



Illinois Department of Transportation

2300 South Dirksen Parkway / Springfield, Illinois / 62764

March 11, 2021

CIRCULAR LETTER 2021-10

AT-RISK PROJECT PRE-AGREEMENT AUTHORITY FOR PRELIMINARY ENGINEERING (SECTION 1440 OF THE FIXING AMERICA'S SURFACE TRANSPORTATION ACT)

COUNTY ENGINEERS / SUPERINTENDENTS OF HIGHWAYS
MUNICIPAL ENGINEERS / DIRECTORS OF PUBLIC WORKS / MAYORS
METROPOLITAN PLANNING ORGANIZATIONS – DIRECTORS
TOWNSHIP HIGHWAY COMMISSIONERS
CONSULTING ENGINEERS

HISTORY & INCEPTION:

In March 2019 the Federal Highway Administration (FHWA) provided a Memorandum entitled "At-Risk Project Pre-Agreement Authority for Preliminary Engineering", which clarifies Section 1440 of the Fixing America's Surface Transportation Act (FAST Act). This Memorandum sought to clarify Section 1440 of the FAST Act authorizing the FHWA to reimburse projects for Preliminary Engineering (PE) costs incurred prior to project authorization, with the firm understanding that the costs for these projects are for eligible activities on eligible projects.

Understanding the importance and opportunity this Memorandum provides, the Illinois Department of Transportation (Department) worked closely and in partnership with the Illinois Division of the FHWA to then craft the attached policy.

PURPOSE & POLICY

With the continued intent and focus to provide updated, consolidated, and more useful means of providing an enhanced streamlined series of policies and procedures within the Bureau of Local Roads & Streets (BLRS), the attached policy was created. The policy summarizes a new optional tool that our Local Public Agency (LPA) partners can employ to commence preliminary work earlier, with prior approval, than the current existing methods when the project is eligible and includes Federally funding.

While this work provides a series of flexibilities and advantages to our LPAs, this policy does require the LPA to assume all risks for the Preliminary Engineering (PE) costs incurred before project authorization, and to later be reimbursed for those PE costs, provided, all federal regulations and polices are followed.

POLICY DETAILS, RISKS & REQUIREMENTS

Section 1440 of the FAST Act (Pub.L.114-94) allows the FHWA to reimburse Federal funding for eligible preliminary engineering costs incurred prior project authorization. In essence this allows the LPA to begin engineering work earlier in the approval process than currently exists.

This Section 1440 Policy will now provide the LPA the option at the initiation of a project to select the Section 1440 procedure, or to follow the traditional process where agreements are approved, and federal authorization is obtained prior to the notice to proceed.

If Section 1440 process is selected, the LPA must declare that it seeks to follow Section 1440, and submit this request to the District Bureau of Local Roads, along with the Statewide Transportation Improvement Plan (STIP) or Transportation Improvement Plan (TIP) number. The LPA shall understand and accept that the LPA assumes all risks for preliminary engineering costs incurred before federal funds are authorized. Importantly, until a project is authorized with the FHWA, there is no guarantee of Federal funding for any work performed prior to federal authorization. However, to minimize this risk the Department, in conjunction with the FHWA, has developed procedures and approval templates (herewith attached with this Circular Letter) to aid the LPA in meeting the requirements of Section 1440. These conditions, restrictions, and procedures are outlined in the attached policy.

The primary risks and conditions in utilizing Section 1440 include but are not limited to the following, and are summarized as follows:

- All Federal laws including the Qualifications Based Selection (QBS) requirements of the Brooks Act (23 CFR 172) and requirements under the umbrella of the National Environmental Policy Act of 1969 (42 U.S.C 4321) shall be adhered to throughout the life of the engineering contract. Failure to do so will nullify federal participation in the preliminary engineering work;
- LPA's will be required to initially pay for preliminary engineering costs until agreements are executed and federal authorization is obtained; and
- Projects will be required to be in the Annual Program and included in the STIP or TIP prior to issuance of the Notice To Proceed (NTP).

EFFECTIVE DATE:

The use and implementation of this policy will be effective on March 15, 2021.

