

DEAR 952.204-73 and obtain a foreign ownership, control and influence determination and facility clearance prior to award of a subcontract. Information to be provided by a Subcontractor pursuant to this clause may be submitted directly to the Contracting Officer. For purposes of this clause, Subcontractor means any Subcontractor at any tier and the term "Contracting Officer" means the DOE Contracting Officer. When this clause is included in a subcontract, the term "Contractor" shall mean Subcontractor and the term "contract" shall mean subcontract. (End of Clause)

#### **PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS**

5. The authority citation for Part 970 continues to read as follows:

**Authority:** 42 U.S.C. 2201, 2282a, 2282b, 2282c; 42 U.S.C. 7101 et seq.; 41 U.S.C. 418b; 50 U.S.C. 2401 et seq.

##### **970.0470-1 [Amended]**

6. Section 970.0470-1(b) is amended by revising both mentions of "Directives System" to read "Directives Program."

##### **970.2201-1-1 [Amended]**

7. Section 970.2201-1-1 is amended by removing the term "guidance" and adding in its place "requirements."

8. Section 970.2201-1-2, paragraphs (a)(1)(i) and (ii) are revised to read as follows:

##### **970.2201-1-2 Policies.**

(a)(1) \* \* \*

(i) Management and operating contractors are expected to bring experienced, proven personnel from their private operations to staff key positions on the contract and to recruit other well-qualified personnel as needed. Such personnel should be employed and treated during employment without discrimination by reason of race, color, religion, sex, age, disability, or national origin. Contractors shall be required to take affirmative action to achieve these objectives.

(ii) The job qualifications and suitability of prospective employees should be established by the contractor prior to employment by careful background checks. Such background checks should include, as appropriate: a credit check; verification of high school diploma received within the last five years or degree/diploma granted by an institution of higher learning; contacts with listed personal references; contacts with listed employers for the last five years (excluding employment of less than 60 days' duration, part-time employments, and craft/union employments); and local law enforcement checks when such checks

are not prohibited by state or local law or regulation, and when the individual resides in the jurisdiction where the contractor is located. When a DOE access authorization will be required, the aforementioned background checks must be conducted and the uncleared employment applicant's or uncleared employee's job qualifications and suitability must be established before a request is made to the DOE to process the individual for an access authorization. In addition, each candidate for a DOE access authorization must be tested for the absence of any illegal drug as defined in 10 CFR part 707.4. Evidence must be furnished to DOE with the uncleared employment applicant's or uncleared employee's security forms that specify: the results of the test for the absence of any illegal drug, as defined in 10 CFR 707.4, and, for the background checks, the date each background check was conducted, the identity of the contact who provided the information, a synopsis of the information provided by each contact, and a statement that all relevant information available has been reviewed and favorably adjudicated in accordance with the contractor's personnel policies. When an uncleared applicant is hired specifically for a position which requires a DOE access authorization, the uncleared employee shall not be placed in that position prior to the access authorization being granted by DOE, unless approved by the head of the cognizant local security office. If an uncleared employee is placed in that position prior to access authorization being granted by the DOE, the uncleared employee may not be afforded access to classified information or matter, or to special nuclear materials (in categories requiring an access authorization) until DOE notifies the employer that an access authorization has been granted. Management and operating contractors and other contractors operating DOE facilities shall include the requirements set forth in this subsection in subcontracts (appropriately modified to identify the parties) wherein subcontract employees will be required to hold DOE access authorizations in order to perform on-site duties, such as protective force operations.

\* \* \* \* \*

[FR Doc. E8-3012 Filed 2-15-08; 8:45 am]

**BILLING CODE 6450-01-P**

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Transit Administration**

#### **49 CFR Part 612**

[Docket FTA-2008-0005]

RIN 2132-AA96

#### **Contractor Performance Incentives for the Capital Investment Program**

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM); request for comments.

