

## **Federal-Aid Highway Funding of Ferry Boats and Ferry Terminal Facilities**

The Federal Highway Administration (FHWA) oversees the Federal-aid highway program. Under this program, Federal-aid highway funds are available, through the State transportation agencies, for designing and constructing ferry boats and for designing, acquiring right-of-way, and constructing ferry terminal facilities. Ferry boats and terminal facilities that serve vehicular travel as links on public highways (other than Interstate highways), as well as ferry boats and terminals only serving passengers as a fixed route transit facility, may be eligible for certain types of Federal-aid highway funding.

The following discussion covers:

- The basic eligibility criteria that must be satisfied if Federal-aid highway funding is to be used for improvements to ferry boats and ferry terminal facilities.
- The various types of Federal-aid highway funding sources available for improvements to ferry boats and ferry terminal facilities.
- The general procedures that are followed to advance ferry improvement projects funded under the Federal-aid highway program.

## Eligibility

The basic criteria that must be satisfied for a ferry boat or ferry terminal to be considered eligible for Federal-aid highway funds are established in Federal law and set forth in Section 129 of title 23, United States Code (U.S.C). These eligibility criteria are:

### Location

1. Vehicular ferries must serve a public road, but cannot be on the Interstate System.
2. Passenger only ferries must be a fixed route transit ferry eligible under 49 U.S.C. Chapter 53 that serves as an alternative to an eligible highway route.
3. The ferry facility must not operate in foreign or international waters except for ferry service in Hawaii, Puerto Rico, a U.S. territory, and Alaska and for ferry service between any State and Canada or between Alaska and Washington.
4. It must not be feasible to build a bridge, tunnel or other highway structure in lieu of the ferry.

### Operation and Fares

The operating authority for the ferry must be under the control of the State or another public entity [23 U.S.C. 129(c)(4)]. This requirement applies to the entire ferry route and is not dependent upon where the improvement is to occur, either the terminal or vessel. A route operated by a private entity would have a contract, permit, or other agreement with a public entity which demonstrates that control to provide service on the public route.

The fares charged for passage must also be under the control of the State or another public entity [23 U.S.C. 129(c)(4)]. All revenues derived from the ferry operation must be applied to actual and necessary costs of operation, maintenance and repair, debt service, negotiated management fees, and in the case of a privately operated toll ferry, for a reasonable rate of return. Fares, tolls, or any other fees, if charged, must be reviewed and approved regularly by the public entity.

### Ownership

The ferry boat or ferry terminal to be improved must be [23 U.S.C. 129(c)(3)]:

1. Publicly owned, where the title for the boat or terminal is vested in a Federal, State, county, town or township, Indian tribe, municipal or other government instrumentality, or
2. Publicly operated, where a public entity operates the boat or terminal, either with public employees or by paying others to do so, even though the boat or terminal may be privately owned, or
3. Majority publicly owned, where more than 50 percent of the ownership is vested in a public entity and where substantial public benefits of the ferry operation are documented.

The ownership test is applied to the specific facility being improved. For example, if a ferry system has privately owned and operated boats but the terminal is publicly owned, Federal-aid highway funds could be used for improvements to the ferry terminal but could not be used for improvements to the ferry boats. The operation of the ferry and fares must be under the control of a public entity as previously discussed.

### Allowable Costs

Federal-aid highway funds are available for capital improvements to existing ferry facilities as well as construction of new ferry facilities. Cost-effective preventive maintenance activities that extend the useful life of the ferry facility are also an eligible activity under 23 U.S.C. 116(e). However, operational costs of a ferry, such as costs of ferry service administration, crews, general maintenance and fuel, are not eligible for direct Federal-aid highway funding.

Federal-aid highway funds may only be used for the allocable portion of the facility or vessel receiving funding. In accordance with 2 C.F.R. 225 Appendix A, paragraph C, costs must be reasonable, necessary and allocable to the eligible purpose for which the funds are being used. It is necessary to determine the portion of the project cost that serves the eligible purpose to determine the Federal share of funding. The ineligible portions of the cost of the facility or vessel cannot be considered part of the non-Federal share of the eligible project costs.

