



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 650

[Docket No. FTA-2016-0008]

RIN 2132-AB27

Private Investment Project Procedures

AGENCY: Federal Transit Administration (FTA), DOT

ACTION: Final Rule.

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

DATES: The effective date of this final rule is [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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I. Executive Summary

A. Purpose of Regulatory Action

This final rule establishes procedures by which FTA recipients contemplating public transportation capital projects may seek a waiver or modification of a mandatory FTA regulation, policy, procedure, or guidance document in order to address impediments to the use of public-private partnerships (P3s) and private investment in public transportation capital projects. The Private Investment Project Procedures (PIPP) are intended to encourage project sponsors to seek modifications of Federal requirements

such that the modification will accelerate the project development process, attract private investment and lead to increased project management flexibility, more innovation, improved efficiency, and/or new revenue streams.

B. Statutory Authority

Section 20013(b)(1) of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. Law 112-141 (July 6, 2012), requires FTA to identify any provisions of 49 U.S.C. chapter 53, and any regulations or practices thereunder, that impede greater use of P3s and private investment. The law requires FTA to develop and implement, on a project basis, procedures and approaches that address such impediments in a manner similar to the Federal Highway Administration's (FHWA) Special Experimental Project Number 15 process (SEP-15), and protect the public interest and any public investment in public transportation capital projects that involve P3s or private investment. Section 20013(b)(5) of MAP-21 requires FTA to issue a rule to carry out the procedures and approaches developed under Section 20013(b)(1).

In accordance with Section 20013(b)(6) of MAP-21, the PIPP may not be used to waive any requirement under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, et seq.; 49 U.S.C. chapter 53 (including 49 U.S.C. 5333); or any other provision of Federal statute. Thus, the PIPP will allow for innovations in project delivery while maintaining FTA's stewardship responsibilities. FTA expects the lessons learned from projects approved under the PIPP to aid FTA in developing more effective approaches to project planning, project development, finance, design, construction, maintenance, and operations.

C. Summary of Major Provisions

In the notice of proposed rulemaking (82 FR 35500, Jul. 31, 2017), FTA proposed to add a new part 650, “Private Investment Project Procedures,” to title 49 of the Code of Federal Regulations (CFR). This final rule adds a new part 650 to title 49 of the CFR. In response to public comments, FTA has made several nonsubstantive, clarifying edits. In addition, FTA has made the following substantive changes:

1. Amended the definition of “Eligible Project” to require a project be included in the statewide long-range transportation plan or the metropolitan transportation plan, as those terms are defined in 23 CFR part 450;
2. Amended section 650.11 to permit one application per phase of a project, and to clarify that multiple waivers or modifications may be sought in one application;
3. Amended section 650.21 to require reporting to FTA one year after construction is complete, and for projects that include private investment in operations and maintenance, a report is required two years after the project has entered into revenue operations; and
4. Amended section 650.31 to permit applicants to identify proposed, as well as committed funding for the project, and to provide that FTA will post on its public Web site information related to waivers the FTA Administrator has granted.

D. Costs and Benefits

This final rule is an Executive Order 13771 deregulatory action, as FTA believes it will reduce the cost of complying with FTA requirements. FTA requested comment on the potential benefits or cost savings associated with this rule but did not receive any relevant information. Therefore, FTA is unable to quantify the benefits or cost savings due to the lack of information about 1) the types of waivers that will be requested, 2) the number of waivers that will be requested, and 3) the difference in cost between complying with FTA's existing requirements and complying with the requirements of a waiver and this final rule.

II. Rulemaking Background

Over the past decade, Federal transportation legislation has evolved to encourage increased use of public-private partnerships and private investment in public transportation capital projects. FTA's notice of proposed rulemaking for this final rule goes into some detail on this history. *See* 82 FR 35500, Jul. 31, 2017, <https://www.gpo.gov/fdsys/pkg/FR-2017-07-31/pdf/2017-15985.pdf>.

More recently, Section 20013(b)(1) of MAP-21 directs FTA to identify impediments in chapter 53 of title 49 of the United States Code, and any regulations or practices thereunder, to the use of public-private partnerships and private investment in public transportation capital projects, and to develop and implement procedures on a project basis that address such impediments in a manner similar to FHWA's SEP-15 process.

