



U.S. DEPARTMENT OF
TRANSPORTATION

**Federal Highway
Administration**

Order

Subject

FHWA Policy on Agency Force Account Use

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1. **What is the purpose of this directive?** This directive clarifies the Federal Highway Administration (FHWA) policy for the approval of the use of agency force account procedures on Federal-aid projects. This directive clarifies when agency force account is permitted under law and regulation. The directive addresses the use of agency force account procedures which include the direct performance of work by any direct recipient (typically the State department of transportation (DOT)) or subrecipient of Federal-aid funding under Title 23 of the Code of Federal Regulations (CFR). It does not address the use of contract force account procedures for work performed by construction contractors as referenced in 23 CFR 635.120(d).
2. **Is this a new directive?** Yes. This is a new directive. Division Administrators are to refer to this directive for all future requests to use agency force account.
3. **What authorities govern this directive?** The FHWA's statutes for Federal-aid construction projects require Federal-aid highway projects to be performed by contracts awarded by competitive bidding. Agency force account can be used only when a State DOT demonstrates to the satisfaction of the Secretary of Transportation that it is more cost effective than competitive bidding or an emergency exists. The following authorities govern this directive:
 - a. Section 112 (a) of Title 23, United States Code (U.S.C.), states that "In all cases where the construction is to be performed by the State transportation department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition."
 - b. 23 U.S.C. 112(b) states ". . . construction of each project . . . shall be performed by contract awarded by competitive bidding, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility."
 - c. 23 CFR 635.204(a) states that competitive bidding must be used unless ". . . the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists."
 - d. 23 CFR 635.204(c) of states "Except as provided in paragraph (b) of this section, when a State transportation department desires that

highway construction work financed with the aid of Federal funds, other than the kinds of work designated under 635.205(b), be undertaken by force account, it shall submit a request to the Division Administrator identifying and describing the project and the kind of work to be performed, the estimated costs, the estimated Federal funds to be provided, and the reason or reasons that force account for such project is considered cost effective.”

- e. 23 CFR 635.205(a) states “It may be found cost effective for a State transportation department or county to undertake a federally financed highway construction project by force account when a situation exists in which the rights or responsibilities of the community at large are so affected as to require some special course of action, including situations where there is a lack of bids or the bids received are unreasonable.”
- f. 23 CFR 635.203 defines the terms “some other method, force account, county, cost effective and emergency” as follows:
 - (1) “Except as provided for as emergency repair work in 668.105(i) and in §635.204(b), the term *some other method* of construction as used in 23 U.S.C. 112(b) shall mean the *force account* method of construction as defined herein. In the unlikely event that circumstances are considered to justify a negotiated contract or another unusual method of construction, the policies and procedures prescribed herein for force account work will apply.”
 - (2) “The term force account shall mean the direct performance of highway construction work by a State transportation department, a county, a railroad, or a public utility company by use of labor, equipment, materials, and supplies furnished by them and used under their direct control.”
 - (3) “The term county shall mean any county, township, municipality or other political subdivision that may be empowered to cooperate with the State transportation department in highway matters.”
 - (4) “The term cost effective shall mean the efficient use of labor, equipment, materials and supplies to assure the lowest overall cost.”
 - (5) “For the purpose of this part, an emergency shall be deemed to exist when emergency repair work as provided for in §668.105(i) is necessary or when a major element or segment

of the highway system has failed and the situation is such that competitive bidding is not possible or is impractical because immediate action is necessary to:

- (a) Minimize the extent of the damage,
- (b) Protect remaining facilities, or
- (c) Restore essential travel.”

4. What is the scope of this directive?

- a. This directive applies to all Federal-aid highway construction projects (projects meeting the definition of “construction” in 23 U.S.C. 101 and physically located within the right-of-way of a public highway) that are proposed to be undertaken by the agency force account method of construction.
- b. This directive does not apply to the contract force account method of construction. Also, this directive does not apply to Federal-aid construction projects that are not located within a public highway right-of-way or projects that, by definition, are not considered to be highway construction projects. A State DOT may use State-approved procurement procedures, or a local public agency (LPA) may use State-approved local procurement procedures for these types of projects (see [Procurement of Federal-aid Construction Projects memorandum](#), issued June 26, 2008). Some examples of projects that are not considered to be highway construction are as follows:
 - (1) Transportation Enhancement projects that are physically located outside the right-of-way of a public highway (restoration of historic railroad stations, shared use paths, recreational trails, landscaping and scenic beautification, railroad mainline improvements, rail yard improvements, etc.).
 - (2) Operational improvements or service-related projects that take place within the right-of-way of a public highway, but the scope of the contract does not meet the definition of “construction” in 23 U.S.C. 101 (e.g., operational improvement projects such as service patrols, route diversion and evacuation routing, 911/511 telephone systems, computer-aided dispatch systems, highway advisory or other radio systems for communicating with vehicles, etc.).