**SUMMARY:** This notice of proposed rulemaking provides interested parties with the opportunity to comment on the Federal Transit Administration's (FTA) proposal to establish a new part 612 of Title 49 of the Code of Federal Regulations to establish procedures for 49 U.S.C. 5309 capital investment (New Starts) project sponsors to apply for incentive awards if their projects meet eligibility criteria for both cost and ridership estimates. This proposed rule would carry out certain provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, August 10, 2005). Interested parties are invited to send comments on all facets of this proposal.

**DATES:** Comments must be submitted by April 21, 2008. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** You may submit comments identified by the docket number [FTA-2008-0005] by any of the following methods:

*Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

*Mail:* U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Ave SE., Washington, DC 20590.

*Hand Delivery:* The West Building of the U.S. Department of Transportation, 1200 New Jersey Ave SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Fax:* 202-493-2251.

*Instructions:* You must include the agency name (Federal Transit Administration) and Docket number (FTA-2008-0005) or the Regulatory Identification Number (RIN) for this rulemaking at the beginning of your comments. You should submit two copies of your comments if you submit them by mail. If you wish to receive confirmation that FTA received your comments, you must include a self-

addressed stamped postcard. Note that all comments received will be posted, without change, to <http://www.regulations.gov> including any personal information provided and will be available to internet users. Please see the Privacy Act section of this document.

*Docket:* For access to the docket to read background documents and comments received, go to <http://www.regulations.gov> at any time or to the U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, 1200 New Jersey Ave SE., Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Sherry Riklin, Deputy Associate Administrator for Planning and Environment, 1200 New Jersey Avenue, SE., East Building, Washington, DC 20590, *phone:* (202) 366-4033, *fax:* (202) 493-2478 or e-mail, [Sherry.Riklin@dot.gov](mailto:Sherry.Riklin@dot.gov). For legal questions, please contact Bonnie L. Graves, Attorney-Advisor, Legislation and Regulations Division, Office of Chief Counsel, Federal Transit Administration, 1200 New Jersey Avenue, SE., East Building, Washington, DC, 20590, *phone:* (202) 366-0944, *fax:* (202) 366-3809, or e-mail, [Bonnie.Graves@dot.gov](mailto:Bonnie.Graves@dot.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On August 10, 2005, President Bush signed the Safe, Accountable, Flexible, and Efficient Transportation Equity Act—A Legacy for Users (SAFETEA—LU). Section 3011 of SAFETEA—LU made a number of changes to 49 U.S.C. 5309 (“Section 5309”), which authorizes the Federal Transit Administration’s (FTA’s) capital investment grant program. SAFETEA—LU emphasized the need to improve the accuracy of the estimates of ridership and costs used to support the selection of a capital investment project (“New Start”) as a locally preferred alternative (LPA) for Section 5309 funds. Section 5309(d)(4)(B)(i) and Section 5309(e)(4)(D) add “the reliability of forecasting methods” as a new evaluation consideration; Section 5309(g)(2)(C) codifies the “before and after” study requirement; and Section 5309(l)(2) requires FTA to produce an annual report on contractor performance in the development of ridership forecasts and cost estimates for New Starts projects.

*Incentive Awards:* Federal transit law supports the use of incentives to encourage the development of more

reliable cost and ridership estimates for New Starts funded under Section 5309. Section 5309(h)(2) authorizes FTA to adjust the final net project cost of a new fixed guideway capital project to include the cost of eligible activities not included in the originally defined project if FTA determines that the originally defined project has been completed at a cost that is significantly below the original estimate. Section 5309(h)(3) accords FTA the discretion to provide a higher percentage of New Starts funding than that requested by the project sponsor as an incentive to producing reliable ridership forecasts and cost estimates.

*Contractor Incentives:* A number of provisions in Section 5309 recognize that contractors to grant recipients play an important role in increasing the reliability of forecasting methods to estimate costs and utilization of New Starts projects. Section 5309(d)(4)(B)(i) requires FTA to consider the reliability of the forecasting methods used to estimate costs and utilization made by the recipient and contractors to the recipient. Section 5309(l)(2) requires FTA to report to Congress annually on the consistency and accuracy of cost and ridership estimates made by each contractor to public transportation agencies developing New Starts projects. Further, Section 5309(l)(3) directs FTA to report to Congress on the suitability of allowing contractors to public transportation agencies that undertake New Starts projects to receive performance incentive awards if a project is completed for less than the original estimated cost. FTA completed this report on November 20, 2006; it is available for review on our web site: <http://www.fta.dot.gov/documents/ContractorPerformanceIncentiveReport102006.pdf>.