In 2004 FHWA initiated SEP-15, pursuant to authority granted to the Secretary by 23 U.S.C. 502(b), to create a procedure to waive certain requirements of title 23 of the United States Code and implementing regulations on a case-by-case basis in order to

encourage tests and experimentation in the entire project development process, specifically aimed at attracting private investment, leading to increased project management flexibility, more innovation, improved efficiency, timely project implementation, and new revenue streams. 69 FR 59983 (Oct. 6, 2004). SEP-15 permits FHWA to experiment in four major areas of project delivery – contracting, right-of-way acquisition, project finance, and compliance with NEPA and other environmental requirements. SEP-15 enables FHWA to actively explore changes in the way it approaches the oversight and delivery of highway projects to further the Administration’s goals of reducing congestion and preserving transportation infrastructure. A key feature of SEP-15 is that it allows FHWA to identify current FHWA laws, regulations, and practices that inhibit greater use of P3s and private investment in transportation improvements and allows FHWA to develop procedures and approaches that address these impediments.

FTA conducted an online dialogue from October 2014 to January 2015 with public transportation recipients and stakeholders to help inform this rulemaking process. In general, commenters identified the following impediments to private investment in public transportation capital projects: the timing of Federal grant awards can discourage lender interest because it is perceived to be incompatible with the timing of private financing schedules, public agency procurement schedules and U.S. Department of Transportation (DOT) financing programs, such as the Transportation Infrastructure Finance and Innovation Act (TIFIA), Railroad Rehabilitation and Improvement Financing (RRIF) and Private Activity Bonds (PAB); the level of Federal oversight could be more flexible and dependent upon the experience of the project sponsor, terms of agreements, and the

existence of concurrent, independent oversight, such as state or regulatory agencies, and type of financing; FTA could rely more heavily upon approvals of third parties with jurisdiction over a project, rather than replicate certain reviews, and commenters questioned whether any necessary FTA reviews could be expedited by having them performed by an independent third party selected by FTA, but paid for by the project sponsor.

Under this final rule, recipients funding a public transportation capital project subject to 49 U.S.C. chapter 53 with FTA, RRIF, TIFIA or other Federal financial assistance could request a modification or waiver, in whole or in part, of one or more specific FTA regulations, practices, procedures or guidance documents (including circular provisions) that is an impediment to the use of P3s or private investment in that project. For example, an applicant could propose that FTA rely upon approvals of third parties with jurisdiction over an eligible project, rather than replicate certain FTA oversight reviews.

III. Summary of NPRM Comments and FTA Responses

FTA received comments from 21 entities, including State DOTs, transit agencies, industry associations, consultants, and individuals, as well as a metropolitan planning organization (MPO), a union, a private operator, a P3 authority, and a development corporation. Most commenters expressed support for the rulemaking, with one commenter suggesting that private investment is not appropriate for public transit projects and should not be encouraged by FTA.

Some comments were outside the scope of the rulemaking. For example, two commenters suggested they would support initiatives related to waivers of FHWA and

USDOT rules; this rulemaking pertains only to FTA. Some commenters suggested lists of requirements or processes that could be waived or modified; this rulemaking does not include such lists, as waiver or modification of administrative requirements will be done on a project (case-by-case) basis. One commenter asked if FTA would consider increasing the Federal share of a project's cost where a P3 is involved, and asked if a project would get a higher rating in the U.S. DOT Transportation Investment Generating Economic Recovery (TIGER) application process if a P3 is involved. The Federal share is statutory and something FTA cannot waive or modify; rating for the TIGER program is outside the scope of this rulemaking. Similarly, commenters' proposed changes to FTA's Capital Investment Grants (CIG) program and requests for preferential treatment for FTA discretionary grant awards that include public and private sector benefits are outside the scope of this rule. Finally, some commenters requested that any public transportation capital project that includes private investment should include a "value for money" or cost-benefit analysis. Project sponsors contemplating private participation in project delivery should ensure that the public interest is protected and the return on investment makes sense, but such an analysis is beyond the scope of this rulemaking.

