

## SUBCHAPTER H—RIGHT-OF-WAY AND ENVIRONMENT

### PART 710—RIGHT-OF-WAY AND REAL ESTATE

#### Subpart A—General

- Sec.  
710.101 Purpose.  
710.103 Applicability.  
710.105 Definitions.

#### Subpart B—Program Administration

- 710.201 Grantee and subgrantee responsibilities.  
710.203 Title 23 funding and reimbursement.

#### Subpart C—Project Development

- 710.301 General.  
710.303 Project authorization and agreements.  
710.305 Acquisition.  
710.307 Construction advertising.  
710.309 Design-build projects.

#### Subpart D—Real Property Management

- 710.401 General.  
710.403 Management.  
710.405 ROW use agreements.  
710.407 [Reserved]  
710.409 Disposal of excess real property.

#### Subpart E—Property Acquisition Alternatives

- 710.501 Early acquisition.  
710.503 Protective buying and hardship acquisition.  
710.505 Real property donations.  
710.507 State and local contributions.  
710.509 Functional replacement of real property in public ownership.  
710.511 Transportation Alternatives.

#### Subpart F—Federal Assistance Program

- 710.601 Federal land transfers.  
710.603 Direct Federal acquisition.

#### Subpart G—Concession Agreements

- 710.701 Purpose.  
710.703 Definitions.  
710.705 Applicability.  
710.707 Fair market value.  
710.709 Determination of Fair market value.

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200.311; 49 CFR 1.48(b) and (cc), parts 21 and 24; 23 CFR 1.32.

SOURCE: 64 FR 71290, Dec. 21, 1999, unless otherwise noted.

#### Subpart A—General

SOURCE: 81 FR 57729, Aug. 23, 2016, unless otherwise noted.

##### § 710.101 Purpose.

The primary purpose of the requirements in this part is to ensure the prudent use of Federal funds under title 23, United States Code, in the acquisition, management, and disposal of real property. In addition to the requirements of this part, other real property related provisions apply and are found at 49 CFR part 24.

##### § 710.103 Applicability.

(a) This part applies whenever title 23, United States Code, grant funding is used, including when grant funds are expended or participate in project costs incurred by the State or other Title 23 grantee. This part applies to programs and projects administered by the Federal Highway Administration (FHWA) and, unless otherwise stated in this part, to all property purchased with title 23 grant funds or incorporated into a project carried out with grant funding provided under title 23, except property for which the title is vested in the United States upon project completion. Grantees are accountable to FHWA for complying with, and are responsible for ensuring their subgrantees, contractors, and other project partners comply with applicable Federal laws, including this part.

(b) The parties responsible for ROW and real estate activities, and for compliance with applicable Federal requirements, can vary by the nature of the responsibility or the underlying activity. Throughout this part, the FHWA identifies the parties subject to a particular provision through the use of terms of reference defined as set forth in §710.105. It is important to refer to those definitions, such as “State Department of Transportation

(SDOT),” “grantee,” “subgrantee,” “State agency” and “acquiring agency,” when applying the provisions in this part.

(c) Where title 23 funds are transferred to other Federal agencies to administer, those agencies’ ROW and real estate procedures may be utilized. Additional guidance is available electronically at the FHWA Real Estate Services Web site: <http://www.fhwa.dot.gov/realestate/index.htm>.

**§ 710.105 Definitions.**

(a) Terms defined in 23 U.S.C. 101(a) and 49 CFR part 24 have the same meaning where used in this part, except as modified in this section.

(b) The following terms where used in this part have the following meaning:

*Access rights* mean the right of ingress to and egress from a property to a public way.

*Acquiring agency* means a State agency, other entity, or person acquiring real property for title 23, United States Code, purposes. When an acquiring agency acquires real property interests that will be incorporated into a project eligible for title 23 grant funds, the acquiring agency must comply with Federal real estate and ROW requirements applicable to the grant.

*Acquisition* means activities to obtain an interest in, and possession of, real property.

*Damages* means the loss in the value attributable to remainder property due to the severance or consequential damages, as limited by State law, that arise when only part of an owner’s real property is acquired.

*Disposal* means the transfer by sale or other conveyance of permanent rights in excess real property, when the real property interest is not currently or in the foreseeable future needed for highway ROW or other uses eligible for funding under title 23 of the United States Code. A disposal must meet the requirements contained in § 710.403(b) of this part. The term “disposal” includes actions by a grantee, or its subgrantees, in the nature of relinquishment, abandonment, vacation, discontinuance, and disclaimer of real property or any rights therein.

*Donation* means the voluntary transfer of privately owned real property, by

a property owner who has been informed in writing by the acquiring agency of rights and benefits available to owners under the Uniform Act and this section, for the benefit of a public transportation project without compensation or with compensation at less than fair market value.

*Early acquisition* means acquisition of real property interests by an acquiring agency prior to completion of the environmental review process for a proposed transportation project, as provided under 23 CFR 710.501 and 23 U.S.C. 108.

*Early Acquisition Project* means a project for the acquisition of real property interests prior to the completion of the environmental review process for the transportation project into which the acquired property will be incorporated, as authorized under 23 U.S.C. 108 and implemented under § 710.501 of this part. It may consist of the acquisition of real property interests in a specific parcel, a portion of a transportation corridor, or an entire transportation corridor.

*Easement* means an interest in real property that conveys a right to use or control a portion of an owner’s property or a portion of an owner’s rights in the property either temporarily or permanently.

*Excess real property* means a real property interest not needed currently or in the foreseeable future for transportation purposes or other uses eligible for funding under title 23, United States Code.

*Federal-aid project* means a project funded in whole or in part under, or requiring an FHWA approval pursuant to provisions in chapter 1 of title 23, United States Code.

*Federally assisted* means a project or program that receives grant funds under title 23, United States Code.

*Grantee* means the party that is the direct recipient of title 23 funds and is accountable to FHWA for the use of the funds and for compliance with applicable Federal requirements.

*Mitigation property* means real property interests acquired to mitigate for impacts of a project eligible for funding under title 23.

*Option* means the purchase of a right to acquire real property within an

agreed-to period of time for an agreed-to amount of compensation or through an agreed-to method by which compensation will be calculated.

*Person* means any individual, family, partnership, corporation, or association.

*Real Estate Acquisition Management Plan (RAMP)* means a written document that details how a non-State department of transportation grantee, subgrantee, or design-build contractor will administer the title 23 ROW and real estate requirements for its project or program of projects. The document must be approved by the SDOT, or by the funding agency in the case of a non-SDOT grantee, before any acquisition work may begin. It must lay out in detail how the acquisition and relocation assistance programs will be accomplished and any anticipated issues that may arise during the process. If relocations are reasonably expected as part of the title 23 projects or program, the Real Estate Acquisition Management Plan (RAMP) must address relocation assistance and related procedures.

*Real property* or *real property interest* means any interest in land and any improvements thereto, including fee and less-than-fee interests such as: temporary and permanent easements, air or access rights, access control, options, and other contractual rights to acquire an interest in land, rights to control use or development, leases, and licenses, and any other similar action to acquire or preserve ROW for a transportation facility. As used in this part, the terms “real property” and “real property interest” are synonymous unless otherwise specified.

*Relinquishment* means the conveyance of a portion of a highway ROW or facility by a grantee under title 23, United States Code, or its subgrantee, to another government agency for continued transportation use. (See part 620, subpart B of this chapter.)

*Right-of-way (ROW)* means real property and rights therein obtained for the construction, operation, maintenance, or mitigation of a transportation or related facility funded under title 23, United States Code.

*ROW manual* means an operations manual that establishes a grantee’s ac-

quisition, valuation, relocation, and property management and disposal requirements and procedures, and has been approved in accordance with § 710.201(c).

*ROW use agreement* means real property interests, defined by an agreement, as evidenced by instruments such as a lease, license, or permit, for use of real property interests for non-highway purposes where the use is in the public interest, consistent with the continued operation, maintenance, and safety of the facility, and such use will not impair the highway or interfere with the free and safe flow of traffic (see also 23 CFR 1.23). These rights may be granted only for a specified period of time because the real property interest may be needed in the future for highway purposes or other purposes eligible for funding under title 23.

*Settlement* means the result of negotiations based on fair market value in which the amount of just compensation is agreed upon for the purchase of real property or an interest therein. This term includes the following:

(1) An *administrative settlement* is a settlement reached prior to filing a condemnation proceeding based on value related evidence, administrative consideration, or other factors approved by an authorized agency official.

(2) A *legal settlement* is a settlement reached by an authorized legal representative or a responsible official of the acquiring agency who has the legal power vested in him by State law, after filing a condemnation proceeding, including agreements resulting from mediation and stipulated settlements approved by the court in which the condemnation action had been filed.

(3) A *court settlement* or *court award* is any decision by a court that follows a contested trial or hearing before a jury, commission, judge, or other legal entity having the authority to establish the amount of just compensation for a taking under the laws of eminent domain.

