



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 633

[Docket No. FTA-2019-0016]

RIN 2132-AB35

Project Management Oversight

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Final rule.

SUMMARY: This final rule amends FTA regulations implementing project management oversight. FTA is modifying the regulation to make it consistent with statutory changes and to modify the scope and applicability of project management oversight.

DATES: Effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For program matters, Corey Walker, Office of Program Management, (202) 366-0826 or corey.walker@dot.gov. For legal matters, Mark Montgomery, Office of Chief Counsel, (202) 366-4011 or mark.montgomery@dot.gov. FTA is located at 1200 New Jersey Ave. SE, Washington DC 20590-0001. Office hours are from 8:00 a.m. to 4:30 p.m. E.T., Monday through Friday, except Federal holidays.

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I. Rulemaking Background

Recognizing a compelling need to strengthen the management and oversight of major capital projects, in the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) (Pub. L. 100–17) (April 2, 1987), Congress authorized FTA’s predecessor agency, the Urban Mass Transportation Administration (UMTA), to conduct oversight of major capital projects and to promulgate a rule for that purpose. The statute, now codified at 49 U.S.C. 5327, authorizes FTA to obtain the services of project management oversight contractors (PMOCs) to assist FTA in overseeing the expenditure of Federal financial assistance for major capital projects. Further, the statute requires FTA to promulgate a regulation that includes a definition of “major capital project” to identify the types of projects governed by the rule.

Accordingly, UMTA promulgated a rule for oversight of major capital projects on September 1, 1989, at 49 CFR part 633 (54 FR 36708). At that time, UMTA’s capital programs were comparatively small, relative to today, totaling a little more than \$2 billion annually. UMTA promulgated a regulation that defined “major capital project” as any project for the construction of a new fixed guideway or extension of an existing fixed guideway or a project involving the rehabilitation or modernization of an existing fixed guideway with a total project cost of \$100 million or more. The rule limited covered projects to those receiving funds made available under sections 3, 9, or 18 of the Urban Mass Transportation Act of 1964, as amended; 23 U.S.C. 103(e)(4); or section 14(b) of the National Capital Transportation Amendments of 1979. That rule is still in effect today.

By 2011, the annual dollar value of the Federal transit capital programs was nearly five times the level authorized under STURAA in 1987, and the number of active PMOC task orders was more than double the number in 1987. Furthermore, FTA funded a larger number of

projects with a total cost of more than one billion dollars that presented significant oversight challenges. On September 13, 2011, FTA published a Notice of Proposed Rulemaking (NPRM) (76 FR 56378) that proposed to: (1) enable FTA to identify the necessary management capacity and capability of a sponsor of a major capital project more clearly; (2) spell out the many facets of project management that must be addressed in a project management plan; (3) tailor the level of FTA oversight to the costs, complexities, and risks of a major capital project; (4) set forth the means and objectives of risk assessments for major capital projects and; (5) articulate the roles and responsibilities of FTA's PMOCs.

After the NPRM was published, however, the Moving Ahead for Progress in the 21st Century Act (MAP-21) (Pub. Law 112-141) (July 6, 2012) repealed the Fixed Guideway Modernization program, created the State of Good Repair program, and amended the Capital Investment Grants Program to add Core Capacity Improvement projects and streamline the New and Small Starts project development process. Moreover, MAP-21 shifted the initiation of project management oversight to the project development phase and removed the statutory requirement that recipients of financial assistance for projects with a total cost of \$1 billion submit an annual financial plan. Given the fundamental changes to these competitive and formula capital programs, FTA withdrew the NPRM (78 FR 16460) to reexamine its proposed definition of major capital project and its policy and procedures for risk assessment. Subsequently, the Fixing America's Surface Transportation (FAST) Act (Pub. L. 114-94) (December 4, 2015) further amended 49 U.S.C. 5327 to limit project management oversight to quarterly reviews, absent a finding that more frequent oversight was necessary, and mandated that the Secretary prescribe regulations outlining a process for at-risk recipients to return to quarterly reviews.

FTA has become much more knowledgeable about the risks common to major capital projects, having conducted its own risk assessments since 2005, witnessed some project sponsors' lack of management capacity and capability and appropriate project controls for some projects, and studied the reasons for cost and schedule changes on many major capital projects. Consequently, on August 26, 2019, FTA published an NPRM (84 FR 44590) proposing to amend its project management oversight rule.

First, the NPRM proposed to change the applicability of the regulation by shifting the definition of a "major capital project" from one based on the type of project or total project cost to one based on both the amount of Federal financial assistance and the total project cost, which FTA views as a more appropriate benchmark than the type of project or total capital cost of a project alone. The current definition of a "major capital project" under 49 CFR 633.5 applies to all construction projects for new fixed guideways or extensions of existing fixed guideways, regardless of project cost, and to fixed guideway rehabilitation and modernization projects with total project costs over \$100 million. The NPRM applied a project cost threshold to all fixed guideway capital projects. As a default, the rule proposed raising the total project cost threshold to \$300 million or more and requiring that the project receive \$100 million or more in Federal investment to be subject to project management oversight.

Second, the NPRM proposed to amend the regulation to bring it into compliance with statutory changes. The rule proposed limiting project management oversight to quarterly reviews, absent a finding by FTA that a recipient requires more frequent oversight, and providing a process for such a recipient to return to quarterly reviews. In addition, the rule proposed applying project management oversight to major capital projects receiving Federal financial assistance under any provision of Federal law.

After reviewing public comments and making some corresponding changes, FTA now amends and finalizes its project management oversight rule.