A. General Comments

Comments. Several commenters addressed the scope of the rule, with one commenter acknowledging the limitations of the rulemaking, in that Section 20013(b) of MAP-21 does not permit FTA to waive or modify statutory requirements, and asserting that often statutory requirements can be the most significant barriers to P3 involvement. Another commenter suggested the scope of the rule appeared narrower than SEP-15, and suggested the rule should be broadened to cover any innovative idea, such as

improvements to project delivery and incentivizing local investment. One commenter noted that the rule applies only prospectively, and not to existing projects, suggesting that existing projects may benefit from P3s and may require relief from FTA requirements related to grant administration or lease of federally-assisted assets. Another commenter suggested that a P3 should include those situations in which a public entity enters into a contract with a private entity to operate, manage, or maintain all or part of a transit system that receives federal funding.

Response. A key difference between FHWA's SEP-15 and the authority provided to FTA by Section 20013(b) of MAP-21 is that SEP-15 permits waiver of statutory requirements in title 23 of the United States Code, and Section 20013(b) does not permit FTA to waive any provision of federal statute. Thus, FTA is limited to waiver or modification of FTA administrative requirements, including regulations, policies, guidance, etc., and not statutory provisions. However, FTA believes that waiver or modification of administrative requirements may result in increased flexibility, improved project efficiency, and timely implementation of project delivery. While there are limitations, FTA does not believe the rule is otherwise significantly narrower than SEP-15; recipients or project sponsors may propose any innovative idea that they believe will remove an impediment to private investment or participation in public transportation capital projects. The rule does apply prospectively and not to existing capital projects. Further, this rule does not apply to contracts between public entities and private entities solely for the operation, management, or maintenance of a transit system. There is no evidence that there are challenges involving the private sector in state of good repair, general maintenance, or other ongoing capital projects, including the capital cost of

contracting for operations. Indeed, many transit agencies contract with private entities for ongoing capital needs, maintenance, and operations. The purpose of this rulemaking is to encourage private entity participation in designing and building new public transportation capital projects, to include, as a component of the whole project, long-term investments in operations and maintenance where desired and appropriate.

Comments. One commenter suggested FTA provide resources to assist recipients in identifying regulations, procedures, policies, etc., that may be waived or modified, to include a list of such provisions, with another commenter suggesting the rule does not appear to provide certainty in the decision-making process. Another commenter suggested that FTA should delay implementation of PIPP until after FTA has published the transparency guidance required by Section 20013(b)(2) of MAP-21.

Response. FTA intends to develop frequently asked questions (FAQs) and other guidance related to the final rule prior to or closely following publication of the final rule, but does not intend to develop a list of provisions that might be waived or modified. It is up to the recipient/project sponsor to identify FTA administrative requirements that are standing in the way of private investment or participation in a particular project. Such impediments are likely to vary from project to project. FTA's Private Sector Liaison is available to provide technical assistance to recipients contemplating a request for a waiver or modification. FTA has not yet developed the guidance required by Section 20013(b)(2) of MAP-21, but does not believe the rulemaking should be delayed. FTA has developed a robust Private Sector Participation Web page that includes numerous resources for recipients and private entities. See

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

B. Section-by-Section Comments

Section 650.5 Definitions

One commenter suggested that projects should be eligible for waiver or modification of administrative requirements only if the project is part of a region's approved long-range transportation plan. This will help to assure the project is a priority for the region. FTA agrees with this comment and has amended the definition of "eligible project" to require the project be included in the statewide long-range transportation plan or the metropolitan transportation plan, as those terms are defined in 23 CFR part 450.

Several commenters suggested various amendments to the proposed definition in the NPRM of Public-Private Partnership (P3). FTA proposed that a P3 be defined as, "a contractual agreement formed between a public agency and a private sector entity that is characterized by private sector investment and risk-sharing in the delivery, financing and operation of a project." Commenters generally sought a broader definition that would go beyond the conventional project delivery and financing approaches to include other characteristics or elements, such as when federal funding benefits both the public and private sectors and their respective abilities to enhance economic development, mitigate congestion, enhance safety, and improve capacity. One commenter asserted the definition could be read to be limited to various project delivery contracting mechanisms such as design-build-finance, design-build-operate-maintain, or design-build-finance-operate-maintain. One commenter suggested FTA amend the definition to read "one or

more private sector agencies.” Two commenters suggested FTA amend the definition to read “private sector investment and/or risk-sharing.” Two commenters suggested that an operations-only agreement should be eligible.