ITEMS ATTACHED WITH THIS CIRCULAR LETTER:

The following key items are attached to this Circular Letter:

- IDOT “Section 1440 Process: At-Risk Project Pre-Agreement for Federally Funded Preliminary Engineering”;
- Section 1440 Approval Template (Appendix A);
- Engineering Agreement Approval Template (Appendix B); and
- Joint Agreement Approval Template (Appendix C)

FREQUENTLY ASKED QUESTIONS:

In order to aid in understanding this new policy and provide helpful insights, a series of Frequently Asked Questions (FAQs) have been included as an attachment to this Circular Letter.

If you have any questions regarding this Circular Letter, please contact Greg Lupton, Local Project Implementation Engineer at (217) 785-1670 or Greg.Lupton@illinois.gov.

Sincerely,



George A. Tapas, P.E., S.E.
Engineer of Local Roads and Streets

Attachments

cc: Arlene K. Kocher, Illinois Division Administrator, FHWA
Michael Smart, Field Engineering Manager, FHWA – Illinois Division
Craig Cassem, Transportation Engineer, FHWA – Illinois Division
Brian Otten, Illinois Association of County Engineers
Brad Cole, Illinois Municipal League
Bryan Smith, Township Officials of Illinois
Donald Goad, Township Highway Commissioners of Illinois



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2300 South Dirksen Parkway / Springfield, Illinois / 62764

Section 1440 Procedure and Policy – FAQs

1. If a project is in the STIP or TIP, and includes Federal Funds as part of its funding equation, does this constitute eligibility to utilize the Section 1440 Procedure?
Response: Projects that have a STIP or TIP number with federal fund participation does not necessarily constitute eligibility of such projects for Federal reimbursement, as all Federal requirements must be followed during the PE phase such as QBS and NEPA to be eligible for reimbursement.

2. If Section 1440 is applied for and accepted by IDOT and the FHWA on an existing project with PE work performed prior to federal authorization, does this procedure replace the “forgiveness” provisions of Section 1.9(b) of Title 23, Chapter 1, Section 1.9(b) of the Code of Federal Regulations?
Response: Yes. Upon enactment, the provisions in Section 1440 established the exclusive method for addressing reimbursement of PE costs incurred prior to project authorization.

3. How far back in time would charges be eligible for reimbursement, if the Section 1440 Procedure is approved?
Response: Projects can only go back to the same date as to when the FAST Act become the regulation, namely October 1, 2015.

4. Who has the decision as to if a Project is submitted for consideration on the Section 1440 Process?
Response: The LPA has sole discretion on either to request Section 1440, or to follow the existing established process.

5. What is the definition of Preliminary Engineering?
Response: Preliminary Engineering that is applicable to engineering work leading to a National Environmental Policy Act (NEPA) decision (Phase I), and completion of the project design (Phase II). These can be separate or combined in contracts for these services.

6. Does the Section 1440 Procedure apply to Right Of Way, Construction, Construction Engineering or Non-Infrastructure work?
Response: These work elements are not eligible for the Section 1440 Procedure.



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Section 1440 Procedure and Policy – FAQs, continued

7. When can a request to use the Section 1440 Procedure be made?

Response: A request to use the Section 1440 Procedure can be made at any time during the PE Phase, including at the completion of the PE phase, provided that all eligibility requirements remain met.

8. Does the Section 1440 Procedure apply for IDOT initiated State jobs, or only for those initiated by LPAs?

Response: Presently only jobs undertaken and initiated by Local Public Agencies will be eligible for the Section 1440 Procedure.

9. How does an LPA go about obtaining a formal request for consideration of the Section 1440 Procedure?

Response: As stated in the attached Section 1440 Procedure, the LPA should decide as early in the process of a project if it desires Section 1440 to be used. If desirable, the LPA should communicate with their respective District Bureau of Local Roads Engineer team, and submit both the STIP/TIP number and a request in writing. In addition, the project must be programmed properly.

10. If during the NEPA process a “No-Build” option is concluded and selected, if approved, would this remain eligible?

Response: Yes, the project would be eligible for reimbursement under this Section 1440 Procedure.

11. What date is used when applying the “10-year PE rule”?

Response: The date of federal authorization of the PE.