5. What definitions are used in this directive?

- a. **Force Account.** For purposes of this directive, the term “force account” shall have the same meaning as defined in 23 CFR 635.203(c). For clarity, the term “agency force account” refers to the direct performance of work by any direct recipient (typically the State DOT) or subrecipient of Federal-aid highway funding. The term “contract force account” refers to the method of paying a contractor based on the cost of labor, equipment, and materials furnished, with consideration for overhead and profit.
 - b. **Some Other Method.** For purposes of this directive, the term “some other method” shall have the same meaning as defined in 23 CFR 635.203(b).
 - c. **Cost Effective.** For purposes of this directive, the term “cost effective” shall have the same meaning as defined in 23 CFR 635.203(e) and clarified in this directive.
 - d. **Emergency.** For the purpose of this part, the term “emergency” shall have the same meaning as defined in 23 CFR 635.203(f).
6. **What information must FHWA Division Administrators ensure they have from the agency to prove that force account is more cost effective than contracting by competitive bidding?** As defined in 23 CFR 635.203(e), the term cost effective means “ . . . the efficient use of labor, equipment, materials and supplies to assure the lowest overall cost.” Under 23 CFR 635.204(c), States must submit a request to the Division Administrator identifying and describing the project and the kind of work to be performed, the estimated costs, the estimated Federal funds to be provided, and the reasons that force account is more cost effective than competitive bidding. In evaluating the project description, the kind of work to be performed, estimated costs, and reasons agency force account is more cost effective, Division Administrators must ensure that they have the following information from the agency:
- a. **Demonstrated ability of the agency to perform the work.**
Division Administrators must be able to determine that the agency has the experience, resources, and demonstrated ability to complete the work with the same level of quality as that expected on a competitively let construction contract.
- (1) **Availability of equipment.**
- (a) The agency must own (or currently lease) most of the equipment that is needed to perform the work. If the agency must acquire or lease substantially more

equipment than required for its normal operation, it would be difficult to justify an affirmative finding of cost-effectiveness. While no contractor, subcontractor or agency owns all of the equipment that it may need, the costs associated with leasing equipment on a force account project should be a relatively minor portion of the overall cost. The FHWA Division Office and the State may elect to limit the percentage of equipment leasing costs for differing types of work.

- (b) In agency force account work, the rates on publicly owned equipment eligible for Federal participation may be the agreed unit price or actual cost. For agreed unit prices, the equipment need not be itemized on the estimate. If the project is to be performed on the basis of actual cost, the estimate should include a schedule of rates, exclusive of profit, to be charged for the use of publicly owned equipment.
 - (2) **Use of minor agreements.** It is anticipated that the agency will perform all work with its own forces. However, in some instances, it may be appropriate for the agency to enter into agreements for specific minor services associated with the scope of work (e.g., guardrail installation). Such instances should be documented and pre-approved. Any work done by contract forces would be subject to prevailing wage rate requirements as appropriate.
 - (3) **Ability to comply with design, construction and material, quality standards.** The agency must have the ability to comply with the appropriate design, construction, and material quality standards.
 - (4) **Ability to document compliance with quality assurance requirements.** The agency must be able to obtain and document the same level of quality that is required for competitively let contracts under 23 CFR 637.
 - (5) **Schedule.** The project/contract completion time is to be equal for both agency and contract work estimates in order to provide a fair comparison of prices.
- b. **Cost comparison.** Division Administrators must obtain sufficient cost information so that a cost-effectiveness determination can be made by comparing the total cost for the agency to perform the work

versus the total cost using competitively bid prices. See the Appendix for a sample cost-effectiveness submittal.

