Use of ARRA Funding for Force Account Work

I. BACKGROUND

Section 1554 of the "American Recovery and Reinvestment Act of 2009" (ARRA or Recovery Act) contains Special Contracting Provisions that are not found in the Code of Federal Regulations (CFR). The CFR (Titles 23 and 49) is the standard used by the Federal Highway Administration (FHWA) for local agency Federal-aid transportation projects. The Special Contracting Provisions found in the "Recovery Act" read as follows:

> ***SECTION 1554. SPECIAL CONTRACTING PROVISIONS.***
> *To the maximum extent possible, contracts funded under this Act shall be awarded as fixed-price contracts through the use of competitive procedures. A summary of any contract awarded with such funds that is not fixed-price and not awarded using competitive procedures shall be posted in a special section of the website established in section 1526.*

Regarding force account work that has been authorized for "Recovery Act" funded local agency projects prior to the issuance of this Office Bulletin, those local agencies will soon be receiving instructions pertaining to that particular force account work.

II. POLICY

The FHWA policy regarding the use of force account by local agencies on "Recovery Act" funded projects is now available as "Question & Answer PO-9" on FHWA's website entitled "Questions & Answers on American Recovery and Reinvestment Act of 2009 (ARRA) Issues Raised by State DOTs." The website is located at:
http://www.fhwa.dot.gov/economicrecovery/qandas.htm#a3

In essence, the policy is:

- FHWA expects that non-competitive procedures (including force account) would be used rarely, if ever. If non-competitive procedures are proposed, the local agency must document answers to the following questions in a two step process:

  (1) Is it possible to procure the project or work using competitive procedures?
  - (a) If the answer is "yes", then competitive procedures shall be used.
  - (b) If the answer is "no", then the local agency must document the reasons as to why the project cannot be procured using competitive procedures and proceed to question (2) below.

  (2) Is it more cost effective to use non-competitive procedures (force account) than competitive procedures in accordance with 23 CFR 635.205?
  - (a) If the answer is "no", then non-competitive procedures (such as force account) shall not be used.

(b) If the answer is "yes", then the local agency shall provide documentation explaining why it is cost effective to use non-competitive procedures (such as force account) including the reasons for not using competitive procedures from (1)(b) above. The documentation shall be provided by the local agency for review by Caltrans and approval by FHWA prior to the local agency requesting authorization of the project.

- The procedures specified in 23 CFR 635 Subpart B (i.e., force account is a more cost effective method) for local agency use of force account are discouraged for "Recovery Act" projects. If used, the cost-effectiveness determination required by 23 CFR 635.205 must provide a well-documented comparison of competitive prices versus all anticipated prices associated with non-competitive costs (i.e. a comparison of all costs including materials costs, equipment costs, labor costs, agency overhead costs, administrative costs, inspection costs, etc.).

- The use of railroad or utility forces (or their designated contractors) are exempt from the two step process as they are deemed to be cost-effective for work on those facilities in accordance with 23 CFR 635.205(b) which is attached. However, section 1554 applies to all "Recovery Act" work, including railroad and utility work. As such, local agencies must still document the reasons for using force account for railroad and utility work and Caltrans must post a summary of the project on its "Recovery Act" website after FHWA approval.

- For all "Recovery Act" projects or work authorized using non-competitive procedures, Caltrans shall post a summary of the project on its "Recovery Act" website. This web posting will then be posted in a special section of the Federal Recovery Accountability and Transparency Board's website whenever established.

- Only after receiving FHWA approval shall Caltrans post the foregoing information on its own "Recovery Act" website and the FHWA Division Office should forward this information to HIPA-30. The information should include the following: project number, location, value of the project, and a synopsis of the rationale for the use of the non-competitive procedures.

III. PROCEDURE

For "Recovery Act" projects, local agencies shall follow the standard Federal-aid procedures in the Local Assistance Procedures Manual (LAPM) or in the Local Assistance Program Guidelines with certain exceptions. These certain exceptions include such areas as the use of non-competitive procedures, including force account, and the associated special reporting requirements. Local agencies that are anticipating the use of non-competitive procedures, including force account, for "Recovery Act" funded projects shall do the following:

- Prior to the local agency requesting authorization for Construction of a "Recovery Act" funded project, the required documentation including a "Public Interest Finding" justifying the non-competitive procedures or force account shall be submitted to the Caltrans District Local Assistance Engineer (DLAE) for review and concurrence. After concurrence by the DLAE, the DLAE will then forward a copy of the required documentation justifying the non-competitive procedures to Caltrans Headquarters

Division of Local Assistance, Project Implementation Office (attention: HQ Area Engineer), for their review and submittal to FHWA for approval.

- Required documentation in most cases will include a completed Public Interest Finding along with the required supporting data including answers to the foregoing two step process, the project number, location, value of the project, and a synopsis of the rationale for the use of non-competitive procedures.

- If FHWA approves the local agency's use of non-competitive procedures, including force account, the local agency will be notified by the DLAE and the local agency can then submit a request for authorization.

- If FHWA denies the local agency's use of non-competitive procedures, including force account, the local agency will be notified by the DLAE and must use competitive procedures for the project.

It is intended that any future "Recovery Act" exceptions or special requirements will be communicated to local agencies by the use of this "Office Bulletin."

IV. APPLICABILITY/IMPACTS

Applicable to all local agency Federal-aid construction projects receiving "Recovery Act" funding. No impacts to the LAPM or the LAPG are anticipated.

Recommended: Eugene R Shy — 8/31/09
Eugene Shy, Committee Chair — Date

Approved: Mohsen Sultan — 8/31/09
Mohsen Sultan, Chief — Date
Office of Policy Development and Quality Assurance

Attachment:

1) DLA-OB 09-06 Attachment 1 – 23 CFR 635.205(b)