II. Summary of NPRM Comments and FTA's Responses

FTA received 69 discrete comments from 17 commenters, including one comment from a mayoral office expressing general support for the proposed rule. Two comments were outside the scope of the proposed rule and are not addressed in this document. One of the comments was a question about the criteria for applying for an FTA grant. Another comment regarded PMOC procurement, which is not addressed in the regulation.

Cost Threshold—Application

One transit agency sought clarification as to when FTA would determine a project had met the cost threshold, thus triggering application of the project management oversight (PMO) regulation to the project. The commenter suggested that the independent cost estimate, receipt of project bids, or the final funding decision should initiate the threshold determination.

In response, FTA has determined that for Capital Investment Grants (CIG) projects, FTA will use the cost estimate provided by the project sponsor when the project enters the CIG Project Development phase and, for non-CIG projects, FTA will use the cost estimate provided by the project sponsor after a National Environmental Policy Act (NEPA) decision is made by FTA. If bid numbers are available, then they will be considered in estimating the baseline cost.

Two commenters suggested that subsequent to FTA's acceptance of a project's funding plan, if a project's Federal investment increases to above \$100 million or the total project cost increases during project delivery to more than \$300 million, project management oversight should be implemented based on project risk and not funding actions. An industry consultant commented that the threshold should remain based on the total cost of the project being \$100

million or more because public transportation infrastructure is a public resource, and the source of funding is irrelevant when determining oversight.

Since higher-cost projects generally tend to involve higher risk, FTA will utilize the cost threshold as a base criterion. If a project's proposed Federal investment and total cost increase during project delivery to meet the \$100 million and \$300 million thresholds, the project will be subject to project management oversight. However, FTA may determine, pursuant to revised 49 CFR sections 633.5(e) and 633.19, to exclude a project from oversight that exceeds the thresholds or to require oversight for a project that does not meet the thresholds on a case-by-case basis. FTA will utilize its risk evaluation tool in making this determination.

Regarding which projects would be eligible for project management oversight services under § 633.11, a transit agency asked FTA to clarify whether covered projects would include those utilizing Federal loans, such as Transportation Infrastructure Finance and Innovation Act (TIFIA).

Major capital projects will include those utilizing Federal loans, such as TIFIA and Railroad Rehabilitation and Improvement Financing (RRIF), because 49 U.S.C. 5327(a) applies the project management oversight requirements to major capital projects for public transportation funded under any provision of Federal law.

A metropolitan transportation agency suggested that the \$100 million Federal investment threshold language in revised § 633.5(e) should clearly state that it is limited to CIG dollars to eliminate confusion that could result from use of funds from other Federal resources.

Pursuant to 49 U.S.C. 5327(a), this regulation is not limited to CIG projects but covers all Federally-funded major capital projects for public transportation, so the Federal share threshold is based on all Federal funds in a project. For a CIG project, the Federal share will include all

Federal money in the project, regardless of source, not just the CIG share of funds.

Cost Threshold—Amount

Four commenters, including two transit agencies and two trade associations, suggested that FTA raise the total project cost threshold in revised § 633.5(e) to \$500 million for parity with Federal Highway Administration (FHWA).

FTA considered cost thresholds of \$1 billion, \$500 million, \$300 million, and \$100 million. A key consideration for selecting \$300 million as the cost threshold was that it reflects the threshold Congress chose to distinguish Small Starts projects from New Starts projects in the CIG program. New Starts projects have more steps to complete in the CIG process and tend to be more complex, potentially requiring more oversight. Because of the number of higher-risk projects in the \$300 million to \$500 million range, FTA is not adopting the \$500 million threshold.

A State DOT expressed concern that the proposed cost threshold was too high and would accordingly leave a void between the existing PMO responsibilities and the FTA-supported State Safety Oversight Agency (SSOA) and degrade safety.

FTA notes that project management oversight is not the same as State safety oversight. FTA conducts project management oversight of major capital projects via its PMOCs pursuant to 49 U.S.C. 5327, whereas SSOAs oversee rail fixed guideway public transportation safety pursuant to 49 U.S.C. 5329(e). Although FTA's oversight of major capital projects includes oversight of safety and security management plans and the project sponsors' readiness to enter revenue service, this is separate and distinct from the responsibilities of SSOAs and their rail transit agencies' capital projects.

Project Sponsor Input

A trade association and two transit agencies noted that FTA should involve the project sponsor in decision-making throughout the PMO process, including initiation of PMO services, exclusion from the PMO program, basic requirements, and implementation of a project management plan (PMP). A trade association and an individual suggested that there should be an element of scalability to project management oversight, depending on the experience level of the project sponsor.

FTA will have conversations with project sponsors on a case-by-case basis to discuss the project risks and determine when to begin project management oversight or whether a project should be included or excluded from project management oversight under revised 49 CFR sections 633.5(e) and 633.19.

Initiating Project Management Oversight

Four commenters requested clarification on the initiation of project management oversight under § 633.13. One commenter noted that a model for the analytical process to be used by the Administrator to “maximize transportation benefits and cost savings” would be difficult to develop and that “transportation benefits” is an ambiguous term. A transit agency commented that oversight at the project development phase may be premature and questioned how in practice this rule would apply for projects that utilize the design-build or progressive design-build methodology. Another agency recommended that project management oversight begin after the locally preferred alternative (LPA) has been adopted and the FTA Administrator and the project sponsor determine that design and engineering work is sufficiently mature for the development of a reasonably reliable project cost, schedule, and PMP.