*State agency* means: A department, agency, or instrumentality of a State or of a political subdivision of a State; any department, agency, or instrumentality of two or more States or of two or more political subdivisions of a

## § 710.201

State or States; or any person who has the authority to acquire property by eminent domain, for public purposes, under State law.

*State department of transportation (SDOT)* means the State highway department, transportation department, or other State transportation agency or commission to which title 23, United States Code, funds are apportioned.

*Stewardship/Oversight Agreement* means the written agreement between the SDOT and FHWA that defines the respective roles and responsibilities of FHWA and the State for carrying out certain project review, approval, and oversight responsibilities under title 23, including those activities specified by 23 U.S.C. 106(c)(3).

*Subgrantee* means a government agency or legal entity that enters into an agreement with a grantee to carry out part or all of the activity funded by title 23 grant funds. A subgrantee is accountable to the grantee for the use of the funds and for compliance with applicable Federal requirements.

*Temporary development restriction* means the purchase of a right to temporarily control or restrict development or redevelopment of real property. This right is for an agreed to time period, defines specifically what is restricted or controlled, and is for an agreed to amount of compensation.

*Transportation project* means any highway project, public transportation capital project, multimodal project, or other project that requires the approval of the Secretary. As used in this part, the term “transportation project” does not include an Early Acquisition Project as defined in this section.

*Uneconomic remnant* means a remainder property which the acquiring agency has determined has little or no utility or value to the owner.

*Uniform Act* means the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Pub. L. 91-646, 84 Stat. 1894; primarily codified in 42 U.S.C. 4601 *et seq.*), and the implementing regulations at 49 CFR part 24.

## 23 CFR Ch. I (4–1–23 Edition)

### Subpart B—Program Administration

SOURCE: 81 FR 57729, Aug. 23, 2016, unless otherwise noted.

#### § 710.201 Grantee and subgrantee responsibilities.

(a) *Program oversight.* States administer the Federal-aid highway program, funded under chapter 1 of title 23, United States Code, through their SDOTs. The SDOT shall have overall responsibility for the acquisition, management, and disposal of real property interests on its Federal-aid projects, including when those projects are carried out by the SDOT’s subgrantees or contractors. This responsibility shall include ensuring compliance with the requirements of this part and other Federal laws, including regulations. Non-SDOT grantees of funds under title 23 must comply with the requirements under this part, except as otherwise expressly provided in this part, and are responsible for ensuring compliance by their subgrantees and contractors with the requirements of this part and other Federal laws, including regulations.

(b) *Organization.* Each grantee and subgrantee, including any other acquiring agency acting on behalf of a grantee or subgrantee, shall be adequately staffed, equipped, and organized to discharge its real property related responsibilities.

(c) *ROW manual.* (1) Every grantee must ensure that its title 23-funded projects are carried out using an FHWA-approved and up-to-date ROW manual or RAMP that is consistent with applicable Federal requirements, including the Uniform Act and this part. Each SDOT that receives funding under title 23, United States Code, shall maintain an approved and up-to-date ROW manual describing its ROW organization, policies, and procedures. Non-SDOT grantees may use one of the procedures in paragraph (d) to meet the requirements in this paragraph; however, the ROW manual options can only be used with SDOT approval and permission. The ROW manual shall describe functions and procedures for all phases of the ROW program, including appraisal and appraisal review, waiver

valuation, negotiation and eminent domain, property management, relocation assistance, administrative settlements, legal settlements, and oversight of its subgrantees and contractors. The ROW manual shall also specify procedures to prevent conflict of interest and avoid fraud, waste, and abuse. The ROW manual shall be in sufficient detail and depth to guide the grantee, its employees, and others involved in acquiring, managing, and disposing of real property interests. Grantees, subgrantees, and their contractors must comply with current FHWA requirements whether or not the requirements are included in the FHWA-approved ROW manual.

(2) The SDOT's ROW manual must be developed and updated, as a minimum, to meet the following schedule:

(i) The SDOTs shall prepare and submit for approval by FHWA an up-to-date ROW Manual by no later than August 23, 2018.

(ii) Every 5 years thereafter, the chief administrative officer of the SDOT shall certify to the FHWA that the current SDOT ROW manual conforms to existing practices and contains necessary procedures to ensure compliance with Federal and State real estate law and regulation, including this part.

(iii) The SDOT shall update its ROW manual periodically to reflect changes in operations and submit the updated materials for approval by the FHWA.

(d) *ROW manual alternatives.* Non-SDOT grantees, and all subgrantees, design-build contractors, and other acquiring agencies carrying out a project funded by a grant under title 23, United States Code, must demonstrate that they will use FHWA-approved ROW procedures for acquisition and other real estate activities, and that they have the ability to comply with current FHWA requirements, including this part. This can be done through any of the following methods:

(1) Certification in writing that the acquiring agency will adopt and use the FHWA-approved SDOT ROW manual;

(2) Submission of the acquiring agency's own ROW manual to the grantee for review and determination whether it complies with Federal and State re-

quirements, together with a certification that once the reviewing agency approves the manual, the acquiring agency will use the approved ROW manual; or

(3)(i) Submission of a RAMP setting forth the procedures the acquiring agency or design-build contractor intends to follow for a specified project or group of projects, along with a certification that if the reviewing agency approves the RAMP, the acquiring agency or design-build contractor will follow the approved RAMP for the specified program or project(s). The use of a RAMP is appropriate for a subgrantee, non-SDOT grantee, or design-build contractor if that party infrequently carries out title 23 programs or projects, the program or project is non-controversial, and the project is not complex.

(ii) Subgrantees, design-build contractors, and other acquiring agencies carrying out a project for an SDOT submit the required certification and information to the SDOT, and the SDOT will review and make a determination on behalf of FHWA. Non-SDOT grantees submit the required certification and information directly to FHWA. Non-SDOT grantees are responsible for submitting to FHWA the required certification and information for any subgrantee, contractor, and other acquiring agency carrying out a project for the non-SDOT grantee.

(e) *Record keeping.* The acquiring agency shall maintain adequate records of its acquisition and property management activities.

(1) Acquisition records, including records related to owner or tenant displacements, and property inventories of improvements acquired shall be in sufficient detail to demonstrate compliance with this part and 49 CFR part 24. These records shall be retained at least 3 years from the later of either:

(i) The date the SDOT or other grantee receives Federal reimbursement of the final payment made to each owner of a property and to each person displaced from a property; or

(ii) The date of reimbursement for early acquisitions or credit toward the State share of a project is approved based on early acquisition activities under § 710.501.

## § 710.203

(2) Property management records shall include inventories of real property interests considered excess to project or program needs, as well as all authorized ROW use agreements for real property acquired with title 23 funds or incorporated into a program or project that received title 23 funding.

(f) *Procurement.* Contracting for all activities required in support of an SDOT's or other grantee's ROW projects or programs through the use of private consultants and other services shall conform to 2 CFR 200.317, except to the extent that the procurement is required to adhere to requirements under 23 U.S.C. 112(b)(2) and 23 CFR part 172 for engineering and design related consultant services.

(g) *Use of other public land acquisition organizations, conservation organizations, or private consultants.* The grantee may enter into written agreements with other State, county, municipal, or local public land acquisition organizations, conservation organizations, private consultants, or other persons to carry out its authorities under this part. Such organizations, firms, or persons must comply with the grantee's ROW manual or RAMP as approved in accordance with paragraphs (c) or (d) of this section. The grantee shall monitor any such real property interest acquisition activities to ensure compliance with State and Federal law, and is responsible for informing such persons of all such requirements and for imposing sanctions in cases of material non-compliance.

(h) *Assignment of FHWA approval actions to an SDOT.* The SDOT and FHWA will agree in their Stewardship/Oversight Agreement on the scope of property-related oversight and approvals under this part that will be performed directly by FHWA and those that FHWA will assign to the SDOT. This assignment provision does not apply to other grantees of title 23 funds. The content of the most recent Stewardship/Oversight Agreement shall be reflected in the FHWA-approved SDOT ROW manual. The agreement, and thus the SDOT ROW manual, will indicate which Federal-aid projects require submission of materials for FHWA review and approval. The FHWA retains re-

## 23 CFR Ch. I (4–1–23 Edition)

sponsibility for any approval action not expressly assigned to the SDOT in the Stewardship/Oversight Agreement.

### § 710.203 Title 23 funding and reimbursement.

(a) *General conditions.* Except as otherwise provided in § 710.501 for early acquisition, a State agency only may acquire real property, including mitigation property, with title 23 grant funds if the following conditions are satisfied:

(1) The project for which the real property is acquired is included in an approved Statewide Transportation Improvement Program (STIP);

(2) The grantee has executed a project agreement or other agreement recognized under title 23 reflecting the Federal funding terms and conditions for the project;

(3) Preliminary acquisition activities, including a title search, appraisal, appraisal review and waiver valuation preparation, preliminary property map preparation and preliminary relocation planning activities, limited to searching for comparable properties, identifying replacement neighborhoods and identifying available public services, can be advanced under preliminary engineering, as defined in § 646.204 of this chapter, prior to completion of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321, *et seq.*) review, while other work involving contact with affected property owners for purposes of negotiation and relocation assistance must normally be deferred until after NEPA approval, except as provided in § 710.501, early acquisition; and in § 710.503 for protective buying and hardship acquisition; and

(4) Costs have been incurred in conformance with State and Federal requirements.