This NPRM would further encourage accurate cost and ridership estimates through the award of additional New Starts funds to project sponsors, which they can choose to pass along to their contractors. The NPRM would complement the Contractor Performance Assessment Report (CPAR) referenced in section 5309(l)(2), which publicizes the identities of contractors with proven records of performing accurate cost and ridership estimation.

*Incentive Award Standards:* Consistent with section 5309(h)(3), FTA proposes that a New Starts project sponsor would be eligible for an incentive award if actual opening year ridership is not less than 90 percent of that forecast and actual capital costs, adjusted for inflation, are not more than 110 percent of those estimated, at the time the project entered Preliminary

Engineering (PE). The rulemaking proposes to determine whether to provide the incentive only after the project is complete and operating, when actual costs and ridership can be determined. FTA believes the incentive should only be provided for actual performance, not for projected performance.

FTA proposes that the amount of the performance incentive award be based on the size and complexity of the project, and that the award be as high as an additional five percent of the New Starts funding under the Full Funding Grant Agreement (FFGA) or Project Construction Grant Agreement (PCGA). FTA is particularly interested in public comment on the criteria FTA should use to determine the percentage for the award. For example, are more complicated and larger projects more deserving of a full five percent? Should the size or complexity of a project be the only general considerations? Are certain modes inherently more difficult for purposes of cost or ridership estimation (e.g., heavy rail as compared to light rail)? Should a project alignment with tunnels, bridges, or other special features receive more of an incentive award than a project without those features? Should FTA take the project sponsor’s experience into account? If so, how? What other factors might FTA consider in determining the percentage of a performance incentive award?

*Incentive Award Procedures:*

Consistent with the intent and provisions of Section 5309, FTA proposes to include an incentive clause in the standard terms and conditions of an FFGA and a PCGA that would allow for an amendment to the grant to award additional New Starts funds for any one of three purposes: (1) To increase the Federal funding contribution to a project; (2) to allow for the addition of project scope; or (3) to provide a financial reward to contractors that have performed sufficiently accurate cost and ridership estimates. The change or addition to project scope could include capital items designed to improve passengers’ ridership experience, such as transit enhancements as defined in 49 U.S.C. 5302(a)(15), additional safety or security measures, or new rail rolling stock. Based on the requirements for the “Before and After” Study, FTA proposes that the project sponsor would submit the data collected on the transit system two years after the beginning of revenue operations. The data would include ridership patterns and information on the as-built scope and capital costs of the project.

**Note:** An FFGA is the form of grant award whereby FTA provides \$75 million or more in Federal financial assistance under 49 U.S.C. 5309(d) for construction of a New Starts project. A PCGA is the form of grant award whereby FTA provides less than \$75 million in Federal financial assistance under 49 U.S.C. 5309(e) for construction of a "Small Starts" project. The regulations governing New Starts projects seeking FFGAs are codified at 49 CFR part 611. FTA has not yet promulgated regulations for Small Starts projects, but guidance on the development of Small Starts projects is available through the agency's Web site, <http://www.fta.dot.gov>.

FTA seeks comments on the proposal to provide incentives to New Start project sponsors and their contractors who provide reliable cost and utilization estimates. FTA is particularly interested in comments on how it might implement incentives for contractors to public transportation agencies. Based on comments received on this NPRM, FTA plans to issue a final rule that will establish procedures for project sponsors to apply for incentive awards of Section 5309 New Starts funds if their project meets eligibility criteria for both cost and ridership estimates, and to share those awards with contractors that produce reliable cost and ridership estimates.