- (1) The agency's cost estimate should be prepared on a force account basis including estimated quantities and prices for material, labor, and equipment. The estimate should be based on one of two methods:
 - (a) Actual cost. Payment will be based on the actual cost of labor, materials, and equipment rates. Estimated hours and rates should be included and final reimbursement will be based on an audit of actual costs.
 - (b) Unit prices. Payment will be based on agreed unit prices and the actual number of units constructed. Agreed unit prices must be developed using quantities, man-hours, pay rates, material costs, and equipment rental rates.
- (2) When an agency proposes to use previously purchased and stockpiled material, the value of the material should be the same as the price listed on the agency's cost inventory. All material must comply with FHWA's general material requirements in 23 CFR Subpart D.
- (3) The agency should include all work items in the agency cost estimate (regardless of Federal participation) so that a fair comparison can be made with the estimate of contract work.
- (4) The agency's total cost estimate should include an adjustment for the agency's overhead or indirect cost rates for labor, equipment, and materials. The agency's overhead or indirect costs rates must be developed in compliance with the Cost Principles for State, Local, and Indian Tribal Governments (2 CFR Part 225). More information about application of these cost principles within the Federal-aid Highway Program may be found in the [Clarification of Policy on Indirect Costs of State and Local Governments](#) memorandum issued May 5, 2004.
- (5) The total agency cost estimate should not be reduced by:
 - (a) Potential savings resulting from use of less than complete plans,

- (b) Potential savings from reduced quality assurance during construction, and
 - (c) Anticipated savings from reduced construction management and documentation.
 - c. **Assurances that the project will comply with all Federal-aid requirements.** The agency must assure that it will comply with all applicable Title 23 requirements during construction such as the applicable sections of Form FHWA-1273 (Required Contract Provisions for Federal-aid Construction Projects), job site poster requirements, environmental commitments, etc.
 - d. **Assurances that the performance of the project by force account will not hinder the State's attainment of its approved Disadvantaged Business Enterprise (DBE) goal.** Whenever an agency performs work by force account, contracting opportunities are not available. Thus, the agency must assure that the performance of the project by force account will not negatively affect the ability of the State to achieve its approved DBE goal.
7. **At what point does an agency's price become more cost effective in comparison with competitive prices?** There is no specific percentage or margin that defines a cost effective determination. However, when comparing the estimate of the agency's prices with competitive prices, it is reasonable to expect that the agency's prices would produce a savings considering the normal price fluctuations in a competitive market.
 8. **Do the General Material Requirements of 23 CFR 635, Subpart D, apply to force account work?** Yes. Materials used to complete the work must meet the requirements in 23 CFR 635, Subpart D.
 9. **Do the Quality Assurance Procedures for Construction provisions of 23 CFR 637, Subpart B, apply to force account work?** The provisions of Part 637 apply to all projects on the National Highway System (NHS). Non-NHS Federal-aid projects may use the quality assurance procedures of the contracting agency as allowed by the FHWA Division Office and State DOT Stewardship and Oversight Agreement.
 10. **Do the prevailing wage rate requirements of 23 CFR 635.117(f) apply to force account projects?**
 - a. Davis-Bacon prevailing wage rate requirements apply to mechanics and laborers employed by contractors and subcontractors on the site of the work. Davis-Bacon prevailing requirements apply to Federal-

aid projects located within the right-of-way of a Federal-aid highway pursuant to 23 U.S.C. 113.

- b. As it relates to agency force account work:
 - (1) Prevailing wage rate requirements do not apply to State, local, or municipal government employees of the owner-agency. Public agencies are not considered "contractors" or "subcontractors" within the meaning of the Davis-Bacon Act. (See the [U.S. Department of Labor's Field Operations Handbook, Section FOH 15b06\(a\)](#).) Any work that is "subcontracted" to private firms, is subject to the application of prevailing wage requirements.
 - (2) The [U.S. Department of Labor's May 29, 2009, letter to the U.S. Department of the Interior](#) provides an advisory opinion that Federal prevailing wage rate requirements do not apply to Federal youth programs where a Federal statute establishes specific compensation to be given participants. On the other hand, State and local youth conservation corps employees and employees of other private organizations (non-profits) are subject to prevailing wage rate requirements.