(b) *Direct eligible costs.* Federal funds may only participate in direct costs that are identified specifically as an authorized acquisition activity such as the costs of acquiring the real property incorporated into the final project and the associated direct costs of acquisition, except in the case of a State that has an approved indirect cost allocation plan as stated in § 710.203(d) or specifically provided by statute. Participation is provided for:

(1) *Real property acquisition.* Usual costs and disbursements associated with real property acquisition as required under the laws of the State, including the following:

(i) The cost of contracting for private acquisition services or the cost associated with the use of local public agencies;

(ii) Ordinary and reasonable costs of acquisition activities, such as, appraisal, waiver valuation development, appraisal review, cost estimates, relocation planning, ROW plan preparation, title work, and similar necessary ROW related work;

(iii) The compensation paid for the real property interest and costs normally associated with completing the purchase, such as document fees and document stamps. The costs of acquiring options and other contractual rights to acquire an interest in land, rights to control use or development, leases, ROWs, and any other similar action to acquire or preserve rights-of-way for a transportation facility are eligible costs when FHWA determines such costs are actual, reasonable and necessary costs. Costs under this paragraph do not include salary and related expenses for an acquiring agency's employees (see payroll-related expenses in paragraph (b)(5) of this section);

(iv) The cost of administrative settlements in accordance with 49 CFR 24.102(i), legal settlements, court awards, and costs incidental to the condemnation process. This includes reasonable acquiring agency attorney's fees, but excludes attorney's fees for other parties except where required by State law (including an order of a court of competent jurisdiction) or approved by FHWA;

(v) The cost of minimum payments and waiver valuation amounts included in the approved ROW manual or approved RAMP; and

(vi) Ordinary and reasonable costs associated with closing, and costs of finalizing the acquisition.

(2) *Relocation assistance and payments.* Usual costs and disbursements associated with the following:

(i) Relocation assistance and payments required under 49 CFR part 24; and

(ii) Relocation assistance and payments provided under the laws of the State that may exceed the requirements of 49 CFR part 24, except for relocation assistance and payments provided to aliens not lawfully present in the United States.

(3) *Damages.* The cost of severance and/or consequential damages to remaining real property resulting from a partial acquisition, actual or constructive, of real property for a project based on elements compensable under State law.

(4) *Property management.* The net cost of managing real property prior to and during construction to provide for maintenance, protection, and the clearance and disposal of improvements until final project acceptance.

(5) *Payroll-related expenses.* Salary and related expenses (compensation for personal services) of employees of an acquiring agency for work on a project funded by a title 23 grant are eligible costs in accordance with 2 CFR part 225 (formerly OMB Circular A-87), as are salary and related expenses of a grantee's employees for work with an acquiring agency or a contractor to ensure compliance with Federal requirements on a title 23 project if the work is dedicated to a specific project and documented in accordance with 2 CFR part 225.

(6) *Property not incorporated into a project funded under title 23, United States Code.* The cost of property not incorporated into a project may be eligible for reimbursement in the following circumstances:

(i) *General.* Costs for construction material sites, property acquisitions to a logical boundary, eligible Transportation Alternatives (TA) projects, sites for disposal of hazardous materials, environmental mitigation, environmental banking activities, or last resort housing; and

(ii) *Easements and alternate access not incorporated into the ROW.* The cost of acquiring easements and alternate access points necessary for highway construction and maintenance outside the approved ROW limits for permanent or temporary use.

(7) *Uneconomic remnants.* The cost of uneconomic remnants purchased in connection with the acquisition of a

partial taking for the project as required by the Uniform Act.

(8) *Access rights.* Payment for full or partial control of access on an existing road or highway (*i.e.*, one not on a new location), based on elements compensable under applicable State law. Participation does not depend on another real property interest being acquired or on further construction of the highway facility.

(9) *Utility and railroad property.* (i) The cost to replace operating real property owned by a displaced utility or railroad and conveyed to an acquiring agency for a project, as provided in 23 CFR part 140, subpart I, Reimbursement for Railroad Work, and 23 CFR part 645, subpart A, Utility Relocations, Adjustments and Reimbursement, and 23 CFR part 646, subpart B, Railroad-Highway Projects; and

(ii) Participation in the cost of acquiring non-operating utility or railroad real property shall be in the same manner as that used in the acquisition of other privately owned property.

(c) *Withholding payment.* The FHWA may withhold payment under the conditions described in 23 CFR 1.36 for failure to comply with Federal law or regulation, State law, or under circumstances of waste, fraud, and abuse.

(d) *Indirect costs.* Indirect costs may be claimed under the provisions of 2 CFR part 225 (formerly OMB Circular A-87). Indirect costs may be included on billings after the indirect cost allocation plan has been prepared in accordance with 2 CFR part 225 and approved by FHWA, other cognizant Federal agency, or, in the case of an SDOT subgrantee without a rate approved by a cognizant Federal agency, by the SDOT. Indirect costs for an SDOT may include costs of providing program-level guidance, consultation, and oversight to other acquiring agencies and contractors where ROW activities on title 23-funded projects are performed by non-SDOT personnel.

### Subpart C—Project Development

SOURCE: 81 FR 57729, Aug. 23, 2016, unless otherwise noted.

#### § 710.301 General.

The project development process typically follows a sequence of actions and approvals in order to qualify for funding. The key steps in this process typically are planning, environmental review, project agreement/authorization, acquisition, construction advertising, and construction.

#### § 710.303 Project authorization and agreements.

As a condition of Federal funding under title 23, the grantee shall obtain FHWA authorization in writing or electronically before proceeding with any real property acquisition using title 23 funds, including early acquisitions under § 710.501(e) and hardship acquisition and protective buying under § 710.503. For projects funded under chapter 1, title 23, United States Code, the grantee must prepare a project agreement in accordance with 23 CFR part 630, subpart A. Authorizations and agreements shall be based on an acceptable estimate for the cost of acquisition.

#### § 710.305 Acquisition.

(a) *General.* The process of acquiring real property includes appraisal, appraisal review, waiver valuations, establishing estimates of just compensation, negotiations, relocation assistance, administrative and legal settlements, and court settlements and condemnations. Grantees must ensure all acquisition and related relocation assistance activities are performed in accordance with 49 CFR part 24 and this part. If a grantee does not directly own the real property interests used for a title 23 project, the grantee must have an enforceable subgrant agreement or other agreement with the owner of the ROW that permits the grantee to enforce applicable Federal requirements affecting the real property interests, including real property management requirements under subpart D of this part.

(b) *Adequacy of real property interest.* The real property interests acquired for any project funded under title 23 must be adequate to fulfill the purpose of the project. Except in the case of an Early Acquisition Project, this means



adequate for the construction, operation, and maintenance of the resulting facility, and for the protection of both the facility and the traveling public.

(c) *Establishment and offer of just compensation.* The amount believed to be just compensation shall be approved by a responsible official of the acquiring agency. This shall be done in accordance with 49 CFR 24.102(d).

(d) *Description of acquisition process.* The acquiring agency shall provide persons affected by projects or acquisitions advanced under title 23 of the United States Code with a written description of its real property acquisition process under State law and this part, and of the owner's rights, privileges, and obligations. The description shall be written in clear, non-technical language and, where appropriate, be available in a language other than English in accordance with 49 CFR 24.5, 24.102(b), and 24.203.

#### § 710.307 Construction advertising.

(a) The grantee must manage real property acquired for a project until it is required for construction. Except for properties acquired under the early acquisition provisions of 23 CFR 710.501(e), clearance of improvements can be scheduled during the acquisition phase of the project using sale/removal agreements, separate demolition contracts, or be included as a work item in the construction contract. The grantee shall develop ROW availability statements and certifications related to project acquisitions as described in 23 CFR 635.309.

(b) The FHWA-SDOT Stewardship/Oversight Agreement will specify SDOT responsibility for the review and approval of the ROW availability statements and certifications in accordance with applicable law. Generally, for non-National Highway System projects, the SDOT has full responsibility for determining that right-of-way is available for construction. For non-SDOT grantees, FHWA will be responsible for the review and approval.

#### § 710.309 Design-build projects.

(a) In the case of a design-build project, ROW must be acquired and cleared in accordance with the Uniform

Act and the FHWA-approved ROW manual or RAMP, as provided in § 710.201(c) and (d). The grantee shall submit a ROW certification in accordance with 23 CFR 635.309(p) when requesting FHWA's authorization. The grantee shall ensure that ROW is available prior to the start of physical construction on individual properties.