For example, if a ferry terminal, including the waiting area, rest rooms, ticketing, docks and parking area, is being constructed as part of a larger marina facility, only the portion of the costs of the facility that is directly attributable to the ferry purpose is eligible for funding. Additionally, if a parking lot is built with 200 spaces including boat trailer parking and only 50 of those spaces are necessary for the ferry, then only those 50 spaces and appropriate access is eligible for Federal participation.

Costs associated with leasing of ferry boats for operation on a public route may be partially eligible for Federal-aid highway funding. First, all of the eligibility criteria noted above would need to be satisfied. If a public entity pays for leasing of a ferry boat, the "ownership" criterion is met as this could be viewed as a publicly operated service. Second, Federal-aid funds will only participate in the portion of the lease cost associated with providing the boat as this is viewed as the "capital" cost. The portion of the lease cost associated with operation of the boat would not be eligible for Federal-aid highway funding.

The term "ferry boat" includes other types of water transportation vessels that meet the location, ownership and operation criteria, including hovercrafts. Boats and facilities constructed for the purpose of dinner cruises, sightseeing, or entertainment excursions, for example, are not eligible for participation.

To be eligible for Federal-aid highway funding, a ferry must be intended to be a long term service. A temporary ferry for a special event or for trial purposes is not eligible. A temporary ferry service could be eligible as part of a traffic control plan if needed during construction of a highway facility, such as a bridge replacement. Such service is not addressed in 23 U.S.C. 129(c) though its principles should be considered. The costs, including operation of the ferry, are

applied as maintenance of traffic cost of the construction project, not as a separate ferry boat project. Temporary services may also occur as part of an emergency relief project.

If Federal-aid highway funds have been used to purchase a new ferry boat or facility or improve an existing one and the grantee or sub-grantee desires to later sell, lease or otherwise dispose of the ferry, this action requires approval from the FHWA. If the service is being ended and the vessels have significant remaining useful life, transfer of the vessels to another federally supported ferry operation may be necessary. The Federal share of any proceeds from this disposition would be credited back to the appropriate Federal-aid highway funding account.

## Funding

Most Federal-aid highway funds are made available to the State transportation agencies, primarily by statutory formula. The State transportation agencies, in cooperation with local officials, select the projects by priority for Federal-aid highway funding. Thus, ferry boat and ferry terminal facility improvement projects will be competing with other highway improvements needed within the State.

Federal-Aid Highway Funding Sources:

### National Highway Performance Program (NHPP) Funds

These are formula Federal-aid highway funds available for improvements to the National Highway System (NHS), a network of the nation's most important highways as defined in 23 U.S.C. 103, including connections to intermodal facilities such as ferry terminals.

NHPP funds can be used for *vehicular* ferry boats and terminals provided:

- The ferry facility provides a link on the designated NHS (other than Interstate). Under Section 118(d) of title 23, U.S.C., Alaska and Puerto Rico have the flexibility to use NHPP funds on roads off the designated NHS.
- It is not feasible to build a bridge or tunnel or other normal highway structure instead of a ferry.
- The criteria listed under "Eligibility" are satisfied.

In the case of an NHS connector route to a vehicular ferry terminal, only the ferry terminal that lies at the end of the connector route is eligible for NHPP funding. The terminal must carry vehicles, but it can also carry passengers. The boats serving this terminal are not eligible for NHPP funding. Vessels are only eligible for NHPP funding when they operate between two points on the NHS.

Transit ferries that relieve congestion on adjacent NHS routes are also eligible when they meet the conditions included in 23 U.S.C. 119(d)(2)(G).

### Surface Transportation Program (STP) Funds

These are formula Federal-aid highway funds available for improvements to Federal-aid highways, a network composed of about one-quarter of the nation's public roads, and for improvements to bridges on any public road.

STP funds can be used for *vehicular* ferry boats and terminal facilities provided:

- The ferry facility provides a link on any public highway route (other than Interstate).
- It is not feasible to build a bridge or tunnel or other normal highway structure instead of a ferry.
- The criteria listed under "Eligibility" are satisfied.

STP funds can also be used for capital improvements to *passenger* ferry boats and terminal facilities provided the ferry facility is an eligible transit project under the Chapter 53 of title 49 U.S.C. In this case the Federal-aid highway funds may be transferred to the FTA for project administration.