11. **Is an agency allowed to perform a portion of a Federal-aid project on a force account basis and let a competitive contract for the remainder of the project?** Yes, however, the same principles apply to force account approvals when the agency is performing a portion of the project – there must be a finding of cost-effectiveness for that portion of the project. The FHWA must have the following assurances from the agency:

- a. The agency's work must be shown to be more cost effective than competitive bidding, and
- b. There must be some assurance that the agency's work will be an integral part of a functional project when completed. For example, a proposal for a State DOT to perform the final pavement markings on a roadway rehabilitation project would, by the nature of the pavement marking work, logically provide this assurance. On the other hand, a proposal for a LPA to perform utility adjustments on a roadway reconstruction project, by itself, does not provide an assurance that the force account work will result in a functional project.

12. **Is a cost-effectiveness finding necessary for a railroad or utility to perform minor adjustments on its own facility?** No. 23 CFR 635.205(b) states that it is cost effective to allow utilities and railroads to

perform minor work on their own systems due to the inherent nature of the operations.

13. **Is there a limitation for an agency to request programmatic force account approval?** Yes. The approval should be limited to a specific time period, not to exceed 2 years. Consideration should be given to specific caps for projects or programs (e.g., capping the total annual value of specific preventive maintenance activities).
14. **What are the requirements for the approval of agency force account projects assumed by the State DOT?**
 - a. The Stewardship and Oversight Agreement between the FHWA Division Office and the State DOT must address the assumption of this approval. Per 23 U.S.C. 106(c), the State DOTs shall assume this responsibility for all non-NHS projects and may, if appropriate, assume this responsibility for projects that are on the NHS but are not located on the Interstate System.
 - b. Agency force account approval authority shall not be further assumed by subrecipients, such as local public agencies. The State DOT is responsible for the review of cost-effectiveness of all LPA requests.
 - c. In all situations where this approval is assumed, the State DOT will be responsible for reviewing cost effectiveness determinations in accordance with the above procedures and ensuring that the project records adequately address any emergency or finding of cost-effectiveness.
15. **Are FHWA Division Office and the State DOT allowed to include additional review and approval procedures for agency force account cost-effectiveness determinations?** Yes. The Division Office and the State DOT may include additional review and approval procedures for cost-effectiveness determinations as long as these procedures do not conflict with this directive.
16. **Where can I obtain additional guidance?** For additional guidance, contact the FHWA's Office of Infrastructure [Contract Administration Group Leader](#) or the Office of Chief Counsel [Senior Attorney Advisor](#) on preconstruction approval procedures.

Victor M. Mendez
Administrator

Appendix – Sample Cost-Effectiveness Determination

Description of Work:

Smith County proposes to install pavement markings as the final work item for the overlay of 0.9 miles of Smithfield Road. Contract forces will provide for the milling and resurfacing of the project by milling and providing a 2 inch overlay throughout the project limits.

Supporting Information:

- Smith County has the necessary experience and ability to perform the work. The County has been installing pavement markings on its roadway system for the past 10 years.
- The County will use its own equipment and does not need to rent equipment.
- The County will provide 100 percent of the labor and equipment for this work.
- The material will come from existing County stockpiles and supplies at a price currently listed in the County's inventory.
- All work will comply with MUTCD, 23 CFR 637 and State DOT requirements.
- Oversight, inspection and materials acceptance will follow State LPA standards.
- The use of Smith County forces will result in an estimated savings of approximately \$2,700 when considering all contract and agency costs.

Cost-Effectiveness Analysis

Estimate of Contract Prices	
Mobilization	\$ 1,000.00
Pavement Markings (11,000 lf @ \$0.50/lf)	\$ 5,500.00
Traffic Control Supervisor	\$ 1,000.00
Contract Total	\$ 7,500.00
Smith County Construction Engineering and Inspection at 10 percent	\$ 750.00
Total Project Estimate by Contract Forces	\$ 8,250.00
Estimate of Smith County Prices	
Labor	\$ 675.00

Equipment	\$ 573.50
Material	\$ 2,125.30
Subtotal (labor, materials, equipment)	\$ 3,373.80
Construction Engineering and Inspection at 10percent	\$ 337.38
Subtotal Smith County (labor, materials, equipment, CEI)	\$ 3,711.18
Indirect Costs (Overhead at 50percent)	\$ 1,855.59
Smith County total estimated cost	\$ 5,566.77
Difference in estimated costs	\$ 1,933.23
Percentage difference	26 percent