(b) The decision to advance a ROW segment to the construction stage shall not impair the safety or in any way be coercive in the context of 49 CFR 24.102(h) with respect to unacquired or occupied properties on the same or adjacent segments of project ROW.

(c) The grantee may choose not to allow construction to commence until all property is acquired and relocations have been completed; or, the grantee may permit the construction to be phased or segmented to allow ROW activities to be completed on individual properties or a group of properties, with ROW certifications done in a manner satisfactory to the grantee for each phase or segment.

(d) If the grantee elects to include ROW services within the design-builder's scope of work for the design-build contract, the following provisions must be addressed in the request for proposals document:

(1) The design-builder must submit written certification in its proposal that it will comply with the process and procedures in the FHWA-approved ROW manual or RAMP as provided in § 710.201(c) and (d).

(2) When relocation of displaced persons from their dwellings has not been completed, the grantee or design-builder shall establish a hold off zone around all occupied properties to ensure compliance with ROW procedures prior to starting construction activities in affected areas. The limits of this zone should be established by the grantee prior to the design-builder entering onto the property. There should be no construction-related activity within the hold off zone until the property is vacated. The design-builder must have written notification of vacancy from the grantee prior to entering the hold off zone.

## § 710.401

## 23 CFR Ch. I (4–1–23 Edition)

(3) Contractors activities must be limited to those that the grantee determines do not have a material adverse impact on the quality of life of those in occupied properties that have been or will be acquired.

(4) The grantee will provide a ROW project manager who will serve as the first point of contact for all ROW issues.

(e) If the grantee elects to perform all ROW services relating to the design-build contract, the provisions in § 710.307 will apply. The grantee will notify potential offerors of the status of all ROW issues in the request for proposal document.

### Subpart D—Real Property Management

SOURCE: 81 FR 57729, Aug. 23, 2016, unless otherwise noted.

#### § 710.401 General.

This subpart describes the grantee's responsibilities to control the use of real property acquired for a project in which Federal funds participated in any phase of the project. The grantee shall specify in its approved ROW manual or RAMP, the procedures for the maintenance, ROW use agreements, and disposal of real property interests acquired with title 23 funds. The grantee shall ensure that subgrantees, including local agencies, follow Federal requirements and approved ROW procedures as provided in § 710.201(c) and (d).

#### § 710.403 Management.

(a) As provided in § 710.201(h), FHWA and SDOT may use their Stewardship/Oversight Agreement to enter into a written agreement establishing which approvals the SDOT may make on behalf of FHWA, provided FHWA may not assign to the SDOT the decision to allow any ROW use agreement or any disposal on or within the approved ROW limits of the Interstate, including any change in access control. The assignment agreement provisions in § 710.201(h) and this paragraph do not apply to non-SDOT grantees.

(b) The grantee must ensure that all real property interests within the approved ROW limits or other project limits of a facility that has been fund-

ed under title 23 are devoted exclusively to the purposes of that facility and the facility is preserved free of all other public or private alternative uses, unless such non-highway alternative uses are permitted by Federal law (including regulations) or the FHWA. An alternative use, whether temporary under § 710.405 or permanent as provided in § 710.409, must be in the public interest, consistent with the continued operation, maintenance, and safety of the facility, and such use must not impair the highway or interfere with the free and safe flow of traffic (see also 23 CFR 1.23). Park and Ride lots are exempted from the provisions of this part. Park and Ride lots requirements are found 23 U.S.C. 137 and 23 CFR 810.106.

(c) Grantees shall specify procedures in their approved ROW manual or RAMP for determining when a real property interest is excess real property and may be disposed of in accordance with this part. These procedures must provide for coordination among relevant State organizational units that may be interested in the proposed use or disposal of the real property. Grantees also shall specify procedures in their ROW manual or RAMP for determining when a real property interest is excess and when a real property interest may be made available under a ROW use agreement for an alternative use that satisfies the requirements described in paragraph (b) of this section.

(d) Disposal actions and ROW use agreements, including leasing actions, are subject to 23 CFR part 771.

(e) Current fair market value must be charged for the use or disposal of all real property interests if those real property interests were obtained with title 23, United States Code, funding except as provided in paragraphs (e)(1) through (6) of this section. The term fair market value as used for acquisition and disposal purposes is as defined by State statute and/or State court decisions. Exceptions to the requirement for charging fair market value must be submitted to FHWA in writing and may be approved by FHWA in the following situations:

(1) When the grantee shows that an exception is in the overall public interest based on social, environmental, or

economic benefits, or is for a non-proprietary governmental use. The grantee's ROW manual or RAMP must include criteria for evaluating disposals at less than fair market value, and a method for ensuring the public will receive the benefit used to justify the less than fair market value disposal.

(2) Use by public utilities in accordance with 23 CFR part 645.

(3) Use by railroads in accordance with 23 CFR part 646.

(4) Use for bikeways and pedestrian walkways in accordance with 23 CFR part 652.

(5) Uses under 23 U.S.C. 142(f), Public Transportation. Lands and ROWs of a highway constructed using Federal-aid highway funds may be made available without charge to a publicly owned mass transit authority for public transit purposes whenever the public interest will be served, and where this can be accomplished without impairing automotive safety or future highway improvements.

(6) Use for other transportation projects eligible for assistance under title 23 of the United States Code, provided that a concession agreement, as defined in § 710.703, shall not constitute a transportation project exempt from fair market value requirements.

(f) The Federal share of net income from the use or disposal of real property interests obtained with title 23 funds shall be used by the grantee for activities eligible for funding under title 23. Where project income derived from the use or disposal of real property interests is used for subsequent title 23-eligible projects, the funds are not considered Federal financial assistance and use of the income does not cause title 23 requirements to apply.

#### § 710.405 ROW use agreements.

(a) A ROW use agreement for the non-highway use of real property interests may be executed with a public entity or private party in accordance with § 710.403 and this section. Any non-highway alternative use of real property interests requires approval by FHWA, including a determination by FHWA that such occupancy, use, or reservation is in the public interest; is consistent with the continued use, op-

erations, maintenance, and safety of the facility; and such use does not impair the highway or interfere with the free and safe flow of traffic as described in § 710.403(b). Except for Interstate Highways, where the SDOT controls the real property interest, the FHWA may assign its determination and approval responsibilities to the SDOT in their Stewardship/Oversight Agreement.

(1) This section applies to highways as defined in 23 U.S.C. 101(a) that received title 23, United States Code, financial assistance in any way.

(2) This section does not apply to the following:

(i) Uses by railroads and public utilities which cross or otherwise occupy Federal-aid highway ROW and that are governed by other sections of this title;

(ii) Relocations of railroads or utilities for which reimbursement is claimed under 23 CFR part 140, subparts E and H, 23 CFR part 645, or 23 CFR part 646, subpart B; and

(iii) Bikeways and pedestrian walkways as covered in 23 CFR part 652.

(b) Subject to the requirements in this subpart, ROW use agreements for a time-limited occupancy or use of real property interests may be approved if the grantee has acquired sufficient legal right, title, and interest in the ROW of a federally assisted highway to permit the non-highway use. A ROW use agreement must contain provisions that address the following items:

(1) Ensure the safety and integrity of the federally assisted facility;

(2) Define the term of the agreement;

(3) Identify the design and location of the non-highway use;

(4) Establish terms for revocation of the ROW use agreement and removal of improvements at no cost to the FHWA;

(5) Provide for adequate insurance to hold the grantee and the FHWA harmless;

(6) Require compliance with non-discrimination requirements;

(7) Require grantee and FHWA approval, if not assigned to SDOT, and SDOT approval if the agreement affects a Federal-aid highway and the SDOT is not the grantee, for any significant revision in the design, construction, or operation of the non-highway use; and

(8) Grant access to the non-highway use by the grantee and FHWA, and the SDOT if the agreement affects a Federal-aid highway and the SDOT is not the grantee, for inspection, maintenance, and for activities needed for reconstruction of the highway facility.

(9) Additional terms and conditions appropriate for inclusion in ROW use agreements are described in FHWA guidance at [http://www.fhwa.dot.gov/real\\_estate/right-of-way/corridor\\_management/air-space\\_guidelines.cfm](http://www.fhwa.dot.gov/real_estate/right-of-way/corridor_management/air-space_guidelines.cfm). The terms and conditions listed in the guidance are not mandatory requirements.

(c) Where a proposed use requires changes in the existing highway, such changes shall be provided without cost to Federal funds unless otherwise specifically agreed to by the grantee and FHWA.

(d) Proposed uses of real property interests shall conform to the current design standards and safety criteria of FHWA for the functional classification of the highway facility in which the property is located.