### Congestion Mitigation and Air Quality Improvement (CMAQ) Program Funds

These are formula Federal-aid highway funds available for transportation projects and programs to help meet the requirements of the Clean Air Act.

CMAQ funds can be used for transit projects that could include *passenger* ferry boats and terminal facilities. Similar to STP funding of a transit project, CMAQ funds for a transit facility may be transferred to the FTA for project administration.

Improvements to a ferry boat to reduce emissions may also be eligible under the CMAQ program.

Specific eligibility is located at [http://www.fhwa.dot.gov/environment/air\\_quality/cmaq/](http://www.fhwa.dot.gov/environment/air_quality/cmaq/)

### Construction of Ferry Boat and Ferry Terminal Facilities Program (FBP) Funds

These funds are distributed by formula to ferry systems and public entities responsible for developing ferries for the construction of ferry boats and ferry terminal facilities. The funds are distributed by the number of routes miles served by the operation, the number of passengers carried each year, and the number of vehicles carried each year.

The funds are distributed to State DOTs who will work with the ferry systems and public entities responsible for the ferries to develop construction projects for the purpose of the program. The funds can be used for ferries that serve both vehicles and passengers and ferries which just carry passengers. The ferry facility must satisfy the criteria listed under "Eligibility." These funds cannot be used for approach roads to the terminals.

## Ferry Boat Discretionary Funds

Prior to the effective date of MAP-21, funds were made available by the Secretary for improvements to ferry boats and ferry terminal facilities on a discretionary basis. These funds can continue to be used for improvements to both vehicular ferry boats and terminal facilities that serve as links on any public road (other than Interstate) and for passenger ferry boats and terminal facilities. Additionally, the ferry facility must satisfy the criteria listed under "Eligibility." Discretionary funds are not eligible for approach roads to ferry facilities.

## Other Programs

Puerto Rico Highway Program and Territorial Highway Program funds may also be used for eligible ferry boat and ferry terminal facilities. The Federal Transit Administration also has funding available for ferry construction and operations.

## Federal Share:

Federal-aid highway funding sources available for ferry improvements, NHPP, STP, CMAQ, FBP and ferry boat discretionary funds, have a basic Federal share of 80 percent. The non-Federal share must be provided by the State or local entity and may include private contributions. Eligible U.S. territories may use the funding at 100% Federal share. For projects that have multiple purposes, the Federal share is applied only to the portion of the project cost that is determined to be reasonable, necessary and allocable to the eligible ferry purpose. More information on non-Federal matching requirements can be found at:

<http://www.fhwa.dot.gov/legregs/directives/policy/memonfmr20091229.htm>

## Access to Federal Funds:

### Formula Funds

NHPP, STP, and CMAQ funds are only available through State transportation agencies. States, in cooperation with local officials, select the projects that will be federally funded. Project selection is accomplished through a transportation planning process conducted cooperatively by the States, Metropolitan Planning Organizations (MPOs), and transit operators with all governmental levels, public and private organizations, and the general public participating in the planning process. To gain access to formula Federal-aid highway funds, the key contact points are State transportation agencies and the MPO if a proposed project lies within an urbanized area with an MPO.

FBP funds are allocated to the State transportation agencies but are only available to the specified ferry operations based on the formula criteria. The specified ferry operations need to work with the State transportation agencies and local government entities to develop eligible projects.

## Ferry Boat Discretionary Funds

The FHWA solicits candidates from State transportation agencies for Ferry Boat Discretionary funds. Information on this discretionary program including the solicitation process and requirements for applications is available through an FHWA Discretionary Programs website at <http://www.fhwa.dot.gov/discretionary>. Only State transportation agencies (including U.S. territories) may submit candidate projects for discretionary funding, although they can submit applications as provided from other public entities. Thus, to gain access to these funds, the key contact point is the State transportation agency. This program has been terminated but funds for awarded projects remain available.

## Development of a Federal-Aid Highway Funded Ferry Project

Once a ferry boat or ferry terminal facility project is selected to receive Federal-aid highway funding, the project *must* be developed in accordance with Federal requirements and procedures that apply to Federal-aid highway projects. The Federal-aid highway funding is *not* provided as a direct grant to the ferry operator; rather, this funding is administered through the State transportation agency which is responsible for ensuring that Federal and State requirements and procedures are followed.

