

INSTRUCTIONAL MEMORANDUMS

To Local Public Agencies



To: Counties and Cities

Date: November 4, 2022

From: Local Systems Bureau

I.M. No. 3.720

Subject: Public Interest Findings

Contents: This Instructional Memorandum (I.M.) provides guidance and information about Public Interest Findings. It includes a description of what they are, conditions that require them, and procedures for their submittal, review, and approval. Except where noted otherwise, the guidance contained in this I.M. applies to any Local Public Agency (LPA) project let by the Iowa Department of Transportation (Iowa DOT), regardless of its funding source(s) or road system classification.

Introduction

There are many State and Federal rules, policies, and procedures that apply to construction contract lettings conducted by the Iowa DOT. For LPA Federal-aid projects, the Iowa DOT is responsible for monitoring the LPA's compliance with these rules, policies, and procedures. However, a limited number of these rules, policies, and procedures contain provisions that permit them to be waived under certain circumstances. A Public Interest Finding (PIF) is an approval by the Iowa DOT to allow such an exception.

As its name suggests, these exceptions are approved if it is in the public's best interest to do so. Usually, an exception is deemed to be in the public's best interest if it is more cost effective than following the established rule, policy, or procedure. Cost effectiveness means that the proposed action results in the lowest overall cost. However, in some situations, other factors may also be considered. A PIF, by its very nature, is an unusual situation. Therefore, the Iowa DOT will approve a PIF only after careful consideration of the specific situation and the precedent that may be set.

Conditions that Require a Public Interest Finding

For each condition listed below, the explanation describes why a PIF is required. In addition, guidance for justification of each type of PIF request is provided. The type and amount of justification required will vary, depending on the nature of the request. Whenever possible, the justification should be objective or quantifiable, such as a cost comparison or product research. The typical conditions that require a PIF include, but may not be limited to, the following:

Note: Conditions 2-5 are applicable both before and after the letting. Therefore, a PIF should be approved before issuing a change order for any of these conditions.

1. ***All of the applicable project clearances will not be obtained by the 1st Tuesday, 2 months prior to letting.***

Explanation: Projects let without the necessary clearances have an increased risk of delays and increased construction costs. To help minimize the potential for delays and increased costs, the Iowa DOT's policy is to ensure that all projects have the necessary clearances prior to this date. This date is when the Administering Team submits the project plans and specifications to the Contracts and Specifications Bureau. It marks the beginning of the letting process.

Project clearances, for the purposes of this document, shall include:

- a) Project Agreement (applicable to Federal-aid and State-aid projects only): This item is considered clear when the appropriate officials of both the Iowa DOT and the LPA have signed the project agreement.
- b) An approved Project Development Certification (PDC): This certification addresses several project clearances, including: railroads, utilities, permits for work on Primary Highways, and right-of-way acquisitions and relocations. These items are considered clear when the PDC has been approved (signed) by the appropriate Iowa DOT bureau(s). For more detailed guidance on each of the clearances addressed by the PDC, refer to [I.M. 3.710](#), Project Development Certification Instructions.
- c) U.S. Army Corps of Engineers 404 Permit (if applicable): This item is considered clear when the Corps has approved the applicable 404 permit application.

- d) Iowa DNR Floodplain Permit (if applicable): This item is considered clear when the Iowa DNR has approved the permit application.

Note: For Federal-aid projects, FHWA Environmental Concurrence is also an essential project clearance. However, since final design may not proceed until after Environmental Concurrence is received, this clearance must already have been obtained prior to submittal of final plans for letting. Therefore, a PIF will not be accepted for lack of this clearance.

The LPA should contact the Iowa DOT Administering Team for assistance in determining which clearances apply to a specific project.