(e) An individual, company, organization, or public agency desiring to use real property interests shall submit a written request to the grantee, together with an application supporting the proposal. If FHWA is the approving authority, the grantee shall forward the request, application, and the SDOT's recommendation if the proposal affects a Federal-aid highway, and the proposed ROW use agreement, together with its recommendation and any necessary supplemental information, to FHWA. The submission shall affirmatively provide for adherence to all requirements contained in this subpart and must include the following information:

(1) Identification of the party responsible for developing and operating the proposed use;

(2) A general statement of the proposed use;

(3) A description of why the proposed use would be in the public interest;

(4) Information demonstrating the proposed use would not impair the highway or interfere with the free and safe flow of traffic;

(5) The proposed design for the use of the space, including any facilities to be constructed;

(6) Maps, plans, or sketches to adequately demonstrate the relationship of the proposed project to the highway facility;

(7) Provision for vertical and horizontal access for maintenance purposes;

(8) A description of other general provisions such as the term of use, insurance requirements, design limitations, safety mandates, accessibility, and maintenance as outlined further in this section; and

(9) An adequately detailed three-dimensional presentation of the space to be used and the facility to be constructed if required by FHWA or the grantor. Maps and plans may not be required if the available real property interest is to be used for leisure activities (such as walking or biking), beautification, parking of motor vehicles, public mass transit facilities, and similar uses. In such cases, an acceptable metes and bounds description of the surface area, and appropriate plans or cross sections clearly defining the vertical use limits, may be furnished in lieu of a three-dimensional description, at the grantee's discretion.

**§ 710.407 [Reserved]**

**§ 710.409 Disposal of excess real property.**

(a) Excess real property outside or within the approved right-of-way limits or other project limits may be sold or conveyed to a public entity or to a private party in accordance with § 710.403(a), (c), (d), (e), (f) and this section. Approval by FHWA is required for disposal of excess real property unless otherwise provided in this section or in the FHWA–SDOT Stewardship/ Oversight Agreement.

(b) Federal, State, and local agencies shall be afforded the opportunity to acquire excess real property considered for disposal when such real property interests have potential use for parks, conservation, recreation, or related purposes, and when such a transfer is allowed by State law. When this potential exists, the grantee shall notify the appropriate agencies of its intentions

to dispose of the real property interests determined to be excess.

(c) The grantee may decide to retain excess real property to restore, preserve, or improve the scenic beauty and environmental quality adjacent to the transportation facility.

(d) Where the transfer of excess real property to other agencies at less than fair market value for continued public use is clearly justified as in the public interest and approved by FHWA under § 710.403(e), the deed shall provide for reversion of the property for failure to continue public ownership and use. Where property is sold at fair market value, no reversion clause is required.

(e) No FHWA approval is required for disposal of excess real property located outside of the approved ROW limits or other project limits if Federal funds did not participate in the acquisition cost of the real property.

(f) Highway facilities in which Federal funds participated in either the ROW or construction may be relinquished to another governmental agency for continued highway use under the provisions of 23 CFR part 620, subpart B.

(g) A request for approval of a disposal must demonstrate compliance with the requirements of § 710.403(a), (c), (d), (e), (f) and this section. An individual, company, organization, or public agency requesting a grantee to approve of a disposal of excess real property within the approved ROW limits or other project limits, or to approve of a disposal of excess real property outside the ROW limits that was acquired with title 23 of the United States Code funding, shall submit a written request to the grantee, together with an application supporting the proposal. If the FHWA is the approving authority, the grantee shall forward the request, the SDOT recommendation if the proposal affects a Federal-aid highway, the application, and proposed terms and conditions, together with its recommendation and any necessary supplemental information, to FHWA. The submission shall affirmatively provide for adherence to requirements contained in this section and must include the information specified in § 710.405(e)(1) through (9).

## Subpart E—Property Acquisition Alternatives

SOURCE: 81 FR 57729, Aug. 23, 2016, unless otherwise noted.

### § 710.501 Early acquisition.

(a) *General.* A State agency may initiate acquisition of real property interests for a proposed transportation project at any time it has the legal authority to do so. The State agency may undertake Early Acquisition Projects before the completion of the environmental review process for the proposed transportation project for corridor preservation, access management, or other purposes. Subject to the requirements in this section, State agencies may fund Early Acquisition Project costs entirely with State funds with no title 23 participation; use State funds initially but seek title 23 credit or reimbursement when the acquired property is incorporated into a transportation project eligible for Federal surface transportation program funds; or use the normal Federal-aid project agreement and reimbursement process to fund an Early Acquisition Project pursuant to paragraph (e) of this section. The early acquisition of a real property interest under this section shall be carried out in compliance with all requirements applicable to the acquisition of real property interests for federally assisted transportation projects.

(b) *State-funded early acquisition without Federal credit or reimbursement.* A State agency may carry out early acquisition entirely at its expense and later incorporate the acquired real property into a transportation project or program for which the State agency receives Federal financial assistance or other Federal approval under title 23 for other transportation project activities. In order to maintain eligibility for future Federal assistance on the project, early acquisition activities funded entirely without Federal participation must comply with the requirements of § 710.501(c)(1) through (5).

(c) *State-funded early acquisition eligible for future credit.* Subject to § 710.203(b) (direct eligible costs), § 710.505(b), and § 710.507 (State and local contributions), Early Acquisition

## § 710.501

## 23 CFR Ch. I (4–1–23 Edition)

Project costs incurred by a State agency at its own expense prior to completion of the environmental review process for a proposed transportation project are eligible for use as a credit toward the non-Federal share of the total project costs if the project receives surface transportation program funds, and if the following conditions are met:

(1) The property was lawfully obtained by the State agency;

(2) The property was not land described in 23 U.S.C. 138;

(3) The property was acquired, and any relocations were carried out, in accordance with the provisions of the Uniform Act and regulations in 49 CFR part 24;

(4) The State agency complied with the requirements of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–4);

(5) The State agency determined, and FHWA concurred, the early acquisition did not influence the environmental review process for the proposed transportation project, including:

(i) The decision on need to construct the proposed transportation project;

(ii) The consideration of any alternatives for the proposed transportation project required by applicable law; and

(iii) The selection of the design or location for the proposed transportation project; and

(6) The property will be incorporated into the project for which surface transportation program funds are received and to which the credit will be applied.

(d) *State-funded early acquisition eligible for future reimbursement.* Early Acquisition Project costs incurred by a State agency prior to completion of the environmental review process for the transportation project are eligible for reimbursement from title 23 funds apportioned to the State once the real property interests are incorporated into a project eligible for surface transportation program funds if the State agency demonstrates, and FHWA concurs, that the terms and conditions specified in the requirements of § 710.501(c)(1) through (5), and the requirements of § 710.203(b) (direct eligible costs) have been met. The State agency must demonstrate that it has

met the following requirements, as set forth in 23 U.S.C. 108(c)(3):

(1) Any land acquired, and relocation assistance provided, complied with the Uniform Act;

(2) The requirements of title VI of the Civil Rights Act of 1964 have been complied with;

(3) The State has a mandatory comprehensive and coordinated land use, environment, and transportation planning process under State law and the acquisition is certified by the Governor as consistent with the State plans before the acquisition;

(4) The acquisition is determined in advance by the Governor to be consistent with the State transportation planning process pursuant to 23 U.S.C. 135;

(5) The alternative for which the real property interest is acquired is selected by the State pursuant to regulations issued by the Secretary which provide for the consideration of the environmental impacts of various alternatives;

(6) Before the time that the cost incurred by a State is approved for Federal participation, environmental compliance pursuant to the National Environmental Policy Act has been completed for the project for which the real property interest was acquired by the State, and the acquisition has been approved by the Secretary under this Act, and in compliance with section 303 of title 49, section 7 of the Endangered Species Act, and all other applicable environmental laws that shall be identified by the Secretary in regulations; and

(7) Before the time that the cost incurred by a State is approved for Federal participation, the Secretary has determined that the property acquired in advance of Federal approval or authorization did not influence the environmental assessment of the project, the decision relative to the need to construct the project, or the selection of the project design or location.

(e) *Federally funded early acquisition.* The FHWA may authorize the use of funds apportioned to a State under title 23 for an Early Acquisition Project if the State agency certifies, and FHWA concurs, that all of the following conditions have been met:

(1) The State has authority to acquire the real property interest under State law; and

(2) The acquisition of the real property interest—

(i) Is for a transportation project or program eligible for funding under title 23 that will not require FHWA approval under 23 CFR 774.3;

(ii) Will not cause any significant adverse environmental impacts either as a result of the Early Acquisition Project or from cumulative effects of multiple Early Acquisition Projects carried out under this section in connection with a proposed transportation project;

(iii) Will not limit the choice of reasonable alternatives for a proposed transportation project or otherwise influence the decision of FHWA on any approval required for a proposed transportation project;

(iv) Will not prevent the lead agency from making an impartial decision as to whether to accept an alternative that is being considered in the environmental review process for a proposed transportation project;

(v) Is consistent with the State transportation planning process under 23 U.S.C. 135;

(vi) Complies with other applicable Federal laws (including regulations);

(vii) Will be acquired through negotiation, without the threat of, or use of, condemnation; and

(viii) Will not result in a reduction or elimination of benefits or assistance to a displaced person required by the Uniform Act and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*).