Section 5327 of title 49, United States Code, stipulates that project management oversight should start at the project development phase unless the Administrator determines that initiating services at another stage would maximize the transportation benefits and cost savings. The oversight work generally will begin after the selection of the LPA, and the level of oversight will be risk-based. As is currently the case, there will be no oversight reviews prior to the beginning of project development. FTA will have conversations with project sponsors early in project development regarding the level and scope of oversight reviews that will be conducted on the project, and oversight will only be initiated if the sponsors have enough data available for meaningful reviews.

Four commenters, including transit agencies and a trade association, proposed changes to the definition of project development. A coalition of transit agencies noted that project sponsors often undertake significant design and engineering and adopt the LPA well before submitting a formal request to enter the Project Development phase of the CIG program. The commenters suggested that the definition of project development be aligned with 49 U.S.C. 5309(d)(1)(B) and FTA's 2016 Final Interim Policy Guidance on the CIG Program.

Section 5327 of title 49, United States Code, uses the term "project development" more generically, and not in the specific way it is used under 49 U.S.C. 5309(d)(1)(B). Section 5309(d)(1)(A) only requires the initiation of NEPA, but not completion of NEPA, prior to entry into project development, so the LPA may not have been chosen before the project enters the Project Development phase of the CIG process. Since project management oversight applies to both CIG and non-CIG projects, FTA will remove the reference to the LPA in the project development definition under § 633.5 and add a reference to the LPA under § 633.13 as an example of when PMO generally will be initiated.

One commenter noted that guidelines and tools must be developed to evaluate progress in project development, since many of the services are out-sourced by recipients.

FTA notes it has developed tools, such as its oversight procedures, to track the progress of the major capital projects. FTA has also published guidelines and handbooks, available on its Guidance Center,¹ and worked with the National Transit Institute to develop a number of courses to help support the industry.

Designating a Major Capital Project

Two transit agencies, a coalition of transit agencies, and a trade association expressed concern that the amended definition of “major capital project” would exclude all Small Starts projects and suggested that FTA allow project sponsors to “opt-in” to project management oversight for projects that would otherwise not meet the definition of major capital project.

Per revised § 633.5(e), the Administrator may designate a project a major capital project if he or she determines a project would benefit from project management oversight. FTA will take into consideration requests by project sponsors to opt-in to the PMO process. A transit agency sought clarification of this opt-in provision and questioned whether there would be a process to appeal the Administrator’s designation of a project as a major capital project that would otherwise not meet the regulatory definition. Another transit agency commented that FTA should apply the provision sparingly.

FTA utilizes a risk-based approach to its oversight and will consider risks when designating a project as a major capital project. Section 5327 of title 49, United States Code, grants the Secretary the authority to define a major capital project through this regulation, which includes the discretion to deem projects that do not meet the thresholds to be major capital

¹ <https://www.transit.dot.gov/guidance>.

projects based on risk. FTA will consider inputs from project sponsors in making a final decision.

Excluding a Major Capital Project

A coalition of transit agencies, a transit agency, and an industry professional sought clarification on the process outlined in § 633.19 for excluding projects meeting the definition of major capital project from project management oversight.

FTA will make this determination case-by-case based on an analysis of the risks associated with each project.

Project Management Plan—Basic Requirement

A PMOC commented that FTA should require all projects accepted into the CIG program to prepare and submit for FTA's approval a PMP, prior to receiving a grant. The commenter suggested that any decision to exclude a project from project management oversight should not be made at the outset, when a project enters project development. Instead, the commenter stated that decision should be made after the sponsor has demonstrated to FTA, through its PMP and other preparations, that it has the management capacity and capability and other resources in place to complete the project successfully. The commenter suggested that a PMOC should be assigned to the project during project development as stated in revised § 633.13, which addresses the initiation of PMO services. Similarly, a regional transportation agency commented that PMOCs should continue to review the readiness of both Small and New Start projects to ensure agencies are ready to be successful with these CIG projects.

In response, FTA notes that pursuant to the 49 U.S.C. 5309(g)(5) policy guidance, all CIG projects are required to have an approved PMP before FTA will enter into a construction grant agreement. In addition, all CIG projects will receive oversight regardless of cost or Federal share until they receive a construction grant agreement.

A transit agency commented that while the definition of major capital project includes

rehabilitation and modernization projects that meet the cost and Federal funding thresholds, it is unclear how these thresholds for oversight would apply to annual capital asset renewal programs at transit agencies. The commenter noted that § 633.21, which outlines the basic requirement for a PMP, implies that this regulation applies to specific, discrete projects for which Federal funding is specifically solicited. The commenter requested that FTA confirm this rule would not apply to ongoing capital asset renewal programs or clarify how the definitions would be applied, e.g., whether the thresholds would be applied on an annual basis or by specific contract.

Capital asset renewal programs at transit agencies generally are made up of a list of projects with cost, scope, and schedule at the outset and then incrementally funded. Once a project is defined with a specific cost and scope, that cost estimate and the Federal funding assumed for the project becomes the basis for determining if it meets the thresholds and if the oversight regulation will apply.

Project Management Plan—Applicability and Contents

Three transit agencies, a coalition of transit agencies, a PMOC, and a trade association provided comments regarding the contents of the PMP under § 633.25. One transit agency commented that the content requirements of § 633.25 are oriented towards a project in construction and suggested either limiting those to reflect the project development phase or changing the phase in which the PMP must be developed to a later phase. Another transit agency commented that the statement beginning in § 633.25, which outlines the PMP contents, should be amended to include the term “phase” to acknowledge that the PMP is iterative and reflects the information available at the time it is developed.