Guidance: If a PIF is requested for this condition, the LPA's request shall address several things:

- a) Identify the project clearance that is not yet obtained.
- b) Explain the special circumstances that have prevented the LPA from obtaining the needed clearance in accordance with the established processes and typical timeframes. The LPA must be able to demonstrate that the circumstances were not reasonably foreseeable or are beyond their control. Lack of planning is not acceptable justification for approving a PIF for this condition.
- c) List the steps being taken to obtain the needed clearance. The LPA must be able to show that aggressive efforts are being made to obtain the needed clearance and their chances of success are high.
- d) Provide an estimate of when the needed clearance will be obtained. This estimate must be reasonable, given the typical timeframes for the clearance in question. A request that requires an accelerated process may not be approved.
- e) Explain the nature of and quantify, if possible, any anticipated negative impacts that are likely to result from delaying the project. The LPA should also explain why those potential impacts outweigh the additional risk of allowing the project to proceed in the letting without the clearance.

Except as noted below, all of the applicable clearances must be obtained by the 1st Tuesday, 1 month prior to letting. Otherwise, the project will be rescheduled for a later letting.

The 1st Tuesday, 1 month prior to letting is when the Iowa DOT begins requesting Federal Highway Administration (FHWA) authorization of projects for letting. As required by the Federal regulations (23 CFR 635.309), the Iowa DOT's request contains assurances that either all the necessary project clearances have been obtained or necessary arrangements have been made so that the project may progress without unnecessary delay or expense. The Iowa DOT is responsible to the FHWA for ensuring that all Federal-aid projects comply with these regulations. While non-Federal-aid projects don't require FHWA authorization, the same procedure will be used for all projects let by the Iowa DOT.

Under very limited circumstances, a project may proceed in the letting process without all the clearances up until the 1st Tuesday of the letting month, but only if the pending clearance is virtually assured. One example is if a right-of-way parcel has not been acquired but is scheduled for condemnation (i.e., a court date has been set) before the 1st Tuesday of the letting month. Another example is if formal permit approval is pending but the permitting agency has given written assurance that approval will be granted before the 1st Tuesday of the letting month.

2. *The contract documents direct the contractor to provide a single proprietary product.*

Explanation: Iowa Code Section [73.2](#) and Iowa DOT policy requires procurement of construction contracts through a competitive bidding process. Specifications that direct the contractor to provide a single proprietary product do not allow competition by other acceptable products. Use of such specifications may unnecessarily add to the project cost.

A product, specification, or process identified in the plans or specifications is considered proprietary if it includes a brand or trade name. If the designer is uncertain whether a particular name is considered a brand or trade name, it may be helpful to consult the United States Patent Office [Trademark Electronic Search System](#).

Also, a specification is considered proprietary if it is so narrowly written that only one product can meet the requirements, even if a brand or trade name is not used.

Guidance: Generic, end-result specifications are always the preferred method because they promote competition. A less desirable but acceptable specification may include proprietary products if at least three acceptable products are listed along with the phrase, “or approved equal.” However, if only one product is specified, one of the following justifications must be provided:

- a) The LPA certifies the product is necessary to ensure compatibility or synchronization with existing facilities or systems for one of the following reasons:
 - 1) Function – the product is necessary for the satisfactory operation of existing facilities.

For example, improvements to a traffic signal system may require a certain model of controller because other controllers would not be compatible with the existing traffic signal system.
 - 2) Aesthetics – the product is necessary to match the visual appearance of existing facilities.

For example, to avoid impacts to an historic district, it may be necessary to specify a certain style of streetlights in order to match the appearance of the existing streetlights that match those of a certain historical period.
 - 3) Logistics – the product must be interchangeable with other parts in the agency’s existing inventory.

For example, an agency may specify a particular type of guard rail end terminal because it maintains a limited inventory of spare parts that are compatible with only this type of end terminal.
- b) The LPA certifies no alternative products exist that adequately meet the project requirements.
- c) The product is part of a research project approved by the Iowa DOT which is designed to test or evaluate new or experimental products. Please note:
 - Before initiating research or testing of an experimental product, LPAs should review the American Association of State Highway and Transportation Officials (AASHTO) [Product Evaluation List](#) to see if the product has already been evaluated.
 - If the experimental portion of the project is being funded by a Federal or State research program, and the purpose of the project is to test or evaluate the proprietary product, then no separate approval is required.
- d) The LPA believes it is in the public’s best interest to specify a single proprietary product, even though other suitable products are available.