(3) The Early Acquisition Project is included as a project in an applicable transportation improvement program under 23 U.S.C. 134 and 135 and 49 U.S.C. 5303 and 5304.

(4) The environmental review process for the Early Acquisition Project is complete and FHWA has approved the Early Acquisition Project. Pursuant to 23 U.S.C. 108(d)(4)(B), the Early Acquisition Project is deemed to have independent utility for purposes of the environmental review process under NEPA. When the Early Acquisition Project may result in a change to the use or character of the real property

interest prior to the completion of the environmental review process for the proposed transportation project, the NEPA evaluation for the Early Acquisition Project must consider whether the change has the potential to cause a significant environmental impact as defined in 40 CFR 1508.27, including a significant adverse impact within the meaning of paragraph (e)(2)(ii) of this section. The Early Acquisition Project must comply with all applicable environmental laws.

(f) *Prohibited activities.* Except as provided in this paragraph, real property interests acquired under paragraph (e) of this section and pursuant to 23 U.S.C. 108(d) cannot be developed in anticipation of a transportation project until all required environmental reviews for the transportation project have been completed. For the purpose of this paragraph, “development in anticipation of a transportation project” means any activity related to demolition, site preparation, or construction that is not necessary to protect public health or safety. With prior FHWA approval, a State agency may carry out limited activities necessary for securing real property interests acquired as part of an Early Acquisition Project, such as limited clearing and demolition activity, if the activities are necessary to protect the public health or safety and are considered during the environmental review of the Early Acquisition Project.

(g) *Reimbursement.* If Federal-aid reimbursement is made for real property interests acquired early under this section and the real property interests are not subsequently incorporated into a project eligible for surface transportation funds within the time allowed by 23 U.S.C. 108 (a)(2), FHWA must offset the amount reimbursed against funds apportioned to the State.

(h) *Relocation assistance eligibility.* In the case of an Early Acquisition Project, a person is considered to be displaced when required to move from the real property as a direct result of a binding written agreement for the purchase of the real property interest(s) between the acquiring agency and the property owner. Options to purchase and similar agreements used for Early

## § 710.503

Acquisition Projects that give the acquiring agency a right to prevent new development or to decide in the future whether to acquire the real property interest(s), but do not create an immediate commitment by the acquiring agency to acquire and do not require an owner or tenant to relocate, do not create relocation eligibility until the acquiring agency legally commits itself to acquiring the real property interest(s).

### § 710.503 Protective buying and hardship acquisition.

(a) *General conditions.* Prior to final environmental approval of a transportation project, the grantee may request FHWA agreement to provide reimbursement for advance acquisition of a particular parcel or a limited number of parcels, to prevent imminent development and increased costs on the preferred location (Protective Buying), or to alleviate hardship to a property owner or owners on the preferred location (Hardship Acquisition), provided the following conditions are met:

(1) The transportation project is included in the currently approved STIP;

(2) The grantee has complied with applicable public involvement requirements in 23 CFR parts 450 and 771;

(3) A determination has been completed for any property interest subject to the provisions of 23 U.S.C. 138; and

(4) Procedures of the Advisory Council on Historic Preservation are completed for properties subject to (54 U.S.C. 306108), (historic properties).

(b) *Protective buying.* The grantee must clearly demonstrate that development of the property is imminent and such development would limit future transportation choices. A significant increase in cost may be considered as an element justifying a protective purchase.

(c) *Hardship acquisitions.* The grantee must accept and concur in an owner's request for a hardship acquisition based on a property owner's written submission that—

(1) Supports the hardship acquisition by providing justification, on the basis of health, safety or financial reasons, that remaining in the property poses an undue hardship compared to other property owners; and

## 23 CFR Ch. I (4–1–23 Edition)

(2) Documents an inability to sell the property because of the impending project, at fair market value, within a time period that is typical for properties not impacted by the impending project.

(d) *Environmental decisions.* Acquisition of property under this section is subject to environmental review under part 771 of this chapter. Acquisitions under this section shall not influence the environmental review of a transportation project which would use the property, including decisions about the need to construct the transportation project or the selection of an alternative.

### § 710.505 Real property donations.

(a) *Donations of property being acquired.* A non-governmental owner whose real property is required for a title 23 project may donate the property. Donations may be made at any time during the development of a project subject to applicable State laws. Prior to accepting the property, the owner must be informed in writing by the acquiring agency of his/her right to receive just compensation for the property, the right to an appraisal or waiver valuation of the real property, and of all other applicable financial and non-financial assistance provided under 49 CFR part 24 and applicable State law. All donations of property received prior to the approval of the NEPA document for the project must meet the requirements specified in 23 U.S.C. 323(d).

(b) *Credit for donations.* Donations of real property may be credited to the State's matching share of the project in accordance with 23 U.S.C. 323. As required by 23 U.S.C. 323(b)(2), credit to the State's matching share for donated property shall be based on fair market value established on the earlier of the following: Either the date on which the donation becomes effective, or the date on which equitable title to the property vests in the State. The fair market value shall not include increases or decreases in value caused by the project. The grantee shall ensure sufficient documentation is developed to indicate compliance with paragraph (a) of this section and with the provisions of 23 U.S.C. 323, and to support the



amount of credit applied. The total credit cannot exceed the State's pro-rata share under the project agreement to which it is applied.

(c) *Donations and conveyances in exchange for construction features or services.* A property owner may donate property in exchange for construction features or services. The value of the donation is limited to the fair market value of property donated less the cost of the construction features or services. If the value of the donated property exceeds the cost of the construction features or services, the difference may be eligible for a credit to the State's share of project costs.

#### § 710.507 State and local contributions.

(a) *Credit for State and local government contributions.* If the requirements of 23 U.S.C. 323 are met, real property owned by State and local governments that is incorporated within a project receiving financial assistance from the Highway Trust Fund can be used as a credit toward the grantee or subgrantee's matching share of total project cost. A credit cannot exceed the grantee or subgrantee's matching share required by the project agreement. The grantee must ensure there is documentation supporting all credits, including the following:

(1) A certification that the State or local government acquisition satisfied the conditions in 23 CFR 710.501(c)(1) through (6); and

(2) Justification of the value of credit applied. Acquisition costs incurred by the State or local government to acquire title can be used as justification for the value of the real property.

(b) *Exemptions.* Credits are not available for real property acquired with any form of Federal financial assistance except as provided in 23 U.S.C. 120(j), or for real property already incorporated into existing ROW and used for transportation purposes.

(c) *Contributions without credit.* Property may be presented for project use with the understanding that no credit for its use is sought. In such case, the grantee shall assure that the acquisition satisfied the conditions in 23 CFR 710.501(c)(1) through (6).

#### § 710.509 Functional replacement of real property in public ownership.

(a) *General.* When publicly owned real property, including land and/or facilities, is to be acquired for a project receiving grant funds under title 23, in lieu of paying the fair market value for the real property, the acquiring agency may provide compensation by functionally replacing the publicly owned real property with another facility that will provide equivalent utility.

(b) *Federal participation.* Federal-aid funds may participate in functional replacement costs only if the following conditions are met:

(1) Functional replacement is permitted under State law and the acquiring agency elects to provide it;

(2) The property in question is in public ownership and use;

(3) The replacement facility will be in public ownership and will continue the public use function of the acquired facility;

(4) The acquiring agency has informed, in writing, the public entity owning the property of its right to an estimate of just compensation based on an appraisal of fair market value and of the option to choose either just compensation or functional replacement;

(5) The FHWA concurs in the acquiring agency determination that functional replacement is in the public interest; and

(6) The real property is not owned by a utility or railroad.

(c) *Federal land transfers.* Use of this section for functional replacement of real property in Federal ownership shall be in accordance with Federal land transfer provisions in subpart F of this part.

(d) *Limits upon participation.* Federal-aid participation in the costs of functional replacement is limited to costs that are actually incurred in the replacement of the acquired land and/or facility and are—

(1) Costs for facilities that do not represent increases in capacity or betterments, except for those necessary to replace utilities, to meet legal, regulatory, or similar requirements, or to meet reasonable prevailing standards; and

(2) Costs for land to provide a site for the replacement facility.

## § 710.511

(e) *Procedures.* When a grantee determines that payments providing for functional replacement of public facilities are allowable under State law, the grantee will incorporate within its approved ROW manual, or approved RAMP, full procedures covering review and oversight that will be applied to such cases.

### § 710.511 Transportation Alternatives.

(a) *General.* 23 U.S.C. 133(h) sets aside an amount from each State's Surface Transportation Block Grant apportionment for Transportation Alternatives (TA). The TA projects that involve the acquisition, management, and disposition of real property, and the relocation of families, individuals, and businesses, are governed by the general requirements of the Federal-aid program found in titles 23 and 49 of the CFR, except as specified in paragraph (b)(2) of this section.

