtrak to operate not more than three long-distance

routes. The objective of this final rule is to implement the statutory mandate in FAST Act section 11307.

A Description and Estimate of the Number of Small Entities to which the Final Rule Will Apply

As stated above, the Regulatory Flexibility Act requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary certifies the rule would not have a significant economic impact on a substantial number of small entities. “Small entity” is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated, and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a “small entity” in the railroad industry is a for profit “line-haul railroad” that has fewer than 1,500 employees, a “short line railroad” with fewer than 500 employees, or a “commuter rail system” with annual receipts of less than seven million dollars. See “Size Eligibility Provisions and Standards,” 13 CFR part 121, subpart A.

Federal agencies may adopt their own size standards for small entities in consultation with the SBA and in conjunction with public comment. Under that authority, FRA has published a final statement of agency policy that formally establishes “small entities” or “small businesses” as railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad in 49 CFR 1201.1-1, which is \$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. See 68 FR 24891, May 9, 2003 (codified at appendix C to 49 CFR part 209).

The \$20 million limit is based on STB's revenue threshold for a Class III railroad carrier. Railroad revenue is adjusted for inflation by applying a revenue deflator formula under 49 CFR 1201.1-1. FRA is using this definition for the final rule. For other entities, the same dollar limit in revenues governs whether a railroad, contractor, or other respondent is a small entity.

This final rule applies to the following eligible petitioners: (1) a rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route, or another rail carrier that has a written agreement with a rail carrier or rail carriers that own such infrastructure; (2) a State, group of States, or State-supported joint powers authority or other sub-State governance entity responsible for provision of intercity rail passenger transportation with a written agreement with the rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route and that host or would host the intercity rail passenger transportation; or (3) a State, group of States, or State-supported joint powers authority or other sub-State governance entity responsible for provision of intercity rail passenger transportation and a rail carrier with a written agreement with another rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route and that host or would host the intercity rail passenger transportation. The only petitioners that may be considered a small entity would be small railroads.

This final rule is voluntary for all eligible petitioners. Therefore, there are no mandates placed on large or small railroads. In addition, the final rule is limited to not more than three long-distance routes operated by Amtrak. Consequently, this final rule is

not likely to affect a substantial number of small entities, and most likely will not impact any small entities. FRA requested comments on this and received none.

Small railroads face the same requirements for entry in the pilot program as other railroads. The railroad must own the infrastructure over which Amtrak operates those long-distance routes described in 49 U.S.C. 24102. Any small entity would likely only bid on a route if it was in its financial interest to do so. Accordingly, any impact on small entities would be positive. The pilot program will allow small railroads to enter a market which currently has substantial barriers.

FRA notes this final rule does not disproportionately place any small railroads that are small entities at a significant competitive disadvantage. Small railroads are not excluded from participation if they are statutorily eligible. This final rule and the underlying statute concern the potential selection of eligible petitioners to operate an entire long-distance route. If Amtrak uses 30 miles of a small railroad's infrastructure on a route that is 750 miles long, that small railroad could not apply under this final rule to operate service only over the 30 mile segment it owns (the small railroad would have to apply to operate service over the whole route). Thus, the ability to bid on a route is not constrained by a railroad's size.

This final rule allows small railroads to participate in the pilot program, but does not require them to take any action. If small entities do not believe it would be beneficial to participate in the pilot program, they are not required to take any action. Therefore, there is no significant economic impact on any small entities as a result of this final rule.

Under the Regulatory Flexibility Act (5 U.S.C. 605(b)), FRA certifies this final rule does not have a significant economic impact on a substantial number of small entities.

3. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 and the Office of Management and Budget's (OMB) Implementing Guidance at 5 CFR 1320.3(c), collection of information means, except as provided in § 1320.4, the obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit.

FRA expects the requirements of this final rule will affect less than 10 "persons" as defined in 5 CFR 1320.3(c)(4). Consequently, no information collection submission is necessary, and no approval is being sought from OMB at this time.

4. Environmental Impact

FRA evaluated this final rule consistent with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA determined this final rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because the rulemaking would not result in a change in current passenger service; instead, the program would only potentially

result in a change in the operator of such service. Under section 4(c) and (e) of FRA's Procedures, FRA concludes no extraordinary circumstances exist for this final rule that might trigger the need for a more detailed environmental review. As a result, FRA finds this final rule is not a major Federal action significantly affecting the quality of the human environment.