The LPA’s request for the use of a single proprietary product shall identify the product and include additional information and / or supporting documentation. The type of information and / or supporting documentation required depends on the type of justification used, as indicated below.

For a justification based on a certification (justification a or b above), include the following:

- An estimate of the additional costs, if any, of providing the single proprietary product.
- The unique needs of the project and an explanation of why only one product can meet those needs.
- The pool of potential alternative products and an explanation of why none of these products can meet the needs of the project.
- If a higher-than-normal standard of performance is driving the need for the proprietary product, explain why the higher performance standard is needed.

For a justification based on research or experimental products (justification c above), include the following:

- A copy of the approved experimental product evaluation work plan. The work plan should conform to FHWA’s guidance for [Construction Projects Incorporating Experimental Features](#).

For a justification based on a public interest finding (justification d above), in addition to the information listed for justifications a and b, include the following:

- An explanation of how the public benefit gained by using a single proprietary product outweighs the increased competition that would be obtained if other acceptable products were allowed.
- Since other acceptable products exist, the above point may be difficult to demonstrate; therefore, additional engineering or economic analysis may be necessary.

Regardless of whether a PIF is approved or what funds are used to pay for the item, any contract let using the Iowa DOT Standard Specifications must also comply with Buy America because these provisions are included in these specifications. The same is true of contracts let under other specifications that are within the scope of the National Environmental Policy Act (NEPA) document, if at least one of those contracts uses Federal-aid.

3. *The contract documents for a Federal-aid contract make publicly owned equipment available for use by the contractor.*

Explanation: Federal regulations (23 CFR 635.106) do not allow competition of publicly owned equipment with privately owned equipment in the completion of a highway construction contract.

Guidance: In some cases, it may be in the public's best interest to approve such a use of publicly owned equipment. This determination is made exclusively on the basis of cost effectiveness.

Therefore, the LPA must be able to substantiate the costs associated with use of its equipment and compare those to the costs that would be incurred by a contractor for similar use. In calculating its own equipment costs, the LPA must take into consideration the initial purchase price, as well as maintenance and operational costs. As an alternative to calculating its own equipment costs, the LPA may use the current [Iowa DOT Schedule of Equipment Rates](#) provided by the Iowa DOT Local Systems Bureau.

If a PIF is approved for this condition, the contract documents must also contain the following information:

- a) a statement clearly indicating that publicly owned equipment will be made available for use by the contractor;
- b) a clear identification of the specific pieces of equipment that will be made available, the rates to be charged by the LPA (if any), and the locations where the equipment will be made available or delivered; and
- c) a statement giving the contractor the option of either using the publicly owned equipment or providing the necessary equipment to complete the work.

If the LPA charges a rental rate for such equipment, it shall not make a profit. If, due to unforeseeable circumstances, the use of publicly owned equipment is not approved until after the work has started, such use shall not be a basis for an increase in project costs, or Federal or State reimbursement.

4. *The contract documents for a Federal-aid contract specify that the contractor shall incorporate materials or products provided by the LPA into the project.*

Explanation: Federal regulations (23 CFR 635.407) require that all materials to be incorporated into the project be acquired through a competitive bidding process. This condition is applicable whether the item in question will have Federal-aid participation or not. Competitive bidding usually delivers the project at the lowest possible cost to the public. Requiring the contractor to use materials provided by the LPA does not allow contractors to select their own sources for materials or products and may result in higher overall project costs.

Guidance: When considering the justification for this condition, materials or products furnished by the LPA will be evaluated on the basis of two general categories, as described below:

- a) Manufactured materials (products): Examples include items such as streetlights, utility accesses or covers, water mains, fire hydrants, etc.

Justification of a PIF for this condition should be based on cost effectiveness or existing facilities / systems compatibility. The cost effectiveness determination shall consider all the costs of obtaining and providing the manufactured materials, even if they are provided to the contractor free of charge.

If a PIF is approved for the LPA to furnish manufactured materials or products to the contractor, their use must be made mandatory. Optional use is not permitted because this in effect allows the LPA to compete with private suppliers. Also, to be eligible for Federal-aid participation, the LPA must be able to demonstrate that the product was previously acquired through a competitive bidding process, unless another method has been approved by a separate PIF for a non-competitive contract award (see no. 2 above). Documentation describing the bidding process used, including the specifications, must be included in the PIF request.