(b) *Requirements.* (1) Acquisition and relocation activities for TA projects are subject to the Uniform Act.

(2) When a person or agency acquires real property for a project receiving title 23 grant funds on behalf of an acquiring agency with eminent domain authority, the requirements of the Uniform Act apply as if the acquiring agency had acquired the property itself.

(3) When, subsequent to Federal approval of property acquisition, a person or agency acquires real property for a project receiving title 23 grant funds, and there will be no use or recourse to the power of eminent domain, the limited requirements of 49 CFR 24.101(b)(2) apply.

(c) *Property management and disposal of property acquired for TA projects.* Subpart D of this part applies to the management and disposal of real property interests acquired with TA funds, including alternate uses authorized under ROW use agreements. A TA project involving acquisition of any real property interest must have a real property agreement between FHWA and the grantee that identifies the expected useful life of the TA project and establishes a pro rata formula for repayment of TAP funding by the grantee if—

## 23 CFR Ch. I (4–1–23 Edition)

(1) The acquired real property interest is used in whole or in part for purposes other than the TA project purposes for which it was acquired; or

(2) The actual TA project life is less than the expected useful life specified in the real property agreement.

### Subpart F—Federal Assistance Programs

SOURCE: 81 FR 57729, Aug. 23, 2016, unless otherwise noted.

### § 710.601 Federal land transfers.

(a) The provisions of this subpart apply to any project constructed on a Federal-aid highway or under Chapter 2 of title 23, of the United States Code. When the FHWA determines that a strong Federal transportation interest exists, these provisions may also be applied to highway projects that are eligible for Federal funding under Chapters 1 and 2 of title 23, of the United States Code, and to highway-related transfers that are requested by a State in conjunction with a military base closure under the Defense Base Closure and Realignment Act of 1990 (Pub. L. 101–510, 104 Stat. 1808, as amended).

(b) Under certain conditions, real property interests owned by the United States may be transferred to a non-Federal owner for use for highway purposes. Sections 107(d) and 317 of title 23, United States Code, establish the circumstances under which such transfers may occur, and the parties eligible to receive such transfers (SDOTs and their nominees).

(c) An eligible party may file an application with FHWA, or can make application directly to the Federal land management agency if the Federal land management agency has its own authority for granting interests in land.

(d) Applications under this section shall include the following information:

(1) The purpose for which the lands are to be used;

(2) The estate or interest in the land required for the project;

(3) The Federal project number or other appropriate references;

(4) The name of the Federal agency exercising jurisdiction over the land

and identity of the installation or activity in possession of the land;

(5) A map showing the survey of the lands to be acquired;

(6) A legal description of the lands desired; and

(7) A statement of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321, *et seq.*) and any other applicable Federal environmental laws, including the National Historic Preservation Act (54 U.S.C. 306108), and 23 U.S.C. 138.

(e) If the FHWA concurs in the need for the transfer, the Federal land management agency will be notified and a right-of-entry requested. For projects not on the Interstate System, the Federal land management agency shall have a period of 4 months in which to designate conditions necessary for the adequate protection and utilization of the reserve or to certify that the proposed appropriation is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved. The FHWA may extend the reply period at the timely request of the Federal land management agency for good cause.

(f) The FHWA may participate in the payment of fair market value or the functional replacement of impacted facilities under 710.509 and the reimbursement of the ordinary and reasonable direct costs of the Federal land management agency for the transfer when reimbursement is required by the Federal land management agency's governing laws as a condition of the transfer.

(g) Deeds for conveyance of real property interests owned by the United States shall be prepared by the eligible party and must be certified as being legally sufficient by an attorney licensed within the State where the real property is located. Such deeds shall contain the clauses required by FHWA and 49 CFR 21.7(a)(2). After the eligible party prepares the deed, it will submit the proposed deed with the certification to FHWA for review and execution.

(h) Following execution by FHWA, the eligible party shall record the deed in the appropriate land record office and so advise FHWA and the affected Federal land management agency.

(i) When the need for the interest acquired under this subpart no longer exists, the party that received the real property must restore the land to the condition which existed prior to the transfer, or to a condition that is acceptable to the Federal land management agency to which such property would revert, and must give notice to FHWA and to the affected Federal land management agency that such interest will immediately revert to the control of the Federal land management agency from which it was appropriated or to its assigns. Where authorized by Federal law, the Federal land management agency and such party may enter into a separate agreement to release the reversion clause and make alternative arrangements for the sale, restoration, or other disposition of the lands no longer needed.

#### § 710.603 Direct Federal acquisition.

(a) The provisions of this paragraph may be applied to any real property that is not owned by the United States and is needed in connection with a project for the construction, reconstruction, or improvement of any section of the Interstate System or for a Defense Access Road project under 23 U.S.C. 210, if the SDOT is unable to acquire the required ROW or is unable to obtain possession with sufficient promptness. If the landowner tenders a right-of-entry or other right of possession document required by State law any time before FHWA makes a determination that the SDOT is unable to acquire the ROW with sufficient promptness, the SDOT is legally obligated to accept such tender and FHWA may not proceed with Federal acquisition. To enable FHWA to make the necessary findings and to proceed with the acquisition of the ROW, the SDOT's written application for Federal acquisition must include the following:

(1) Justification for the Federal acquisition of the lands or interests in lands;

(2) The date FHWA authorized the SDOT to commence ROW acquisition, the date of the project agreement, and a statement that the agreement contains the provisions required by 23 U.S.C. 111;

(3) The necessity for acquisition of the particular lands under request;

(4) A statement of the specific interests in lands to be acquired, including the proposed treatment of control of access;

(5) The SDOT's intentions with respect to the acquisition, subordination, or exclusion of outstanding interests, such as minerals and utility easements, in connection with the proposed acquisition;

(6) A statement on compliance with the provisions of parts 771 and 774 of this chapter, as applicable;

(7) Adequate legal descriptions, plats, appraisals, and title data;

(8) An outline of the negotiations that have been conducted with landowners;

(9) An agreement that the SDOT will pay its pro rata share of costs incurred in the acquisition of, or the attempt to acquire, ROW; and

(10) A statement that assures compliance with the applicable provisions of the Uniform Act.

(b) Except as provided in paragraph (a) of this section, direct Federal acquisitions from non-Federal owners for projects administered by the FHWA Office of Federal Lands Highway may be carried out in accordance with applicable Federal condemnation laws. The FHWA will proceed with such a direct Federal acquisition only when the public agency responsible for the road is unable to obtain the ROW necessary for the project. The public agency must make a written request to FHWA for the acquisition and, if the public agency is a Federal agency, the request shall include a commitment that any real property obtained will be under that agency's sole jurisdiction and control and FHWA will have no jurisdiction or control over the real property as a result of the acquisition. The FHWA may require the applicant to provide any information FHWA needs to make the required determinations or to carry out the acquisition.

(c) If the applicant for direct Federal acquisition obtains title to a parcel prior to the filing of the Declaration of Taking, it shall notify FHWA and immediately furnish the appropriate U.S. Attorney with a disclaimer together with a request that the action against

the landowner be dismissed (ex parte) from the proceeding and the estimated just compensation deposited into the registry of the court for the affected parcel be withdrawn after the appropriate motions are approved by the court.

(d) When the United States obtains a court order granting possession of the real property, FHWA shall authorize the applicant for direct Federal acquisition to immediately take over supervision of the property. The authorization shall include, but need not be limited to, the following:

(1) The right to take possession of unoccupied properties;

(2) The right to give 90 days notice to owners to vacate occupied properties and the right to take possession of such properties when vacated;

(3) The right to permit continued occupancy of a property until it is required for construction and, in those instances where such occupancy is to be for a substantial period of time, the right to enter into rental agreements, as appropriate, to protect the public interest;

(4) The right to request assistance from the U.S. Attorney in obtaining physical possession where an owner declines to comply with the court order of possession;

(5) The right to clear improvements and other obstructions;

(6) Instructions that the U.S. Attorney be notified prior to actual clearing, so as to afford him an opportunity to view the lands and improvements, to obtain appropriate photographs, and to secure appraisals in connection with the preparation of the case for trial;

(7) The requirement for appropriate credits to the United States for any net salvage or net rentals obtained by the applicant for direct Federal acquisition, as in the case of ROW acquired by an SDOT for Federal-aid projects; and

(8) Instructions that the authority granted to the applicant for direct Federal acquisition is not intended to preclude the U.S. Attorney from taking action, before the applicant has made arrangements for removal, to reach a settlement with the former owner which would include provision for removal.

## Federal Highway Administration, DOT

## § 710.703

(e) If the Federal Government initiates condemnation proceedings against the owner of real property in a Federal court and the final judgment is that FHWA cannot acquire the real property by condemnation, or the proceeding is abandoned, the court is required by law to award such a sum to the owner of the real property that in the opinion of the court provides reimbursement for the owner's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings.