 <p>Illinois Department of Transportation</p>	<p>Section 1440 Process At-Risk Project Pre-Agreement for Federally Funded Preliminary Engineering</p>	<p>Bureau of Local Roads & Streets</p>
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1.0 Purpose

- 1.1 This procedure describes the process for Local Public Agencies (LPA) to initiate the flexibilities and advantages provided in the Federal Highway Administration (FHWA) Memorandum entitled “At-Risk Project Pre-Agreement Authority for Preliminary Engineering” dated March 19, 2019, which clarifies Section 1440 of the Fixing America’s Surface Transportation Act (FAST Act).
- 1.2 This procedure permits the LPA to assume all risks for Preliminary Engineering (PE) costs incurred before project authorization, and to later be reimbursed for those PE costs with Federal Funds after project authorization, provided all federal regulations and polices are followed.
- 1.3 This procedure is afforded to the LPA for the purposes of reducing up-front processing time such that engineering work can commence at an earlier date.

2.0 Authorizing Authority

- 2.1 Section 1440 of the Fixing America’s Surface Transportation Act (FAST Act) (Pub. L.114-94).

3.0 Risks and Requirements

- 3.1 All Federal laws including the qualifications-based selection requirements of the Brooks Act (23 CFR 172) and requirements under the umbrella of the National Environmental Policy Act of 1969 (42 U.S.C 4321) shall be adhered to throughout the life of the engineering contract. Failure to do so will nullify federal participation in the preliminary engineering work.
- 3.2 The LPA will be required to initially pay for PE costs with non-federal funds and seek reimbursement after the funding agreement is executed and federal authorization is obtained (see Section 4.3 of this process).
- 3.3 Projects will be required to be in the Annual Program and included in the STIP or TIP prior to issuing the notice to proceed for use of this Section 1440 Process to be valid and to remain eligible for reimbursement
- 3.4 Phase II engineering activities may not commence until Phase I work is complete. In addition, capacity changing projects in Non-Attainment Areas must be conformed prior to commencing of Phase II under this Section 1440 Process.

4.0 Procedure

4.1 Project Planning

- 4.1.1 During the planning phase the LPA will determine if Section 1440 procedures will be employed.
- 4.1.2 Should the LPA determine and prefer to employ this procedure, then the process and procedures described within this “Section 1440 Process” shall be followed
- 4.1.3 Should the LPA select not to employ this procedure; engineering agreement approvals and Federal authorizations will be required as is traditionally executed prior to initiating work per the Bureau of local Roads and Streets Manual (BLRS Manual).
- 4.1.4 The LPA will notify, in writing, the respective District Bureau of Local Roads (BLRS) of the decision to utilize this Section 1440 Process, accompanied with the STIP or TIP number.

4.2 LPA Programming / Project Initiation

- 4.2.1 The LPA shall contact District BLRS to ensure the project is included in the annual element of the local program and included in the TIP or STIP.
- 4.2.2 Once programmed, the BLRS will notify CBLRS of the LPA’s intent to utilize Section 1440 procedures in writing.
- 4.2.3 Based on the BLRS recommendation and verification of programming requirements, the CBLRS will issue a Notice to Proceed letter to the LPA.
- 4.2.4 Upon issuance of the Notice to Proceed by the Department, the LPA shall follow Federal Qualifications Based Selection (QBS) procedures outlined in Chapter 5-5.06(a) of the BLRS Manual for consultant selection (if the LPA chooses to perform engineering with in-house forces, QBS procedures are not required). Once the LPA consultant contract (or LPA in-house engineering agreement) is executed by the LPA, work may commence.
- 4.2.5 The LPA shall send a copy of the executed engineering agreement to District BLRS for review, which will then be forwarded on to CBLRS. The Department will conduct the standard financial review and validate that the QBS attestation statements and qualification requirements were met.
QBS attestation statements and qualification validations shall consist of the submittal of the following information:
 - completed QBS check-sheet;

- copy of the public notice;
- criterion and weighting for evaluation;
- composition of the selection committee;
- listing and rating of the top three firms; and
- selection justification.

If satisfactory the CBLRS will respond with a letter stating the upper limit of reimbursement and review of the QBS requirements.