5. Federalism Implications

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 4, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this final rule consistent with the principles and criteria in Executive Order 13132. This final rule complies with a statutory mandate, and, thus, is in compliance with Executive Order 13132.

In addition, this final rule will not have a substantial effect on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, this final rule will not have any federalism implications that impose substantial direct compliance costs on State and local governments. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this final rule is not required.

6. Unfunded Mandates Reform Act of 1995

Under Section 201 of the Unfunded Mandates Reform (UMR) Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the UMR Act (2 U.S.C. 1532) further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement [detailing the effect on State, local, and tribal governments and the private sector].

The \$100,000,000 has been adjusted to \$155,000,000 to account for inflation. This final rule will not result in expenditure of more than \$155,000,000 by the public sector in any one year, and, thus, preparation of such a statement is not required.

7. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355, May 22, 2001. Under the Executive Order, a “significant energy action” is defined as any action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including any notice of inquiry, advance notice of proposed rulemaking, and notice of proposed rulemaking that: (1)(i) is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) the Administrator of the OMB Office of Information and Regulatory Affairs designates as a significant energy action. FRA evaluated this final rule consistent with Executive Order 13211. FRA determined this final rule will not have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA concludes this regulatory action is not a “significant energy action” under Executive Order 13211.

Executive Order 13783 requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Executive Order 13783 defines “burden” to mean unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources. FRA determined this final rule will not potentially burden the development or use of domestically produced energy resources.

8. Privacy Act Information

Interested parties should be aware that anyone can search the electronic form of all written communications and comments received into any agency docket by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the Federal Register published on Apr. 11, 2000, 65 FR 19477, or you may visit <http://www.dot.gov/privacy.html>. Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

List of Subjects in 49 CFR Part 269

Railroad employees, Railroads.

The Rule

For the reasons discussed in the preamble, FRA revises part 269 of chapter II, subtitle B, title 49 of the Code of Federal Regulations to read as follows:

PART 269—COMPETITIVE PASSENGER RAIL SERVICE PILOT PROGRAM

Sec.	
269.1	Purpose.
269.3	Limitations.
269.5	Definitions.
269.7	Petitions.
269.9	Bid process.
269.11	Evaluation.
269.13	Award.
269.15	Access to facilities; employees.
269.17	Cessation of service.

Authority: Sec. 11307, Pub. L. 114-94; 49 U.S.C. 24711; and 49 CFR 1.89.

§ 269.1 Purpose.

The purpose of this part is to carry out the statutory mandate in 49 U.S.C. 24711 requiring the Secretary to implement a pilot program for competitive selection of eligible petitioners in lieu of Amtrak to operate not more than three long-distance routes.

§ 269.3 Limitations.

(a) Route limitations. The pilot program this part implements is available for not more than three Amtrak long-distance routes.

(b) Time limitations. An eligible petitioner awarded a contract to provide passenger rail service under the pilot program this part implements shall only provide such service for a period not to exceed four years from the date of commencement of service. The Administrator has the discretion to renew such service for one additional operation period of four years.

§ 269.5 Definitions.

As used in this part—

Act means the Fixing America’s Surface Transportation Act (Pub. L. 114-94 (Dec. 4, 2015)).

Administrator means the Federal Railroad Administrator, or the Federal Railroad Administrator’s delegate.

Amtrak means the National Railroad Passenger Corporation.

Eligible petitioner means one of the following entities, other than Amtrak, that has submitted a petition to FRA under § 269.7:

(1) A rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route, or another rail carrier that has a written agreement with a rail carrier or rail carriers that own such infrastructure;

(2) A State, group of States, or State-supported joint powers authority or other sub-State governance entity responsible for providing intercity rail passenger transportation with a written agreement with the rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route and that host or would host the intercity rail passenger transportation; or

(3) A State, group of States, or State-supported joint powers authority or other sub-State governance entity responsible for providing intercity rail passenger transportation and a rail carrier with a written agreement with another rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route and that host or would host the intercity rail passenger transportation.

File and filed mean submission of a document under this part to FRA at PassengerRail.Liaison@dot.gov on the date the document was emailed to FRA.

Financial plan means a plan that contains, for each Federal fiscal year fully or partially covered by the bid:

(1) An annual projection of the revenues, expenses, capital expenditure requirements, and cash flows (from operating activities, investing activities, and financing activities, showing sources and uses of funds, including the operating subsidy amount) attributable to the route; and

(2) A statement of the assumptions underlying the financial plan's contents.