(f) As soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of the compensation in a Federal condemnation, FHWA shall reimburse the owner to the extent deemed fair and reasonable, the following costs:

(1) Recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States;

(2) Penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such real property; and

(3) The pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States or the effective date of possession, whichever is the earlier.

(g) The lands or interests in lands, acquired under this section, will be conveyed to the State or the appropriate political subdivision thereof, upon agreement by the SDOT, or said subdivision to:

(1) Maintain control of access where applicable;

(2) Accept title thereto;

(3) Maintain the project constructed thereon;

(4) Abide by any conditions which may set forth in the deed; and

(5) Notify the FHWA at the appropriate time that all the conditions have been performed.

(h) The deed from the United States to the State, or to the appropriate political subdivision thereof, or in the case of a Federal applicant for a direct Federal acquisition any document des-

ignating jurisdiction, shall include the conditions required by 49 CFR part 21 and shall not include any grant of jurisdiction to FHWA. The deed shall be recorded by the grantee in the appropriate land record office, and the FHWA shall be advised of the recording date.

[81 FR 57729, Aug. 23, 2016, as amended at 83 FR 21710, May 10, 2018]

### Subpart G—Concession Agreements

AUTHORITY: 23 U.S.C. 156 and 315; 23 CFR 1.32; 49 CFR 1.48.

SOURCE: 73 FR 77503, Dec. 19, 2008, unless otherwise noted.

#### § 710.701 Purpose.

The purpose of this subpart is to prescribe the standards that ensure fair market value is received by a highway agency under concession agreements involving federally funded highways.

#### § 710.703 Definitions.

As used in this subpart:

(a) *Best value* means the proposal offering the most overall public benefits as determined through an evaluation of the amount of the concession payment and other appropriate considerations. Such other appropriate considerations may include, but are not limited to, qualifications and experience of the concessionaire, expected quality of services to be provided, the history or track record of the concessionaire in providing the services, timelines for the delivery of services, performance standards, complexity of the services to be rendered, and revenue sharing. Such appropriate considerations may also include, but are not limited to, policy considerations that are important, but not quantifiable, such as retaining the ability to amend the concession agreement if conditions change, having a desired level of oversight over the facility, ensuring a certain level of maintenance and operations for the facility, considerations relative to the structure and amount of the toll rates, economic development impacts and considerations, or social and environmental benefits and impacts.

## § 710.705

(b) *Concession agreement* means an agreement between a highway agency and a concessionaire under which the concessionaire is given the right to operate and collect revenues or fees for the use of a federally funded highway in return for compensation to be paid to the highway agency. A concession agreement may include, but not be limited to, obligations concerning the development, design, construction, maintenance, operation, level of service, and/or capital improvements to a facility over the term of the agreement. Concession agreement shall not include agreements between government entities, even when compensation is paid, where the primary purpose of the transaction is not commercial in nature but for the purpose of determining governmental ownership, control, jurisdiction, or responsibilities with respect to the operation of a federally funded highway. The highway agency's determination as to whether an agreement between government entities constitutes a concession agreement shall be controlling.

(c) *Concessionaire* means any private or public entity that enters into a concession agreement with a highway agency.

(d) *Fair market value* means the price at which a highway agency and concessionaire are ready and willing to enter into a concession agreement for a federally funded highway on, or as if in, the open market for a reasonable period of time and in an arm's length transaction to any willing, knowledgeable, and able buyer. For purposes of this subpart, a concession agreement based on best value shall be deemed fair market value.

(e) *Federally funded highway* means any highway (including highways, bridges, and tunnels) acquired with Federal assistance made available from the Highway Trust Fund (other than the Mass Transit Account). A highway shall be deemed to be acquired with Federal assistance if Federal assistance participated in either the purchase of any real property, or in any capital expenditures in any fixtures located on real property, within the right-of-way, including the highway and any structures located upon the property.

## 23 CFR Ch. I (4–1–23 Edition)

(f) *Highway agency* in this subpart means any SDOT or other public authority with jurisdiction over a federally funded highway.

[73 FR 77503, Dec. 19, 2008, as amended at 81 FR 57741, Aug. 23, 2016]

### § 710.705 Applicability.

This subpart applies to all concession agreements involving federally funded highways that are executed after January 18, 2009.

### § 710.707 Fair market value.

A highway agency shall receive fair market value for any concession agreement involving a federally funded highway.

### § 710.709 Determination of fair market value.

(a) Fair market value may be determined either on a best value basis, highest net present value of the payments to be received over the life of the agreement, or highest bid received, as may be specified by the highway agency in the request for proposals or other relevant solicitation. If best value is used, the highway agency should identify, in the relevant solicitation, the criteria to be used as well as the weight afforded to the criteria.

(b) In order to be considered fair market value, the terms of the concession agreement must be both legally binding and enforceable.

(c) Any concession agreement awarded pursuant to a competitive process with more than one bidder shall be deemed to be fair market value. Any concession agreement awarded pursuant to a competitive process with only one bidder shall be presumed to be fair market value. Such presumption may be overcome only if the highway agency determines the proposal to not be fair market value based on the highway agency's estimates. Nothing in this subpart shall be construed to require a highway agency to accept any proposal, even if the proposal is deemed fair market value. For purposes of this subsection, a competitive process shall afford all interested proposers an equal opportunity to submit a proposal for the concession agreement and shall comply with applicable State and local law.

## Federal Highway Administration, DOT

## § 750.101

(d) If a concession agreement is not awarded pursuant to a competitive process, the highway agency must receive fair market value, as determined by the highway agency in accordance with State law, so long as an independent third party assessment is conducted and made publicly available.

(e) Nothing in this subpart is intended to waive the requirements of part 172, part 635, and part 636 whenever any Federal-aid (including TIFIA assistance) is to be used for a project under the concession agreement.

### PART 750—HIGHWAY BEAUTIFICATION

#### Subpart A—National Standards for Regulation by States of Outdoor Advertising Adjacent to the Interstate System Under the 1958 Bonus Program

Sec.

- 750.101 Purpose.
- 750.102 Definitions.
- 750.103 Measurements of distance.
- 750.104 Signs that may not be permitted in protected areas.
- 750.105 Signs that may be permitted in protected areas.
- 750.106 Class 3 and 4 signs within informational sites.
- 750.107 Class 3 and 4 signs outside informational sites.
- 750.108 General provisions.
- 750.109 Exclusions.
- 750.110 State regulations.

#### Subpart B—National Standards for Directional and Official Signs

- 750.151 Purpose.
- 750.152 Application.
- 750.153 Definitions.
- 750.154 Standards for directional signs.
- 750.155 State standards.

#### Subpart C [Reserved]

#### Subpart D—Outdoor Advertising (Acquisition of Rights of Sign and Sign Site Owners)

- 750.301 Purpose.
- 750.302 Policy.
- 750.303 Definitions.
- 750.304 State policies and procedures.
- 750.305 Federal participation.
- 750.306 Documentation for Federal participation.
- 750.307 FHWA project approval.
- 750.308 Reports.

#### Subpart E—Signs Exempt From Removal in Defined Areas

- 750.501 Purpose.
- 750.502 Applicability.
- 750.503 Exemptions.

#### Subpart F [Reserved]

#### Subpart G—Outdoor Advertising Control

- 750.701 Purpose.
- 750.702 Applicability.
- 750.703 Definitions.
- 750.704 Statutory requirements.
- 750.705 Effective control.
- 750.706 Sign control in zoned and unzoned commercial and industrial areas.
- 750.707 Nonconforming signs.
- 750.708 Acceptance of state zoning.
- 750.709 On-property or on-premise advertising.
- 750.710 Landmark signs.
- 750.711 Structures which have never displayed advertising material.
- 750.712 Reclassification of signs.
- 750.713 Bonus provisions.

SOURCE: 38 FR 16044, June 20, 1973, unless otherwise noted.

#### Subpart A—National Standards for Regulation by States of Outdoor Advertising Adjacent to the Interstate System Under the 1958 Bonus Program

AUTHORITY: Sec. 12, Pub. L. 85-381, 72 Stat. 95, as amended; 23 U.S.C. 131; delegation of authority in 49 CFR 1.48(b).

#### § 750.101 Purpose.

(a) In section 12 of the Federal-Aid Highway Act of 1958, Pub. L. 85-381, 72 Stat. 95, hereinafter called the *act*, the Congress declared that:

(1) To promote the safety, convenience, and enjoyment of public travel and the free flow of interstate commerce and to protect the public investment in the National System of Interstate and Defense Highways, hereinafter called the *Interstate System*, it is in the public interest to encourage and assist the States to control the use of and to improve areas adjacent to such system by controlling the erection and maintenance of outdoor advertising signs, displays, and devices adjacent to that system.

(2) It is a national policy that the erection and maintenance of outdoor advertising signs, displays, or devices