FTA notes that while some PMP elements such as a detailed construction schedule, construction staff, and others will not be available at the early stages of the project, most of the

PMP items listed are important and should be developed early (at least in some form) at the project development phase, with additional details provided as the project progresses. FTA will add the term “phase” to the statement in § 633.25 to provide more clarity.

A coalition of transit agencies commented that proposed § 633.25(k) through (n), proposed to expand the contents of the PMP greatly, noting that this information has not been previously required by FTA, is not required by statute, and adds a substantial cost to projects. Another transit agency requested that FTA detail the anticipated content for compliance with subsection (n) (management of risks, contingencies, and insurance) and perform an assessment of the potential burden on project sponsors and publish it for public review and comment before determining whether the additions should be in the final PMO rule. One commenter asked whether the Risk and Contingency Management Plan (RCMP) would still be a required subplan of the PMP, noting the NPRM appears to fold the subplan into the PMP.

In response, FTA notes that, other than subsection (n), all the project management elements listed in the NPRM are expressly required by 49 U.S.C. 5327. Section 633.25(n), addressing risk and contingency management, is a standard industry practice and was added based on past experiences and its criticality for project success. This includes a process of identifying, evaluating, and responding to risks, including the management of cost and schedule contingencies and the identification of insurance necessary to minimize risk to the project. The RCMP is a means to address the requirements in § 633.25(n).

One transit agency commented that it is unclear from the NPRM if recipients and project sponsors need to update their existing PMPs to comply with the requirements that FTA proposed to add.

In response, all recipients must comply with the new requirements if their project meets

the definition of major capital project, but the plans do not need to be in one single large PMP document. The additional materials may be submitted as individual subplans, so there will be no requirement to go back and consolidate.

A PMOC commented that § 633.25 should include a requirement for a design management plan that defines the roles and responsibilities of the recipient and its consultants, third parties, and the contractor.

The regulation addresses this requirement through § 633.25(a) and (f), which cover organizational structures, functional responsibilities, reporting relationships, and staffing.

A trade association and a transit agency commented that the proposed changes to information requested as part of project management oversight may create redundant information requests as part of other CIG reporting requirements.

There are likely to be overlaps in the reporting requirements for CIG projects under 49 U.S.C. 5309 and the PMP under 49 U.S.C. 5327 if a project sponsor is building more than one project at the same time. FTA does not believe regulatory changes are needed to address potential overlaps in reporting requirements. FTA will work with project sponsors to combine requirements, such as combined quarterly meetings and minor modifications to existing PMPs to reduce redundancies.

Project Management Plan—Due Date and Updates

Two transit agencies and one industry consultant provided comments regarding the implementation of a project management plan under § 633.27. One transit agency noted that FTA should limit the number of revisions required and that there should be some guidance on the reasonableness of FTA comments on the PMP. Specifically, the agency is concerned that there is ambiguity in requiring revisions “at a new phase” and where there is a “significant change”

under § 633.27(b). The industry consultant added that the term “periodic,” regarding the updates required under § 633.25, is vague.

FTA notes that a PMP is a living document that must be updated at many phases of the project (for example as new resources are added or as the project transitions from design into construction). Project sponsors will be given 90 days to submit the PMP upon formal notification from FTA, and FTA generally will approve or disapprove the PMP within 60 days, pursuant to 49 U.S.C. 5327(b). Project sponsors need not wait until they receive notification from FTA to begin working on the PMP. FTA will work with project sponsors to minimize the number of revisions needed, and will provide reasonable comments to streamline the process. Periodic updates to the PMP are required by 49 U.S.C. 5327(a)(11), and FTA intends to require updates or reviews every two years or upon significant changes to the project. A review of the PMP might show that there is no need for an update because nothing significant has changed to the project. FTA will assess significance on a case-by-case basis (e.g., when key staff leave a project or a project is trending towards delays and cost overruns).

One transit agency questioned why § 633.27(c) requires project budget, schedule, financing, ridership estimates, and the status of local efforts to enhance ridership to be updated on a “periodic basis” as opposed to when there are changes to those items. Another transit agency commented that the NPRM adds requirements to provide updates for project capital and operating financing, as well as for the operating plan based on the ridership estimates. The commenter also noted that the NPRM requires recipients to submit current data on a major capital project’s budget and schedule on a quarterly basis and that such reporting requirements may result in additional costs to recipients or project sponsors.

This provision reflects a statutory requirement under 49 U.S.C. 5327(a)(11). FTA

recognizes that there may be limited information on these topics that will need to be updated regularly.

One transit agency requested that project sponsors be given 180 days to submit the PMP.

CIG projects must progress through project development in two years. The 90-day period to prepare the PMP will help move projects through the process in that timeframe. Non-CIG projects should have a PMP in place as early as possible. Stakeholders should be aware that project sponsors do not have to wait for FTA to request a PMP to begin preparing their PMP.

Project Management Plan—Reporting

An industry consultant commented that monthly reporting is the responsible minimum standard.

Section 5327 of title 49, United States Code, limits project management oversight to quarterly reviews, but the Administrator maintains discretion to require more frequent oversight if a project is at risk of going over budget or becoming behind schedule.

A transit agency commented that FTA should add a clause clarifying that the § 633.25(l) requirement to submit a quarterly project budget and schedule is met through the project budget and schedule updates submitted with quarterly milestone progress reports. FTA does not intend to duplicate submittals, so one submittal with the quarterly progress report is sufficient.

