

ACTION TRANSMITTAL No. 2016-25

DATE: February 24, 2016
TO: Technical Advisory Committee
FROM: TAC Funding and Programming Committee
PREPARED BY: Joe Barbeau, Senior Planner (651-602-1705)
SUBJECT: Policy and Process to Defederalize TAB-Selected Projects
REQUESTED ACTION: Adoption of the attached policy and process to defederalize TAB-selected projects
RECOMMENDED MOTION: That TAC recommend to TAB adoption of the attached Policy and Process to Defederalize TAB-Selected Projects

BACKGROUND AND PURPOSE OF ACTION: In recent months, two recipients of TAB-awarded STP funds have approached Council staff about the possibility of “defederalizing” projects. In each case, the applicants wanted to move federal funds from a smaller project to a larger project, leaving the former free of federal funding. This provides several advantages in terms of local expense and staff time.

A work group was established to advise staff on these requests and establish a long-term policy and process for future requests. The work group created the attached policy and process for TAB consideration. The draft reflects members’ concern that all projects must be completed on time and as applied for in the Regional Solicitation application. Under the proposed policy and process, any time a TAB-selected project is not completed, the amount of federal funds programmed to it will be returned to the region. All defederalized projects are subject to the Council’s scope change and program year policies.

RELATIONSHIP TO REGIONAL POLICY: TAB develops and issues a Regional Solicitation for federal funds. In programming those funds, TAB sets the expectation that all awarded projects will be funded as proposed and on-time with exceptions made only through the scope change or program year policies.

COMMITTEE COMMENTS AND ACTION: Prior to bringing this action item to the February 18 Funding & Programming Committee meeting, this draft policy and process was brought to the Funding & Programming Committee, TAC, and TAB as an informational item.

At the February 17 TAB meeting, concern was expressed with the departure from federal Disadvantaged Business Enterprise (DBE) requirements. The question of whether federal DBE requirements could still be followed, despite eliminating several other federal requirements for defederalized projects was asked. Also discussed was environmental assessment, which includes environmental justice (EJ) review. EJ review, required only on federal projects, is meant to assure that a project’s negative externalities do not disproportionately impact low-income or minority communities.

At its February 18, 2016 meeting, the Funding & Programming Committee unanimously recommended adoption of the attached Policy and Process to Defederalize TAB-Selected Projects with two changes (tracked in the attached document):

- 2nd bullet under “Funding”: Changing “All funds transfers should be one-to-one...” to “All funds transfers shall be one-to-one...”
- 4th bullet under “Funding”: removal of “Defederalized funds may only be transferred to a project that is eligible to receive those funds.” Committee members thought this was inconsistent with the rest of the bullet.

At the meeting, staff shared TAB’s DBE concerns. MnDOT informed the Committee that it prefers not to try to retain certain federal policies, as moving away from time-consuming and costly federal requirements is the purpose of defederalization.

Regardless of whether a project is “federalized” all employers involved in it are subject to Equal Employment Opportunity (EEO) laws prohibiting hiring and wage discrimination. Also discussed was “Local Hiring Preference,” a local practice that favors hiring employees within the jurisdiction. This practice has not been used with federal projects, as per FHWA practice.

ROUTING

TO	ACTION REQUESTED	DATE COMPLETED
TAC Funding & Programming Committee	Review & Recommend	2-18-2016
Technical Advisory Committee	Review & Recommend	
Transportation Advisory Board	Review & Adopt	

POLICY AND PROCESS TO DEFEDERALIZE TAB-SELECTED PROJECTS

OVERVIEW

Projects selected through the TAB Regional Solicitation and HSIP processes are awarded federal funds and are therefore subject to federal requirements that can cost an agency considerable time and money. When conditions are right, an agency may consider “defederalizing” a project. Defederalization entails transferring federal funds from one project (“defederalized project”) to another project already subject to federal requirements (“receiving project”), allowing the former project to proceed without adherence to some federal requirements.

POLICY

Project Sponsors:

- Project sponsors must voluntarily agree to participate in the defederalization of a project, be it their own or another sponsor’s.
- One sponsor may defederalize one or more of its projects by shifting federal funds to one or more of its other projects.
- One sponsor may defederalize one or more of its projects by working with other sponsor(s) to absorb federal funds in exchange for local funding.
- TAB will not recognize agreements for “future consideration” (i.e., TAB will not enforce an agreement for one sponsor to “return the favor” to another sponsor at a future time).
- All sponsors involved with a defederalization request must provide a resolution agreeing to be responsible for the project, the project’s timing, and the risks.

Funding:

- All federally funded projects must maintain the federally required minimum local match (usually 20%, but 10% for Highway Safety Improvement Program).
- All funds transfers ~~should~~ shall be one-to-one in terms of funding amount. A sponsor may not “purchase” defederalization by exchanging federal funds for a lesser amount of local funding.
- All transferred funds must be eligible to be used on the project they are proposed to fund.
- ~~Defederalized funds may only be transferred to a project that is eligible to receive those funds.~~ In cases in which the funds are not eligible to the project proposed to receive funds, the Minnesota Department of Transportation (MnDOT) Metro District State Aid office may “flex” funds through the USDOT.
- If federal funds are transferred to a project with an earlier program year, the sponsor must advance construct (AC) the project and be reimbursed in the year to which the funds are assigned in the TIP. A TIP amendment is required to reflect the use of AC.
- Federal funds cannot be transferred to a future year, as this would put a burden on TAB to redistribute funds.
- If State Aid funds are to be exchanged for federal aid funds, transfers can only occur county-to-county or city-to-city.