FTA did not amend the definition of P3 proposed in the NPRM. The definition provides the framework necessary for the rule; it is not clear how the definition would prohibit characteristics of a P3 that include enhancing economic development, mitigating congestion, etc. The purpose of the rule is to provide a process by which recipients can request a waiver or modification of an administrative requirement that impedes greater use of public-private partnerships and private investment in public transportation capital projects. Thus, design-build is a critical component of a P3 under this rule. As stated above in the “General Comments” section, there is no evidence that FTA requirements impede recipients’ ability to contract with private entities for state of good repair projects, transit operations, or general maintenance. While the rulemaking is not limited to CIG projects, generally speaking, the rule will apply to new construction of public transportation corridors, systems, lines, etc. Further, while the definition provides for an agreement between “a public entity and a private sector entity,” the rule does not prohibit an agreement between a public entity and two or more private entities. Finally, private sector investment inherently involves sharing the risk of the project, so FTA declines to amend the definition of P3 to read “and/or.”

Section 650.11 Private investment project procedures

Several commenters expressed concern about the proposed provision in the NPRM that only one application per project could be submitted. Commenters asserted that FTA should permit multiple applications through the development of the project, either by

phase or when new opportunities are identified. One commenter suggested that if a project has more than one FTA recipient, each of the recipients should be permitted to request a waiver or modification.

In response to comments, FTA has amended this section to provide that one application per phase of a project may be submitted, and that an application may include requests for waiver or modification of more than one FTA requirement. Allowing an application for each phase of a project means a recipient may submit one application during the project development phase, a second application during the engineering phase, and a third application during construction. FTA encourages recipients to include all of their requests for waiver or modification into one application, in order to streamline the waiver request process.

Where more than one recipient is carrying out a project, the rule does not prohibit each recipient from requesting a waiver or modification of FTA administrative requirements. FTA does, however, expect recipients to work together in such situations to ensure recipients are not working at cross-purposes or submitting duplicate requests. Thus, section 650.31(b)(7) requires recipients to obtain the concurrence of other recipients involved in the same project prior to submitting an application for waiver or modification.

One factor considered by the FTA Administrator in section 650.11(b) is “the amount of private sector participation or risk transfer proposed is sufficient to warrant modification or waiver of FTA requirements.” One commenter suggested this is a subjective factor and that FTA should provide clarity on the type or level of private

participation that is deemed sufficient. In response, we note that this will be a case-by-case determination, likely dependent on project size, scope and cost, and thus not quantifiable in the rule.

Section 650.13 Limitation

The proposed text included language from Section 20013(b) of MAP-21, providing the Administrator may not waive or modify “any requirement under” 49 U.S.C. 5333, NEPA, or any other provision of Federal statute. One commenter suggested FTA amend the text to read, “statutory provision of” to better distinguish between statutory requirements that cannot be waived and regulatory requirements that can. FTA declines to make this change, as the language in the rule is the same language that is in the statute.

Section 650.21 Lessons learned report

FTA proposed in the NPRM that a project receiving a waiver or modification of an FTA requirement would be required to submit a report to FTA not later than one year after completion of the project. The report would evaluate the effectiveness of the waiver or modification on project delivery. One commenter suggested that in the case of a design-build-operate-maintain agreement, it could be decades before the project is “complete.” In response to this comment, we have amended the language to provide that a report is due one year after completion of construction, and for projects that include private entity involvement in operations or maintenance, a second report will be required two years after the project begins revenue operations. Other commenters suggested that reporting best practices and lessons learned could be reported as they are learned over the life of the project; FTA believes the reporting requirements of one year after construction

and two years into revenue operations is the appropriate balance between getting the information as it is available and not imposing unduly burdensome reporting requirements.