FRA means the Federal Railroad Administration.

Operating plan means a plan that contains, for each Federal fiscal year fully or partially covered by the bid:

(1) A complete description of the service planned to be offered, including the train schedules, frequencies, equipment consists, fare structures, and such amenities as sleeping cars and food service provisions; station locations; hours of operation; provisions for accommodating the traveling public, including proposed arrangements for stations shared with other routes; expected ridership; passenger-miles; revenues by class of service between each city-pair proposed to be served; connectivity with other intercity transportation services; and compliance with applicable Service Outcome Agreements; and

(2) A statement of the assumptions underlying the operating plan's contents.

Long-distance route means those routes described in 49 U.S.C. 24102(5) and operated by Amtrak on the date of enactment of the Act.

§ 269.7 Petitions.

(a) In general. An eligible petitioner may petition FRA to provide intercity passenger rail transportation over a long-distance route in lieu of Amtrak for a period of time consistent with the time limitations described in § 269.3(b).

(b) Petition requirements. Eligible petitioners must:

(1) File the petition with FRA no later than 180 days after [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER];

(2) Describe the petition as a "Petition to Provide Passenger Rail Service under 49 CFR part 269";

(3) Describe the long-distance route or routes over which the eligible petitioner wants to provide intercity passenger rail transportation and the Amtrak service that the eligible petitioner wants to replace; and

(4) If applicable, provide an executed copy of all written agreements with all entities that own infrastructure on the long-distance route or routes over which the eligible petitioner wants to provide intercity passenger rail transportation. The written agreement(s) must demonstrate the infrastructure owner's support for the petition.

§ 269.9 Bid process.

(a) Notification. FRA will notify the eligible petitioner and Amtrak of receipt of a petition filed with FRA and will publish a notice of receipt in the Federal Register not later than 30 days after FRA's receipt of such petition.

(b) Bid requirements. An eligible petitioner that has filed a timely petition under § 269.7 and Amtrak, if Amtrak desires, may file a bid with FRA not later than 120 days after FRA publishes the notice of receipt in the Federal Register under paragraph (a) of this section. Each such bid must:

(1) Provide FRA with sufficient information to evaluate the level of service described in the proposal, and to evaluate the proposal's compliance with the requirements in § 269.13(b);

(2) Describe how the bidder would operate the route;

(i) This description must include, but is not limited to, an operating plan, a financial plan and, if applicable, any executed agreement(s) necessary for the operation of passenger service over right-of-way on the route that is not owned by the bidder.

(ii) In addition, if the bidder intends to generate any revenues from ancillary activities (i.e., activities other than passenger transportation, accommodations, and food service) as part of its proposed operation of the route, then the bidder must fully describe such ancillary activities and identify their incremental impact in all relevant sections of

the operating plan and the financial plan, and on the route's performance, together with the assumptions underlying the estimates of such incremental impacts.

(3) Describe what passenger equipment the bidder would need, including how it would be procured;

(4) Describe in detail, including amounts, timing, and intended purpose, what sources of Federal and non-Federal funding the bidder would use, including but not limited to any Federal or State operating subsidy and any other Federal or State payments;

(5) Contain a staffing plan describing the number of employees the bidder needs to operate the service, the job assignments and requirements, and the terms of work for prospective and current employees of the bidder for the service outlined in the bid;

(6) Describe the capital needs for the passenger rail service including in detail any costs associated with compliance with Federal law and regulations;

(7) Describe in detail the bidder's plans for meeting all FRA safety requirements, including equipment, employee, and passenger parameters;

(8) Describe, for each Federal fiscal year fully or partially covered by the bid, a projection of the passenger rail service route's total revenue, total costs, total contribution/loss, and net cash used in operating activities per passenger-mile attributable to the route;

(9) Describe how the passenger rail service would meet or exceed the performance required of or achieved by Amtrak on the applicable route during the last fiscal year, and how the bidder would report on the performance standards. At a minimum, this description must include, for each Federal fiscal year fully or partially

covered by the bid a projection of the route's expected Passenger Miles per Train Mile, End-Point and All Stations On-Time Performance, Host Railroad and Operator Responsible Delays per 10,000 Train Miles, Percentage of Passenger Trips to/from Underserved Communities, Service Interruptions per 10,000 Train Miles due to Equipment-Related Problems, and customer service quality;

(10) Analyze the reasonably foreseeable effects, both positive and negative, of the passenger rail service on other intercity passenger rail services;

(11) Describe the bidder's compliance with all applicable Federal, state, and local laws; and

(12) Provide State or States written concurrence of the bid for a route that receives funding from a State or States.