Defederalized Projects:

- Defederalized projects must be completed with all elements, and in the time frame, shown in the original application for funding. MnDOT Metro District State Aid or Metropolitan Council

Transit Grants, depending on the project, will continue to monitor all TAB-selected projects to assure that they are completed consistent with policy.

- Defederalized projects are subject to TAB's Scope Change Consultation and Evaluation processes. Project sponsors must consult with MnDOT Metro District State Aid or Metropolitan Council Transit Grants, depending on the project, in order to seek permission to deviate from the approved scope.
- Defederalized projects are subject to TAB's Program Year Policy.
- Should a TAB-selected project be withdrawn or otherwise unable to be completed, the project sponsor must return its federal funding to the region. If the federal funding has already been committed to a local project, the sponsor must provide local funds to TAB. This will be reflected in the resolution provided by the sponsor.

PROCESS

1. Applicant submits a project defederalization request. Requests must be made by December 31 of the state fiscal year prior to the program year associated with the earliest-programmed project involved in the transfer. For example, defederalization of a project programmed in fiscal year 2018 must be requested by December 31, 2016.
2. Applicant provides a proposal to Metropolitan Council and MnDOT Metro State Aid. The proposal must include the following:
 - Description and funding table showing proposed defederalized project(s) and receiving project(s) will absorb the federal funds. Amount and source of funds must be shown as well.
 - Resolution(s) from the governing board of any agencies involved with the defederalization. The resolution must include:
 - Identification of any proposed defederalized project(s) and receiving project(s). Amounts must be included
 - Source(s) of non-federal funds.
 - Commitment to authorizing all TAB-selected projects in the program year identified in the TIP.
 - Acknowledgement that all TAB-selected projects will comply with all MnDOT State Aid or Metropolitan Council Transit Grants project requirements.
 - Acknowledgement that all TAB-selected projects will be completed with the scope and timing proposed in the original application and that MnDOT State Aid and/or Metropolitan Council Transit Grants will monitor the project to assure that this happens.
 - Acknowledgement that all TAB-selected projects are subject to TAB's scope change policy.
 - Guarantee that should they fail to deliver part or all of the TAB-funded projects, federal funding will be turned back to the region for distribution to other regional projects.
 - Acknowledgment of any project advancement and advanced construction that needs to occur.
 - Guarantee that the project will be delivered using the local State Aid process or Metropolitan Council Transit Grants process.

Federal and State Aid Requirements

TASK	STATE AID FUNDING	FEDERAL AID FUNDING
Project in the STIP (State Transportation Improvement Program)		X
PPMS (MnDOT Scheduling Software)		X
Project of Divisional Interest (PODI) - if applicable - required full FHWA oversight/approvals of environmental, construction plans and construction		X
Kickoff Meeting (project sponsor & State Aid)		X
Advance Construct (AC) Agreement if applicable		X
DCP Agency Agreement		X
Environmental Impacts	X (State Process)	X (Federal Process)
Environmental Document Preparation/Review (Environmental Assessment or Project Memorandum)	(1)	X
- Public Involvement	(1)	X
- Cultural Resources/SHPO		X
- Threatened and Endangered Species		X
- Noise Analysis		X
- 4 (f)/6 (f)		X
- Environmental Justice		X
Delegated Contract Process (DCP)		X
Construction Plans	X	X
- Design complies with State Aid Rules	X	X
- ADA Compliance	(1)	X
- Traffic Control Plan	(1)	X
- Erosion Control Plan	(1)	X
- State Aid Force Account for work by local forces	X	
- Federal Aid Force Account for work by local forces - requires review/approval and federal funding authorization by FHWA prior to the work being done.		X
Right of Way Acquisition	(1)	X
Right of Way Review/Certificate		X
Utility Relocation Certificate		X
Disadvantaged Business Enterprise (DBE)/On the Job Training (OJT) Goals/Determination		X
Equal Employment Opportunity (EEO)	X	X
Local Hiring Preferences allowed	X	
Specifications/Proposal Preparation	X	X
Specifications Review		X
- Federal documents included		X
- Federal Wage Rates		X
- State Wage Rates	X	X
- Schedule of Materials Control	X	X
- Buy America		X

TASK	STATE AID FUNDING	FEDERAL AID FUNDING
Proprietary Items	X	
- Proprietary Items not allowed unless a Public Interest Statement is provided/approved		X
Required Permits (DNR, COE, NPDES, etc.)		X
Federal Authorization of funding by FHWA		X
Advertisement for Bid		
- Add language Review/Approval (required federal language)		X
- Local agency publishes advertisement	X	X
Bid Opening	X	X
- Project Sponsor consults with State Aid to set bid opening date (must follow federal requirements)		X
- DBE Review/Clearance from Office of Civil Rights		X
- Bid Abstract Review		X
- Bid Justification Review/Approval if bids +/- 10% of Engineers Estimate		X
Project Award	X	X
- Project Award Concurrence		X
POST- AWARD		
Payment Requests submitted	X	X
- 95% of bid paid following contract award and required documentation	X	
- Federal funds are reimbursed up to the participation level as costs are incurred.		X
Independent Assurance Testing		X
DBE/OJT Monitoring		X
Supplemental Agreement (SA) and Change Order (CO) Submittals/Review/Approval	X	X
Materials Exception Summary Review/Approval by MnDOT Materials		X
Final Inspection	X	X

(1) Project sponsor follows local process. Not reviewed by State Aid or FHWA.