Several commenters suggested FTA make the waiver process as transparent as possible, with determinations on waivers, supporting materials, etc. available online. In response, FTA has added a new provision, section 650.31(e) stating FTA will publish on its public Web site information related to waivers the FTA Administrator has granted, including the waiver application and any supporting documentation. FTA will redact proprietary information prior to publication.

Section 650.31 Application process

This section proposed a number of requirements that an application for waiver or modification must meet in order to be considered. Two commenters suggested that the requirement under 650.31(b)(7), that other recipients concur with the application submission where more than one recipient is involved with a project, be deleted. FTA declines to delete this requirement; where two or more recipients are involved in the same project, FTA expects them to work together to submit the application, or at least be aware that one recipient is submitting an application. This will help speed up the process in getting a decision. Several commenters suggested that FTA should accept applications with information available to the recipient at the time the application is submitted; FTA expects complete applications, and will inform any applicant that submits an incomplete application that FTA will not consider an application until it is complete. Several commenters suggested recipients be permitted to resubmit an application with additional

information to address a denial or partial approval. FTA declines to accept this suggestion, but will make its Private Sector Liaison available to recipients seeking a waiver or modification for technical assistance purposes, which should help to ensure applications, once submitted, are complete and ready for consideration by the FTA Administrator. One commenter suggested recipients not be required to include duplicative information previously submitted in an earlier application (as in an earlier phase of the project). FTA believes reference to information in an earlier application should be sufficient; we have not amended the regulatory text.

One commenter suggested including additional bases for waivers, such as hardship, unforeseen circumstances, a need for additional time for compliance, etc. FTA declines to include any of these as bases for waivers. The purpose of the rule is to remove impediments to private sector participation in public transportation capital projects. Thus, the additional bases proposed are not applicable here.

One of the requirements in the proposed rule was that recipients provide, “a financial plan identifying sources and uses of funds committed to the project.” Several commenters suggested that funding sources might not be committed at the time of a waiver or modification application, and that in fact such sources might not be available unless FTA granted a waiver or modification. Two commenters suggested FTA amend the provision to state funds should be “proposed or committed.” FTA has accepted this suggestion and amended the regulatory text accordingly.

FTA did not propose any timeframes for submission or review of applications. Applications may be submitted at any time when a recipient or project sponsor has the

information necessary to submit a complete application. Several commenters suggested timeframes for FTA's response to an application, generally varying from 30 to 60 days. Given that the goal of the application is to remove impediments to private sector investment in capital projects, FTA recognizes that a prompt response to an application is important. FHWA generally provides a response to an applicant for SEP-15 within 60 days, depending on the complexity of the request. FTA believes this is a reasonable timeframe and will strive to respond to complete applications within 60 days. If an application is incomplete, FTA will not wait 60 days to respond, but will notify the applicant as soon as FTA determines the application is not complete. While FTA will strive to respond to applications in a timely manner, we decline to include specific timeframes in the regulatory text.

IV. Regulatory Analyses and Notices

Executive Order 12866 and 13563; USDOT Regulatory Policies and Procedures

Executive Orders 12866 and 13563 direct Federal agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits—including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Also, Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The final rule will encourage tests and experimentation in the project development process and is specifically aimed at attracting public-private partnerships and private investment. Public-private partnerships of capital projects are rare in the U.S. transit industry, although they are common in other countries. The final rule provides an avenue to

address existing impediments to P3 projects with the aim of increasing their use, but it is unlikely, on its own, to significantly increase the level of P3 activity in the U.S. transit industry.

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

Executive Order 13771

This final rule is an E.O. 13771 deregulatory action because FTA believes it will reduce the cost of complying with FTA requirements. However, FTA is unable to quantify the cost savings due to the lack of information about 1) the types of waivers that will be requested, 2) the number of waivers that will be requested, and 3) the difference in cost between complying with FTA's existing requirements and complying with the requirements of a waiver and this final rule.

Regulatory Flexibility Act

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

Unfunded Mandates Reform Act of 1995

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

Executive Order 13132 (Federalism)

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

Executive Order 12372 (Intergovernmental Review)

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

Paperwork Reduction Act (PRA)

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. FHWA has received an average of less than one application per year for its SEP-15 program since its inception. Therefore, FTA believes that this rule will not generate collection of information requirements that impact ten or more applicants. FTA sought comment on

whether FTA should anticipate ten or more applications to the PIPP on an annual basis, but did not receive any comments on this issue.