One important requirement is that *Federal-aid highway funding can only be used to pay for costs incurred after the FHWA has authorized the work to proceed* [23 CFR 1.9(a) and 630.106(b)]. Therefore, for any phase of work on the ferry project where it is intended to be reimbursed with Federal-aid funds, from preliminary engineering through right-of-way acquisition to construction, prior authorization of this work by the FHWA is essential to allow for reimbursement of the Federal share of incurred costs. It should be noted that this includes any costs incurred that are intended to be used for local matching purposes.

As a ferry boat or ferry terminal project is developed, requirements from Federal highway statutes and other Federal laws must be satisfied. Several of the key requirements follow:

Environmental Review - A project must comply with the National Environmental Policy Act. This requires that each project be evaluated to determine its impact on the environment. Some projects involving rehabilitation or safety upgrades may have minor impacts and are considered Categorical Exclusions not requiring preparation of an Environmental Impact Statement (EIS) or an Environmental Assessment (EA). For those projects that are not a Categorical Exclusion, an EA is usually prepared. If the EA reveals that the impacts are not significant, then a "Finding of No Significant Impact" (FONSI) is prepared. However, if there will be significant impacts, a draft EIS is prepared in cooperation with the State transportation agency. A project must also comply with all environmental laws, such as 4(f), the Historic Preservation Act, the Endangered Species Act, Clean Air Act, and Clean Water Act.

Right-of-Way Acquisition - Acquisition of needed right-of-way for a project must comply with the requirements of the Uniform Relocation Acquisition and Real Property Acquisition Policies Act of 1970 (as amended by title VI of the Surface Transportation and Uniform Relocation Assistance Act of 1987). Eligible residents who are displaced because of the project must be

offered a comparable replacement dwelling that is decent, safe, sanitary, and adequate to accommodate the displaced person. Relocation advisory services are furnished and payments are made to cover costs incurred for moving, replacement housing, and certain incidental costs. Businesses, farms, and nonprofit organizations also are reimbursed for moving and related expenses.

Competitive Bidding: The physical construction of a project is to be done by a contract awarded by competitive bidding unless some other method, such as force account, is approved by the FHWA as more cost effective. The State transportation agency assures there is an opportunity for free, open, competitive bidding, including adequate publicity of the advertisement or call for bids. Projects for the construction of ferry boats, dock construction, or ferry terminals must comply with the procurement requirements of 23 CFR Part 635.

Davis-Bacon Wage Rates: The Davis-Bacon Act requires the payment of predetermined minimum wage rates on certain federally funded contracts. It applies to all Federal-aid highway contracts or contracts directly tied to Federal-aid highways exceeding \$2,000.

For ferry boat projects involving the building, alteration, and repair of a ship, the Department of Labor (DOL) position is that inclusion of Davis-Bacon requirements in the contract are only necessary if the location of contract performance is known when bids are solicited. If Davis-Bacon is not included in a ferry boat project, the DOL requires that the contract provisions include:

- a statement clause that explains why the wage rate determinations are not included,
- a reminder that the contractor must pay at the very least the Federal minimum wage rate,
- a reminder that the contractor must submit weekly certified payroll statements, and
- a reminder that the contractor must comply with all other DOL labor standards.

For more information, see <http://www.fhwa.dot.gov/construction/contracts/080625.cfm>.

Buy America: The Buy America provisions require the use of domestic steel and iron in Federal-aid highway construction projects. However, waivers can be granted by the FHWA. In February 1994, the FHWA issued a nationwide waiver of the Buy America requirements for certain steel items used in the construction of ferry boats. The items included in the waiver were marine diesel engines, electrical switchboards and switch gear, electric motors, pumps, ventilation fans, boilers, electrical controls, and electronic equipment. Not included in the waiver were products readily available in the United States, such as steel pipe and tubing, and galvanized steel products. Additionally, items not included in the waiver remain subject to the Buy America requirements, see <http://www.fhwa.dot.gov/construction/cqit/buyam.cfm>.