We note, moreover, that the award of additional Federal financial assistance for a New Starts or Small Starts project to reward a grantee or its contractors for accurate cost and ridership estimates would be strictly limited to New Starts funds under 49 U.S.C. 5309(d) or 5309(e). Occasionally, New Starts and Small Starts projects are financed with additional sources of Federal assistance, such as Section 5309 Fixed Guideway Modernization and Bus & Bus Facilities funding, Section 5307 Urbanized Area Formula funding, or funding under the Surface Transportation Program and Congestion Mitigation and Air Quality program, but none of these other sources of Federal funding will be available for these incentive awards.

## II. Rulemaking Analysis And Notices

### *Executive Order 12866*

This NPRM is significant for purposes of Executive Order 12866 and the Department of Transportation's Regulatory Policies and Practices. The NPRM proposes to establish procedures for Section 5309 capital investment project sponsors to apply for incentive awards if their project meets eligibility criteria for both cost and ridership estimates and is a Departmental priority. These proposals are not expected to have noteworthy cost impacts on regulated parties. FTA requests

comment on whether this rulemaking may have unintended cost impacts.

### *Federalism Assessment*

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). FTA believes this rule does not impose any requirements that would have substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government.

### *Executive Order 13175*

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this proposed rule does not have tribal implications and does not impose direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

### *Regulatory Flexibility Act and Executive Order 13272*

Section 603 of the Regulatory Flexibility Act (RFA) requires an agency to prepare an initial regulatory flexibility analysis describing impacts on small entities whenever an agency is required by 5 U.S.C. 553 to publish a general notice of proposed rulemaking for any proposed rule. Similarly, section 604 of the RFA requires an agency to prepare a final regulatory flexibility analysis when an agency issues a final rule under 5 U.S.C. 553 after being required to publish a general notice of proposed rulemaking. Because this proposed rulemaking establishes a process by which entities may seek increased funding as an incentive for accurate ridership and cost estimates, FTA does not believe this NPRM will have a significant economic impact on a substantial number of small entities. FTA requests public comment on whether this rulemaking may have unintended impacts on small entities.

### *Unfunded Mandates Reform Act of 1995*

This proposed rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$120.7 million or more, in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector.

### *Paperwork Reduction Act*

There are no new information collection requirements in this NPRM.

### *Regulation Identifier Number (RIN)*

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document may be used to cross-reference this action with the Unified Agenda.

### *Environmental Assessment*

The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321–4347), requires Federal agencies to consider the consequences of major Federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. We find that there are no significant environmental impacts associated with this NPRM, but ask for public comment on this issue.

### *Privacy Act*

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comments (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

### **List of Subjects in 49 CFR Part 612**

Grant Programs—Transportation; Mass Transportation.

For the reasons set forth in the preamble, we propose to amend title 49, chapter VI of the Code of Federal Regulations by adding a new part as follows:

### **PART 612—CONTRACTOR PERFORMANCE INCENTIVES FOR THE CAPITAL INVESTMENT PROGRAM**

- Sec.
- 612.1 Purpose.
  - 612.3 Definitions.
  - 612.5 Eligible candidates.
  - 612.7 Payment mechanism.
  - 612.9 Incentive award standards.
  - 612.11 Incentive amount.
  - 612.13 Funding source.
  - 612.15 Eligible uses of award.

**Authority:** 49 U.S.C. 5309; 49 U.S.C. 5334; 49 CFR 1.51

#### **§ 612.1 Purpose.**

To improve the accuracy of the estimates of ridership and costs used to support the selection of a fixed guideway capital project as a locally preferred alternative (LPA), this rule

establishes procedures for 49 U.S.C. 5309 ("Section 5309") capital investment project sponsors to apply for and receive incentive awards if their project meets eligibility criteria for both cost and ridership estimates.

#### § 612.3 Definitions.

As used in this part, the following definitions apply:

*Before and After Study* refers to the project sponsor's comparison and analysis of planning assumptions, forecast results, and existing transit system characteristics "before" implementation of a New Starts project with the project costs and benefits realized "after" two years of revenue service.