The agency also commented that under § 633.27(d), FTA proposes to require more frequent compliance reviews of any project that is “at risk of materially exceeding its budget or falling behind schedule.” Accordingly, the commenter requested that FTA define “materially.”

Section 5327(d)(2)(B) of title 49, United States Code, provides FTA the discretion to require more frequent oversight if the recipient has failed to meet the requirements of the PMP and the project may be at risk of going over budget or becoming behind schedule. In response to

the comment, FTA has added to § 633.27(d) that “Budget and schedule changes will be analyzed on a case-by-case basis, but FTA generally will consider any cost increase or schedule delay exceeding 5 percent as a material change.”

Regulatory Cost Savings

One anonymous commenter noted that FTA’s cost savings analysis was too low. The commenter suggested that \$32 million was a more appropriate estimate, because of the 1 percent drawdown for oversight, and questioned how the remaining \$23.9 million in savings would be applied, noting that FTA provided no economic analysis of that amount.

The drawdown for oversight from this program is combined with the drawdown from other FTA programs and then budgeted for several oversight activities. The \$3.2 billion amount is the total cost of the projects and not the annual budgets for the projects. The \$8.1 million amount, on the other hand, is the estimated savings in oversight cost per year and reflects the money that would have been spent on external contractors. FTA will continue to manage its oversight resources judiciously to ensure that all its projects and programs receive sufficient oversight.

Another commenter noted that the oversight cost savings estimate of \$11 million is flawed, because simply multiplying hours does not account for the potential for severe project overruns, delays, and quality problems.

FTA’s analysis is an approximation, but § 633.5(e)(2) allows the Administrator to determine on a case-by-case basis that certain projects should be subject to project management oversight based on an assessment of risk, which would include an analysis of the likelihood of budget and schedule overruns.

Financing the PMO Program

A PMOC commented that 49 U.S.C. 5338(f)(1) and (2) does not specify that the oversight funds will be used to contract for project management oversight services in connection with a major capital project as set forth in the current version of § 633.19. The commenter noted that the funds may be used for other activities as described in the statute and would not be available to fund the project management oversight program as intended. The commenter recommended that the current text of § 633.19 be retained to ensure that the oversight takedown be used as originally intended.

FTA notes that project management oversight is an eligible expense of funds authorized for oversight, and other activities are authorized to be funded from that source as well. However, project management oversight is a statutory requirement for all projects meeting the definition of major capital project, per 49 U.S.C. 5327(a) and (d)(2), and FTA will utilize oversight funds as authorized for that purpose.

Access to Information

An industry consultant suggested that § 633.27 should include the requirement of affidavits attesting to full compliance with Federal and State Disadvantaged Business Enterprise (DBE) and Minority Business Enterprise (MBE) programs, a detailed report of employment of relatives, in-laws, and neighbors on the project, and waiver of confidentiality for the purposes of immediate and unannounced government inspection of invoices, receipts, payroll, and payments related to project. Similarly, another commenter requested that § 633.15 include coverage of procurement and civil rights, and the tie to contract administration based on 2 CFR Part 200 and FTA Circular 4220.1F. The commenter noted that there is no mention of the requirements for Americans with Disabilities Act (ADA), DBE, and Title VI requirements in the regulation.

The regulation addresses the technical oversight of the projects. Reviews such as DBE

and ADA compliance are critical but are not addressed primarily through project management oversight. Instead, these requirements are covered through other areas of FTA oversight, such as triennial reviews.

Definitions

Two parties provided comments on the definition of “recipient.” A trade association noted that within the definition of “recipient” the term “sponsor” is not defined. A transit agency proposed defining “sponsor” within the definition in § 633.5(i). Both commenters suggested defining “sponsor” as the “entity designated to deliver the project per the terms set forth in the construction grant agreement.”

In response, FTA has defined “sponsor” under § 633.5(j) as “the entity designated to deliver the project per the terms set forth in the grant agreement.”

A transit agency and a trade association provided input on the definition of “full funding agreement.” Both commenters suggested keeping a definition of grant agreement in the regulation and utilizing the term “construction grant agreement,” which would encompass grant agreements for various Federal funding programs including New Starts, Small Starts, Core Capacity, BUILD, and INFRA under which major capital transit projects may receive Federal funds.

Because neither term is used in the regulation, a definition is unnecessary. Further, the purpose of a full funding grant agreement is addressed under 49 U.S.C. 5309.

A transit agency requested clarification on adding ferries to the definition of “fixed guideway” under § 633.5(c). Specifically, the commenter sought an explanation of what the fixed guideway of a ferry system includes and the anticipated impact of this change in the fixed guideway definition with respect to project management oversight.

Ferries are included in the definition of a fixed guideway set forth at 49 U.S.C. 5302, which is a “public transportation facility using and occupying a separate right-of-way for the exclusive use of public transportation, using rail, using a fixed catenary system; for a passenger ferry system; or for a bus rapid transit system.” For a passenger ferry system, this would include all infrastructure necessary for the operation of the system, e.g., terminals, ferry boats, and related equipment.

A transit agency requested a definition of “risk-informed monitoring” which is referenced in the definition for project management oversight in § 633.5(g).

FTA will not define this term in the regulation, because 49 U.S.C. 5327(d)(2)(B) makes clear that FTA must assess whether projects are at risk of going over budget or becoming behind schedule. “Risk-informed monitoring” in this context means that the oversight will be scaled based on the level of risk of the project.

A transit agency noted that FTA previously solicited comments on alternate definitions of a Federal project and suggested that FTA continue with efforts to refine the Federal project definition and consider opportunities to incorporate similar lines-of-thinking in the proposed rule.