(c) Supplemental information. (1) FRA may request supplemental information from a bidder and/or Amtrak if FRA determines it needs such information to evaluate a bid.

(2) FRA's request may seek information about the costs related to the service that Amtrak would still incur following the cessation of service, including the increased costs for other services.

(3) FRA will establish a deadline by which the bidder and/or Amtrak must file the supplemental information with FRA.

§ 269.11 Evaluation.

(a) Evaluation. FRA will select a winning bidder by evaluating the bids based on the requirements of this part.

(b) Notification. (1) Upon selecting a winning bidder, FRA will publish a notice in the Federal Register describing the identity of the winning bidder, the long-distance route the bidder will operate, a detailed justification explaining why FRA selected the bid, and any other information the Administrator determines appropriate.

(2) The notice under this paragraph (b) will be open for public comment for 30 days after the date FRA selects the bid.

§ 269.13 Award.

(a) Award. FRA will execute a contract with a winning bidder that is not or does not include Amtrak, consistent with the requirements of this section and as FRA may otherwise require, not later than 270 days after the bid deadline established by § 269.9(b).

(b) Contract requirements. Among other things, the contract between FRA and a winning bidder that is not or does not include Amtrak must:

(1) Award to the winning bidder the right and obligation to provide intercity passenger rail transportation over that route subject to such performance standards as FRA may require for a duration consistent with § 269.3(b);

(2) Award to the winning bidder an operating subsidy, as determined by FRA and based on Amtrak's final audited publically-reported fully-allocated operating costs of the route for the prior fiscal year, excluding costs related to Other Postretirement Employee Benefits, Amtrak Performance Tracking System Asset Allocations, Project Related Costs, and Amtrak Office of Inspector General activities, subject to the availability of funding, for the first year at a level that does not exceed 90 percent of the level in effect for that specific route during the fiscal year preceding the fiscal year in which the petition was received, adjusted for inflation;

(3) State that any award of an operating subsidy is made annually, is subject to the availability of funding, and is based on the amount calculated under paragraph (b)(2) of this section, adjusted for inflation;

(4) Condition the operating and subsidy rights upon the winning bidder providing intercity passenger rail transportation over the route that is no less frequent, nor over a shorter distance, than Amtrak provided on that route before the award;

(5) Condition the operating and subsidy rights upon the winning bidder's compliance with performance standards FRA may require, but which, at a minimum, must meet or exceed the performance required of or achieved by Amtrak on the applicable route during the fiscal year immediately preceding the year the bid is submitted;

(6) Subject the winning bidder to the grant conditions established by 49 U.S.C. 24405; and

(7) Subject the winning bidder to the requirements of the appropriations act(s) funding the contract.

(c) Publication. The winning bidder shall make their bid available to the public after the bid award with any appropriate redactions for confidential or proprietary information.

§ 269.15 Access to facilities; employees.

(a) Access to facilities. (1) If the award under § 269.13 is made to an eligible petitioner, Amtrak must provide that eligible petitioner access to the Amtrak-owned reservation system, stations, and facilities directly related to operations of the awarded route(s).

(2) If Amtrak and the eligible petitioner awarded a route cannot agree on the terms of access, either party may petition the Surface Transportation Board under 49 U.S.C. 24711(g).

(b) Employees. The employees of any person, except as provided in a collective bargaining agreement, an eligible petitioner uses in the operation of a route under this part shall be considered an employee of that eligible petitioner and subject to the applicable Federal laws and regulations governing similar crafts or classes of employees of Amtrak.

(c) Hiring preference. The winning bidder must provide hiring preference to qualified Amtrak employees displaced by the award of the bid, consistent with the staffing plan the winning bidder submits and the grant conditions established by 49 U.S.C. 24405.

§ 269.17 Cessation of service.

(a) If an eligible petitioner awarded a route under this part ceases to operate the service or fails to fulfill its obligations under the contract required under § 269.13, the Administrator, in collaboration with the Surface Transportation Board, shall take any necessary action consistent with title 49 of the United States Code to enforce the contract and ensure the continued provision of service, including the installment of an interim service and re-bidding the contract to operate the service.

(b) In re-bidding the contract, the entity providing service must either be Amtrak or an eligible petitioner.

Issued in Washington D.C. on July 3, 2017.

Patrick Warren,
Executive Director.

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