National Environmental Policy Act

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

Executive Order 12630 (Taking of Private Property)

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

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

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a) (77 FR 27534) require DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies and activities on minority and/or low-income populations. The DOT Order requires DOT agencies to address compliance with

the Executive Order and the DOT Order in all rulemaking activities. In addition, on July 17, 2014, FTA issued a circular to update its EJ Policy Guidance for Federal Transit Recipients (www.fta.dot.gov/legislation_law/12349_14740.html), which addresses administration of the Executive Order and DOT Order.

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

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

Executive Order 13175 (Tribal Consultation)

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

Executive Order 13211 (Energy Effects)

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

Privacy Act

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

Statutory/Legal Authority for This Rulemaking

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

Regulation Identifier Number

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

List of Subjects in 49 CFR Part 650

Grant programs – transportation, Mass transportation.

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

PART 650—PRIVATE INVESTMENT PROJECT PROCEDURES

Sec.

Subpart A—General Provisions

650.1 Purpose.

650.3 Applicability.

650.5 Definitions.

Subpart B—Private Investment Project Procedures

650.11 Private investment project procedures.

650.13 Limitation.

Subpart C—Reporting

650.21 Lessons learned report.

Subpart D—Applications

650.31 Application process.

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

Subpart A—General Provisions

§ 650.1 Purpose.

This part establishes private investment project procedures that seek to identify and address Federal Transit Administration requirements that are impediments to the greater use of public-private partnerships and private investment in public transportation

capital projects, while protecting the public interest and any public investment in such projects.

§ 650.3 Applicability.

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

§ 650.5 Definitions.

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

Administrator means the Administrator of the Federal Transit Administration.

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

Eligible project means any surface transportation capital project that is subject to 49 U.S.C. chapter 53, included in the statewide long-range transportation plan or the metropolitan transportation plan, as those terms are defined in 23 CFR part 450, and that will be implemented as a public-private partnership, a joint development, or with other private sector investment.

FTA means the Federal Transit Administration.

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

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

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

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

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

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

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

Subpart B—Private Investment Project Procedures

§ 650.11 Private investment project procedures.

(a) A recipient may, subject to the requirements of this part, submit applications to modify or waive existing FTA requirements for an eligible project. For projects with

multiple recipients, recipients may, but are not required to, submit an application for a project jointly; however, only one application per phase of a project may be submitted. Applications may contain requests for modification or waiver of more than one FTA requirement. All applications shall comply with the requirements of § 650.31.

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

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

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

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

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

§ 650.13 Limitation.

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

(1) 49 U.S.C. 5333;

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

(3) Any other provision of Federal statute.

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

Subpart C—Reporting

§ 650.21 Lessons learned report.

For a project for which the Administrator has modified or waived any FTA requirement pursuant to this part, not later than one year after completion of construction, and not later than two years after a project that includes private entity involvement in operations or maintenance activities has entered revenue operations, the recipient shall submit to FTA a report that evaluates the effects of the modification or waiver of Federal requirements on the delivery of the project. The report shall describe the modification or waiver applied to the project; evaluate the success or failure of the modification or waiver; evaluate the extent to which the modification or waiver addressed impediments to greater use of public-private partnerships and private investment in public transportation capital projects; and may include any recommended statutory, regulatory or other changes with an explanation of how the changes would encourage greater use of public-private partnerships and private investment in public transportation capital projects.

Subpart D—Applications

§ 650.31 Application process.

(a) Applications must be submitted to the FTA Private Sector Liaison at FTA Headquarters and provide a copy to the FTA Regional Administrator for the region in which the project is located. Addresses for FTA Headquarters and Regions are available at www.transit.dot.gov.

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

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

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

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

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

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

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

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

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

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

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

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

(e) FTA will publish on its public Web site information related to waivers the FTA Administrator has granted. This may include a copy of the waiver application and any supporting documents, with proprietary information redacted.

Under authority delegated in 49 CFR 1.91

K. Jane Williams

Acting Administrator

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