The definition of “Federal project” is unrelated to this rule. Per 49 U.S.C. 5327(a), the project management plan requirements, and this regulation implementing the statute, apply to all major capital projects for public transportation under any provision of Federal law.

Oversight Procedures

A transit agency commented that FTA should update its project management oversight procedures (OPs) concurrent with finalizing the PMO rule to help ensure that the actual guidelines followed by FTA’s contractors align with the final rule. The commenter further

suggested that the draft OPs be subject to formal public review and comment before issuance.

FTA notes that its OPs are contractual documentation for FTA's contractors and not guidance for recipients. Thus, a public review and comment process is not required.

Incorporating Another PMP

FTA received two comments pertaining to the implementation of a PMP under § 633.29. An industry consultant commented that the incorporation of “applicable elements from a previously approved project management plan or to incorporate procedures that a recipient uses to manage other capital projects” is not sufficient planning and increases risk. A transit agency suggested maintaining the section or adding a similar provision to § 633.25.

In response, the intent of the referenced clause in § 633.29 was to avoid unnecessary duplication. For example, some PMP elements such as document control procedures, quality control procedures, and material testing policies generally will not change much from project to project, especially when the project sponsor is building multiple projects at the same time. In the final rule, FTA is rescinding § 633.29, because the statute mandates that the PMP for each major capital project include the elements in § 633.25(k) through (m), and FTA does not have the discretion to waive these elements of the plan.

III. Regulatory Analyses and Notifications

Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

This final rule is an Executive Order 13771 deregulatory action. Details on the estimated cost savings of this rule can be found in the rule’s economic analysis.

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review) and Department of Transportation (DOT) 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. The rule amends the definition of a “major capital project” under 49 CFR part 633 by raising the total project cost threshold and adding a minimum Federal share, thereby reducing the number of public transportation projects subject to project management oversight. This action complies with Executive Orders 12866 and 13563 to improve regulation, as well as DOT’s regulatory requirements at 49 CFR part 5.

FTA has determined that this rulemaking is not a significant regulatory action within the meaning of Executive Order 12866 and within the meaning of DOT 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. In addition, this rule does not have an impact on another agency and does not materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs. This rule does not raise novel legal issues.

To calculate the benefits and annual cost savings from this proposed rule, FTA evaluated

its project management oversight contracts for major capital projects from 2013 through 2018. This period was chosen to reflect changes to FTA's program management oversight procedures after MAP-21 was enacted in 2012. This period included several emergency relief program projects under 49 U.S.C. 5324 to repair significant damages to public transportation infrastructure resulting from Hurricane Sandy, which FTA also analyzed.

Using FTA's risk evaluation tool, FTA evaluated projects in construction during that period based on ten key risk factors to produce a risk score from 0–100. Projects were then assigned a risk range based on the calculated score, with low-risk projects in the range of 0–39, medium-risk projects from 40–55, and high-risk projects from 56–100. This evaluation indicated that most high-risk projects, including 18 of the 22 projects in the high-risk range, involved total project costs of over \$300 million. While removing project management oversight from projects with total costs between \$100 and \$300 million may increase the risk of materially exceeding budget or falling behind schedule for some projects, there are currently only four high-risk projects in this range, and under the rule, FTA may deem certain projects that do not meet the dollar-amount thresholds a “major capital project” to mitigate unacceptable risk. In addition, reducing the number of lower-risk projects undergoing project management oversight will allow FTA to focus on higher-risk projects while yielding annual cost savings to FTA and its recipients.

FTA calculated the average total cost of oversight for projects in construction during that period that would not have qualified as major capital projects under the default threshold of this proposed rule. FTA estimates that an average of 38.3 projects annually, including emergency relief program projects, would no longer require additional oversight under the default threshold.

This rule would reduce recipients' labor hours for oversight procedures, which include

attending meetings, preparing quarterly reports and other requested documents, and accompanying contractors onto project construction sites. To estimate the potential cost savings for project sponsors, FTA staff examined the current projects in construction that would no longer qualify as major capital projects under the rule and estimated the level of effort required for oversight procedures. For two projects, FTA received input from recipients. Assuming variations in the level of effort based on the complexity of the project, FTA estimated that the labor hours required for recipients ranges from 1.7 to 2.3 times FTA's level of effort of approximately 39,477 hours per year for project management oversight procedures. Accordingly, FTA used an average factor of two and determined that the default threshold to qualify as a major capital project under the proposed rule would reduce the level of effort required for project sponsors by an average of 78,955 hours annually at a wage rate of \$139.67 based on an average of the Bureau of Labor Statistics rate for Construction Managers and the PMOC loaded rate for contractors. This burden reduction would result in an annual cost savings to project sponsors of approximately \$11 million.

In addition, the rule reduces the level of effort required under FTA's project management oversight contracts and yields corresponding cost savings to FTA. Removing oversight from an average of 38.3 projects annually, at an average wage rate of \$206, would yield annual cost savings to FTA of approximately \$8.1 million.

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 this rule on small entities, and certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

FTA has determined that this rule does not impose unfunded mandates, as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This rule does not include a Federal mandate that may result in expenditures of \$155.1 million or more in any 1 year (when adjusted for inflation) in 2012 dollars for either State, local, and tribal governments in the aggregate, or by the private sector. In addition, the definition of “Federal mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. Federal public transportation law permits this type of flexibility.

Executive Order 13132 (Federalism)

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial direct effect 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. FTA has analyzed this action in accordance with the principles and criteria contained in Executive Order 13132, and FTA determined that this action will not have a substantial direct effect or Federalism implications on the States. FTA also determined that this action will not preempt any State law or regulation or affect the States’ ability to discharge traditional State governmental functions.