Disadvantaged Business Enterprise (DBE): The main objective of the DBE program is to ensure that DBE firms have an opportunity to participate in Federal-aid funded contracts. Each State's DBE program and its annual goals are approved by the FHWA. State transportation agencies are required to meet statewide DBE goals as defined in their annual program. The DBE goals and contract special provisions may be inserted on individual projects as necessary to meet the State's annual goal.



Use of Engineering Consultants - Recipients and sub-recipients are permitted to engage the services of consultant engineering firms to the extent necessary or desirable in the delivery of Federal-aid highway program funded projects. The procurement, management, and administration of these engineering and design related services must be conducted in compliance with the provisions of 23 U.S.C. 112 and 23 CFR 172 to be eligible for Federal-aid participation.

In accordance with these statutory and regulatory requirements, engineering and design related services using Federal-aid highway program funding and directly related to an ultimate construction project must be procured using qualifications-based selection procedures, as prescribed in the Brooks Act (40 U.S.C. 11). These procedures require selection of consultants on the basis of demonstrated competence and qualifications for the type of professional services required and subsequent negotiation of a fair and reasonable cost. Price and in-State preferences shall not be used as evaluation criteria in the advertisement or selection phases as these factors do not assess the qualifications of consultants to perform the desired services in a competent and responsible manner.

For engineering and design related services contracts with total costs below the lesser of the Federal simplified acquisition threshold or a small purchase threshold established in State laws, policies, or procedures, contracting agencies are permitted to procure the services in accordance with established State small purchase procedures and State laws and regulations. The contracting agency should take steps to ensure an adequate number of sources are considered and project phases or contract requirements should not be broken down into smaller components merely to permit the use of small purchase procedures.

For more information, please refer to the FHWA Consultant Services Web Site at <http://www.fhwa.dot.gov/programadmin/consultant.cfm>.

Design-Build - The design-build method of contracting is an alternative to the traditional design-bid-build contracting method. With the design-build procurement, the contracting agency identifies the end result parameters and establishes the design criteria. The prospective bidders then develop proposals that optimize their construction abilities. The submitted proposals may be rated by the contracting agency on factors such as design quality, timeliness, management capability, and cost, and these factors may be used to adjust the bids for the purpose of awarding the contract. Federal-aid highway funds may participate in design-build contracts and awarded using competitive bidding procedures.

Maintenance - Federal highway law requires that all federally assisted projects be properly maintained. Maintenance and operation of ferry services is not eligible for Federal-aid funding.

Any project constructed under the provisions of Title 23 U.S.C., Chapter 1, must be maintained until it is not needed as part of the Federal-aid highway. This also applies to a ferry serving as a public road or a transit route. FTA guidance indicates the service life of a passenger vessel is 25 years, 30 years for other types of vessels, and up to 60 years for vessels if refurbished.

“Facilities” have a useful life of 40 years. (See [www.fta.dot.gov/documents/C\\_5010\\_1D\\_Finalpub.pdf](http://www.fta.dot.gov/documents/C_5010_1D_Finalpub.pdf)). The FHWA generally follows this guidance regarding the useful life of ferry vessels and facilities. Any disposals must be

coordinated with the FHWA Office of Program Administration. Disposals include any lease or use for other purposes.

Other laws may also apply to the construction of ferry boats and facilities. For instance, the Jones Act, administered by MARAD, requires that vessels be constructed in the U.S. A waiver process is available for small passenger vessels. In addition to the Jones Act, the Passenger Vessel Services Act prohibits a foreign vessel from transporting passengers between ports of places in the US. Additional information may be found at [http://www.marad.dot.gov/ships\\_shipping\\_landing\\_page/domestic\\_shipping/Domestic\\_Shipping.htm](http://www.marad.dot.gov/ships_shipping_landing_page/domestic_shipping/Domestic_Shipping.htm).

### Additional Information

The FHWA has a division office in each State, typically located in the State's capital. The mailing addresses, phone numbers, and e-mail addresses for the FHWA division offices can be found on FHWA's Home Page website (<http://www.fhwa.dot.gov/keyfield/famc.htm>). Feel free to contact the FHWA division office in your State if you have questions on use of Federal-aid highway funding for ferry boats and terminals facilities.