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*Making Conservation
A California Way of Life.*

September 2017

To: Federal Grant Subrecipient
RE: Senate Bill 3, incremental increases to the California minimum wage

Dear Subrecipient:

The California Department of Transportation (Caltrans) Division of Rail and Mass Transportation (DRMT) has received a number of inquiries from subrecipient agencies about modifying existing fixed-price third party operating services contracts to increase contract prices due to Senate Bill (SB) 3, Leno. Minimum wage: in-home supportive services: paid sick days.

Approved by Governor Brown on April 4, 2016, SB 3 amended Section 245.5, 246, and 1182.12 of the California Labor Code. SB 3 incrementally increases the State of California's minimum wage beginning January 1, 2017 through the year 2023 to a maximum of \$15.00 per hour. For employers with 26 or more employees the increase took affect on January 1, 2017 raising the minimum wage to \$10.50/hour. The minimum wage increases are delayed for one year for employers with 25 or fewer employees.

Under the Davis-Bacon Act Federal contracting guidance includes wage protection for laborers and mechanics employed on FTA assisted construction, alteration, or repair projects. There are no minimum wage requirements established for service contracts unless (1) an increased or decreased wage determination is issued by the U.S. Department of Labor or (2) an amendment to the Fair Labor Standards Act which affects the Federal minimum wage is enacted after the contract is awarded.

Procurement of third party service contracts supported with FTA grant funds must comply with 2 CFR Part 200.317 through 200.326, Procurement Standards, and FTA Circular 4220.1F, Third Party Contracting Guidance. In instances where subrecipients seek to modify an existing third party contract to allow for an increase in compensation beyond the rates established by the third party contract, the modification must be justified to the standards established by C4220.1F and approved by the DRMT prior to implementation; otherwise, the subrecipient risks being denied FTA reimbursement.

As it relates to existing third party operating services contracts, subrecipients will have the following four options in response to a request for a contract price increase due to SB 3:

1. Option 1: No Change
2. Option 2: Re-solicit then Terminate
3. Option 3: Cost Analysis
4. Option 4: Reallocate Federal Support

Option 1: No Change

A primary purpose of contracting is to establish consistency and minimize risk between the contract parties. Federal procurement guidelines require that third party contracts be awarded from fair and open competition. Once a contract is executed, subrecipients are under no obligation to modify a third party contract due to claims by the contractor that the terms of the agreement are no longer favorable.

Accordingly, if a subrecipient determines that the terms of the third party contract continue to be fair and reasonable, the subrecipient may deny a contractor's request to modify contract terms outside of what is established in the contract.

Option 2: Resolicit then Terminate

There may be instances when a subrecipient determines that the terms of a contract are no longer in the best interest of the transit agency. In these instances, federal contracting provisions allow the subrecipient the option to terminate third party contracts exceeding \$10,000.00. If a subrecipient makes this determination, the current third party contract should be maintained while the new third party contract procurement process is conducted.

Option 3: Cost Analysis

If a subrecipient determines that an existing operating services contract price is no longer fair and reasonable, and that the contractor should be provided a rate increase, the subrecipient must provide factual data to support a rate increase entitlement to the contractor. ***It should be noted that the FTA has advised that higher costs to the contractor to perform the contract does not normally entitle the contractor to a price adjustment.***

At a minimum, the following items must be submitted to the DRMT for approval to justify a third party contract rate increase modification:

- a. Subrecipient memorandum detailing the reasons the current circumstances surrounding the third party contract;
- b. Subrecipient memorandum detailing a fact based determination that the modification is within the scope of the original contract, that the work being performed is consistent with the original award and is not considered a change order, that the subrecipient has not taken actions that has caused the the contractor to incur additional costs, and that the modification would not be considered a "cardinal change;"
- c. Subrecipient conducted cost analysis of the contractor's proposal that includes: labor hours, overhead rates, profit, and other direct costs;
- d. Subrecipient *Negotiation Memorandum* explaining how the contractor's proposal was negotiated in relation to the cost analysis and determined to be fair and reasonable; and

- e. Supporting documentation, ***including price/cost sheets from all proposers of the previous solicitation***, staff reports, and correspondences between the subrecipient and contractor, etc.

Additional price and cost guidance is provided by the FTA Pricing Guide available on the FTA website.

Option 4: Reallocate Federal Support

If a subrecipient determines that none of the options above will meet its needs, the subrecipient may discontinue the use of federal funds used to support the third party contract. This course of action must be formally documented by the subrecipient, and then submitted to and acknowledged by the DRMT federal grant program. Please contact your DRMT Program, Liaison.