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

Federal agencies must obtain approval from the Office of Management and Budget

(OMB) for each collection of information they conduct, sponsor, or require through regulations. FTA has analyzed this rule under the Paperwork Reduction Act and determined that it does not impose additional information collection requirements for the purposes of the Act above and beyond existing information collection clearances from OMB.

National Environmental Policy Act

NEPA requires Federal agencies to analyze the potential environmental effects of their proposed actions in the form of a categorical exclusion, environmental assessment, or environmental impact statement. This rulemaking is categorically excluded under FTA's environmental impact procedure at 23 CFR 771.118(c)(4), which pertains 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)

FTA has analyzed this rule under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. FTA does not believe this rule effects a taking of private property or otherwise has taking implications under Executive Order 12630.

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 rulemaking 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 might disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

FTA has analyzed this action under Executive Order 13175 (November 6, 2000), and determined 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 required.

Privacy Act

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

Statutory/Legal Authority for This Rulemaking

This rulemaking is issued under the authority of 49 U.S.C. 5327, which requires the Secretary to conduct oversight of major capital projects and to promulgate a rule for that purpose that includes a definition of major capital project to delineate the types of projects governed by the rule.

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 633

Grant programs-transportation, Mass transportation.

K. Jane Williams,

Deputy Administrator.

In consideration of the foregoing, and under the authority of 49 U.S.C. 5327, revise 49 CFR part 633 to read as follows:

PART 633—PROJECT MANAGEMENT OVERSIGHT

Subpart A—General Provisions

Sec.

633.1 Purpose.

633.3 Scope.

633.5 Definitions.

Subpart B—Project Management Oversight Services

633.11 Covered projects.

633.13 Initiation of project management oversight services.

633.15 Access to information.

633.17 Project management oversight contractor eligibility.

633.19 Exclusion from the project management oversight program.

Subpart C—Project Management Plans

633.21 Basic requirement.

633.23 FTA review of a project management plan.

633.25 Contents of a project management plan.

633.27 Implementation of a project management plan.

633.29 [Reserved]

Authority: 49 U.S.C. 5327; 49 U.S.C. 5334; 49 CFR 1.90.

Subpart A—General Provisions

§ 633.1 Purpose.

This part implements 49 U.S.C. 5327 regarding oversight of major capital projects. The part provides for a two-part program for major capital projects receiving Federal financial assistance. First, subpart B discusses project management oversight, designed primarily to aid FTA in its role of ensuring successful implementation of Federally-funded projects. Second, subpart C discusses the requirement that, to receive Federal financial assistance for a major capital project for public transportation under Chapter 53 of Title 49, United States Code, or any other provision of Federal law, a recipient must prepare a project management plan approved by the Administrator and carry out the project in accordance with the project management plan.

§ 633.3 Scope.

This rule applies to a recipient of Federal financial assistance undertaking a major capital project for public transportation under Chapter 53 of Title 49, United States Code, or any other provision of Federal Law.

§ 633.5 Definitions.

As used in this part:

Administrator means the Administrator of the Federal Transit Administration or the Administrator's designee.

Days means calendar days.

Fixed guideway means any public transportation facility: using and occupying a separate right-of-way for the exclusive use of public transportation; using rail; using a fixed catenary system; for a passenger ferry system; or for a bus rapid transit system.

FTA means the Federal Transit Administration.

Except as provided in § 633.19, *Major capital project* means a project that:

(1) Involves the construction, expansion, rehabilitation, or modernization of a fixed guideway that:

(i) Has a total project cost of \$300 million or more and receives Federal funds of \$100 million or more; and

(ii) Is not exclusively for the acquisition, maintenance, or rehabilitation of vehicles or other rolling stock; or

(2) The Administrator determines to be a major capital project because project management oversight under this part will benefit the Federal government or the recipient, and the project is not exclusively for the acquisition, maintenance, or rehabilitation of rolling stock or other vehicles. Typically, this means a project that:

(i) Involves new technology;

(ii) Is of a unique nature for the recipient; or

(iii) Involves a recipient whose past record indicates the appropriateness of extending project management oversight under this part.

Project development means the phase in which planning, design and engineering work is undertaken to advance the project from concept to a sufficiently mature scope to allow for the development of a reasonably reliable project cost, schedule, and project management plan.

Project management oversight means the risk-informed monitoring of the recipient's management of a major capital project's progress to determine whether the project is on time, within budget, in conformance with design and quality criteria, in compliance with all applicable Federal requirements, constructed to approved plans and specifications, delivering the identified benefits, and safely, efficiently, and effectively implemented.

Project management plan means a written document prepared by a recipient that explicitly defines all tasks necessary to implement a major capital project. A project management plan may be a single document or a series of documents or sub plans integrated with one another into the project management plan either directly or by reference for the purpose of defining how the recipient will effectively manage, monitor, and control all phases of the project.

Recipient means a direct recipient of Federal financial assistance or the sponsor of a major capital project.

Sponsor means the entity designated to deliver the project per the terms set forth in the grant agreement.

Subpart B—Project Management Oversight Services

§ 633.11 Covered projects.

(a) The recipient is using funds made available under Chapter 53 of Title 49, United States Code, or any other provision of Federal law; and

(b) The project is a major capital project.

§ 633.13 Initiation of project management oversight services.