*Contractor Performance Assessment Report* refers to an annual report to Congress, in which FTA reports the accuracy of contractor projections for cost and ridership from entry into Preliminary Engineering (PE) through two years after the system is open for service.

*Full Funding Grant Agreement (FFGA)* refers to an instrument that defines the scope of a project, the Federal financial contribution, and other terms and conditions for funding New Starts projects as required by 49 U.S.C. 5309(d)(1) and (g)(2).

*Project Construction Grant Agreement (PCGA)* refers to an instrument that defines the scope of a project, the Federal financial contribution, and other terms and conditions for funding Small Starts projects as required by 49 U.S.C. 5309(e)(7).

*Section 5309 capital investment project* refers to a new fixed guideway system or an extension to an existing fixed guideway system, but does not include rail modernization or non-corridor bus capital projects funded under 49 U.S.C. 5309.

#### § 612.5 Eligible candidates.

All Section 5309 capital investment project sponsors who will or have received a Full Funding Grant Agreement (FFGA) or a Project Construction Grant Agreement (PCGA) after August 10, 2005, are eligible to receive incentive awards.

#### § 612.7 Payment mechanism.

(a) Full Funding Grant Agreements (FFGA) and Project Construction Grant Agreements (PCGA) for Section 5309 capital investment projects will include an incentive clause that will allow for an amendment to either increase the Federal funding contribution, allow for the addition of scope, or provide a financial award, when the criteria of § 612.9 have been met.

(b) Upon submission of its "before and after" data documenting that the project meets the cost and ridership criteria, the project sponsor may request that FTA award the project sponsor a performance incentive.

#### § 612.9 Incentive award standards.

(a) For a project sponsor to be eligible to receive a performance incentive award, the project must meet criteria for both cost and ridership estimates.

(1) Actual opening year ridership shall be not less than 90 percent of that forecast; and

(2) Actual capital costs, adjusted for inflation, shall be not more than 110 percent of those estimated; at the time the project entered Preliminary Engineering (PE).

(b) FTA will base its incentive award eligibility determination on the cost and ridership information provided by the project sponsor to FTA for the purposes of the "Before and After Study" and the "Contractor Performance Assessment Report."

#### § 612.11 Incentive amount.

FTA will determine the amount of the performance incentive award based on the size and complexity of the project and may award up to an additional five percent of the federal grant amount identified in the FFGA or PCGA.

#### § 612.13 Funding source.

Incentive funds will be available from New Starts funds available under 49 U.S.C. 5309(d) or 5309(e).

#### § 612.15 Eligible uses of award.

The performance incentive award may be:

(a) used to fund any item eligible under 49 U.S.C. 5309(b)(1) or (b)(4); or

(b) shared with contractors that prepared reliable cost and ridership estimates for the project.

Issued in Washington, DC, this 12th day of February 2008.

**James S. Simpson,**

*Administrator.*

[FR Doc. E8-3025 Filed 2-15-08; 8:45 am]

**BILLING CODE 4910-57-P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[FWS-R1-ES-2008-0016; 1111 FY07 MO-B2]

RIN 1018-AV00

#### Endangered and Threatened Wildlife and Plants; Listing *Phyllostegia hispida* (No Common Name) as Endangered Throughout Its Range

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; request for public comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to list *Phyllostegia hispida* (no common name), a plant species from the island of Molokai in the Hawaiian Islands, as endangered under the Endangered Species Act of 1973, as amended (Act). If we finalize this rule as proposed, it would extend the Act's protections to this species. We have determined that critical habitat for *Phyllostegia hispida* is prudent but not determinable at this time.

**DATES:** We will accept comments received or postmarked on or before April 21, 2008. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by April 4, 2008.

**ADDRESSES:** You may submit comments by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018-AV00; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments Solicited section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Patrick Leonard, Field Supervisor, U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office, 300 Ala Moana Boulevard, Box 50088, Honolulu, HI 96850; telephone 808-792-9400; facsimile 808-792-9581. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**