- b) Local natural materials: Examples include earth material (borrow), HMA millings, crushed PCC pavement, sand, or gravel.

Justification of a PIF for this condition should be based on cost effectiveness. When calculating its cost for local natural materials, the LPA must account for all costs incurred in obtaining and providing the materials, such as their cost to acquire a borrow or quarry source, and their labor and equipment costs in transporting or stockpiling the material.

If a PIF is approved for the LPA to furnish local natural materials, the contract documents must clearly specify how and where they will be provided. If the LPA elects to deliver the materials to the project site, the method, frequency, and location of the delivery must be specified. Or, if the LPA chooses to make its stockpile, borrow, or quarry areas available for the contractor's use, their locations must be identified. Also, the unit price (if any) that will be charged for the materials must be stated in the contract documents. If Federal-aid participation is requested in the cost of local natural materials, the Federal-aid share will be limited to the LPA's actual costs, or the fair market value, whichever is less.

5. *The contract documents for a Federal-aid contract specify a mandatory disposal area for excavated materials.*

Explanation: Federal regulations (23 CFR 635.407) prohibit the contract documents from specifying a mandatory disposal site for excess excavated materials. This condition is applicable whether the item in question will have Federal-aid participation or not. The excess excavated materials may have some value. Therefore, if the contractor was allowed to dispose of the excavated materials elsewhere, perhaps by selling the excavated materials to another interested party, the contractor may be able to submit a lower bid as a result.

Excavated materials include earth, rock, sand, or gravel and crushed, broken, or milled pavement materials. Excavated materials do not include other items that may be salvaged, such as traffic signals, controller cabinets, light poles, guard rail, fire hydrants, manhole castings, street furniture, or retaining wall blocks.

Guidance: This requirement may be waived if the LPA can demonstrate that use of a mandatory disposal area is cost effective. Use of a mandatory disposal area may also be justified on the basis of environmental considerations, provided that it would not result in excessive extra costs. The findings of the environmental document may be used to substantiate a PIF based on environmental considerations.

If a PIF is approved for this condition, the location of the mandatory disposal area shall be clearly identified in the contract documents.

Note: Regardless of which type of materials are salvaged or whether a PIF is required, the cost of transporting and stockpiling any salvaged materials shall not have any Federal-aid or State-aid participation. For additional guidance, refer to Attachment A to [I.M. 3.700](#), Check and Final Plans.

Procedures for Requesting and Approving a Public Interest Finding

1. If the LPA proposes to do something that requires a PIF, the Iowa DOT Administering Team contacts the LPA and explains the reasons why the rule, policy, or procedure is in place. The Administering Team should encourage compliance with the rule, policy, or procedure by suggesting alternatives that do not require a PIF.

2. If, after consultation with the Administering Team, the LPA still feels that a PIF can be justified, the LPA shall submit a Public Interest Finding Request ([Form 517030](#)) to the Administering Team. This request shall include sufficient information and supporting documentation (e.g., cost comparisons, a description of specific project requirements, etc.) to support the PIF. The request form may be prepared by a consultant but must be signed by the LPA staff person who is in responsible charge of the project.
3. The Administering Team reviews the LPA's request and either approves or disapproves the request in writing to the LPA. The Administering Team keeps a copy of the request and approval or disapproval in its project file. If the PIF was for a project clearance (see condition no. 1), the Administering Team's approval will also indicate how far the project may progress in the letting without the needed clearance. For most LPA projects, only the Administering Team approval is required. For projects with full oversight by FHWA, if the Administering Team recommends approval, it will forward the form to FHWA for review and approval.
4. When the project plans and specifications are turned-in to the Iowa DOT Contracts and Specifications Bureau, the Administering Team includes a copy of the LPA's approved PIF request. If the need for a PIF is discovered after the plans are turned-in, the approved PIF documentation shall be submitted to the Contracts and Specifications Bureau as soon as possible, but no later than the 1st Tuesday, 1 month prior to letting. Otherwise, the project will be rescheduled for a later letting.