Project management oversight services will be initiated as soon as practicable, once the Administrator determines that this part applies. In most cases, this means that project management oversight will begin during the project development phase of the project, generally after the locally preferred alternative has been chosen (if applicable), unless the Administrator determines it more appropriate to begin oversight during another phase of the project, to maximize the transportation benefits and cost savings associated with project management oversight.

§ 633.15 Access to information.

A recipient for a major capital project shall provide the Administrator and the project management oversight contractor chosen under this part access to its records and construction sites, as reasonably may be required.

§ 633.17 Project management oversight contractor eligibility.

(a) Any person or entity may provide project management oversight services in connection with a major capital project, with the following exceptions:

(1) An entity may not provide project management oversight services for its own project;
and

(2) An entity may not provide project management oversight services for a project if there exists a conflict of interest.

(b) In choosing private sector persons or entities to provide project management oversight services, the Administrator uses the procurement requirements in the government-wide procurement regulations, found at Chapter 1 of title 48, Code of Federal Regulations.

§ 633.19 Exclusion from the project management oversight program.

The Administrator may, in compelling circumstances, determine that a project meeting the criteria of § 633.5(e)(1) is not a major capital project because project management oversight under this part will not benefit the Federal government or the recipient. Typically, this means a project that:

(a) Involves a recipient whose past record indicates the appropriateness of excluding the project from project management oversight under this part; and

(b) Involves such a greater level of financial risk to the recipient than to the Federal government that project management oversight under this part is made less necessary to secure the recipient's diligence.

Subpart C—Project Management Plans

§ 633.21 Basic requirement.

(a) If a project meets the definition of major capital project, the recipient shall submit a project management plan prepared in accordance with § 633.25, as a condition of Federal financial assistance.

(b)(1) The Administrator will notify the recipient when the recipient must submit the project management plan. Normally, the Administrator will notify the recipient sometime during the project development phase. If the Administrator determines the project is a major capital project after the project development phase, the Administrator will inform the recipient of the determination as soon as possible.

(2) Once the Administrator has notified the recipient that it must submit a project management plan, the recipient will have a minimum of 90 days to submit the plan.

§ 633.23 FTA review of a project management plan.

Within 60 days of receipt of a project management plan, the Administrator will notify the recipient that:

- (a) The plan is approved;
- (b) The plan is disapproved, including the reasons for the disapproval;
- (c) The plan will require modification, as specified, before approval; or
- (d) The Administrator has not yet completed review of the plan, and state when it will be

reviewed.

§ 633.25 Contents of a project management plan.

A project management plan must be tailored to the type, costs, complexity, and phase of the major capital project, and to the recipient's management capacity and capability. A project management plan must be written to a level of detail sufficient to enable the recipient to determine whether the necessary staff and processes are in place to control the scope, budget, schedule, and quality of the project, while managing the safety and security of all persons. A project management plan must be developed with a sufficient level of detail to enable the Administrator to assess the adequacy of the recipient's plan. At a minimum, a recipient's project management plan must include:

- (a) Adequate recipient staff organization with well-defined reporting relationships, statements of functional responsibilities, job descriptions, and job qualifications;
- (b) A budget covering the project management organization, appropriate contractors and consultants, property acquisition, utility relocation, systems demonstration staff, audits, contingencies, and miscellaneous payments as the recipient may be prepared to justify;
- (c) A construction schedule for the project;
- (d) A document control procedure and recordkeeping system;

(e) A change order procedure that includes a documented, systematic approach to the handling of construction change orders;

(f) A description of organizational structures, management skills, and staffing levels required throughout the construction phase;

(g) Quality control and quality assurance functions, procedures, and responsibilities for project design, procurement, construction, system installation, and integration of system components;

(h) Material testing policies and procedures;

(i) Internal plan implementation and reporting requirements including cost and schedule control procedures;

(j) Criteria and procedures to be used for testing the operational system or its major components;

(k) Periodic updates of the project management plan, especially related to project budget and schedule, financing, ridership estimates, and the status of local efforts to enhance ridership where ridership estimates partly depend on the success of those efforts;

(l) The recipient's commitment to submit a project budget and project schedule to the Administrator quarterly;

(m) Safety and security management; and

(n) Management of risks, contingencies, and insurance.

§ 633.27 Implementation of a project management plan.

(a) Upon approval of a project management plan by the Administrator the recipient shall begin implementing the plan.

(b) Generally, a project management plan must be modified if the project is at a new phase or if there have been significant changes identified. If a recipient must modify an approved project management plan, the recipient shall submit the proposed changes to the Administrator along with an explanation of the need for the changes.

(c) A recipient shall submit periodic updates of the project management plan to the Administrator. Such updates shall include, but not be limited to:

(1) Project budget;

(2) Project schedule;

(3) Financing, both capital and operating;

(4) Ridership estimates, including operating plan; and

(5) Where applicable, the status of local efforts to enhance ridership when estimates are contingent, in part, upon the success of such efforts.

(d) A recipient shall submit current data on a major capital project's budget and schedule to the Administrator on a quarterly basis for the purpose of reviewing compliance with the project management plan, except that the Administrator may require submission more frequently than on a quarterly basis if the recipient fails to meet the requirements of the project management plan and the project is at risk of materially exceeding its budget or falling behind schedule.

Budget and schedule changes will be analyzed on a case-by-case basis, but FTA generally will consider any cost increase or schedule delay exceeding five percent as a material change.

Oversight of projects monitored more frequently than quarterly will revert to quarterly oversight once the recipient has demonstrated compliance with the project management plan and the project is no longer at risk of materially exceeding its budget or falling behind schedule.

§ 633.29 [Reserved]