4.3 Funding

- 4.3.1 The LPA in conjunction with District BLRS shall initiate a draft joint funding agreement and forward to CBLRS for review.
- 4.3.2 Once CBLRS has reviewed and returned comments to District BLRS on the joint funding agreement, the District BLRS may instruct the LPA that they may locally execute the agreement.
- 4.3.3 Once the agreement is locally executed it shall be returned to District BLRS for review, and then forwarded to the CBLRS for Department execution and filing. Accompanying the joint funding agreement, the LPA shall provide a summary of expenditures incurred to date and the date engineering work commenced.
- 4.3.4 The Department will certify in the FHWA FMIS system that all Federal requirements were met prior to the authorization request. The following language shall be included in the FMIS remarks section with appropriate dates and cost information. ***"The State requests authorization for reimbursement of prior incurred preliminary engineering costs in accordance with Section 1440 of the FAST Act. All Federal requirements for such costs were met. The costs were incurred beginning xx/xx/xxxx."***
- 4.3.5 The CBLRS will send out the fully executed joint funding agreement to the District BLRS and the LPA. The transmittal letter will indicate the date of Federal authorization pursuant to Section 1440 requirements and instruct the LPA to submit a reimbursement request.
- 4.3.6 Section 1440 is not applicable for any work completed after Federal authorization of the project.
- 4.3.7 Upon execution of the joint funding agreement the CBLRS will initiate a Contract Obligation Document (COD) with the Illinois Comptroller.

4.4 Reimbursement of PE Costs

- 4.4.1 The LPA shall submit a request for reimbursement to the District BLRS with appropriate backup documentation (see Chapter 5-10 of the BLRS Manual). The District BLRS will create an invoice for submission to the CBLRS.

4.4.2 Upon review and acceptance, the reimbursement request will be processed, and payment will be made to the LPA by the Illinois Comptroller's Office

5.0 Definitions

- 5.1 Engineering Agreement – The contract between the LPA and their engineering consultant to complete preliminary engineering services for a particular project.
- 5.2 Joint Funding Agreement – The legal mechanism between the department and the LPA by which funding is obligated and paid by the department for preliminary engineering work.
- 5.3 Execution – The process of securing all appropriate signatures on the joint funding agreement to allow release of funds for a project.
- 5.4 Contract Obligation Document (COD) – This is the state obligation of funding which allows reimbursement payments from state Road Fund to the LPA.
- 5.5 Federal Authorization – The means by which the department requests an obligation of Federal funding for an individual project.
- 5.6 Reimbursements - Once a reimbursement is made from the Road Fund to an LPA, the department will in turn submit a Federal reimbursement request to the FHWA for reimbursement back into the Road Fund.
- 5.7 Department – The Illinois Department of Transportation
- 5.8 Preliminary Engineering - Defined as the engineering work leading to a National Environmental Policy Act (NEPA) decision (Phase I) and completion of the project design (Phase II). Preliminary Engineering contracts may be structured as a combination of Phase I and Phase II engineering, or work may be segregated into separate contracts for Phase I and Phase II.

6.0 Forms and Records

- 6.1 BLR 05310 – Local Agency Agreement for Federal Participation
- 6.2 BLR 05311 – Local Agency Amendment for Federal Participation

- 6.3 BLR 05530 – Local Public Agency Engineering Services Agreement
- 6.4 BLR 05620 – Invoice
- 6.5 BLR 05621 – Local Public Agency Cost Plus Fixed Fee Invoice
- 6.6 GATA Uniform Intergovernmental Grant Agreement Template

7.0 Attachments

- 7.1 Section 1440 approval template - Appendix A
- 7.2 Engineering agreement approval template – Appendix B
- 7.3 Joint agreement approval template – Appendix C

8.0 References

- 8.1 Bureau of Local Roads and Streets Manual
- 8.2 Section 1440 of the Fixing America’s Surface Transportation Act (FAST Act) (Pub. L.114-94
- 8.3 FHWA Memorandum “At-Risk Project Pre-Agreement Authority for Preliminary Engineering”, dated March 19, 2019
- 8.4 Title 23 Code of Federal Regulations
- 8.5 National Environmental Policy Act 42 U.S. Code § 4321-4347



Illinois Department of Transportation

2300 South Dirksen Parkway / Springfield, Illinois / 62764

[Date]

Ms. Bertha Sample
Village Clerk
Village of Example
Example, Illinois 60000

Subject: Section 1440 Notice to Proceed
Village: Example
Section: 20-12345-00-PV
Project: ABCD(123)
Job: P-90-000-00

Dear Ms. Sample:

Pursuant to Section 1440 of the FAST Act we hereby approve the above stated project to proceed prior to federal authorization and execution of the joint funding agreement. You may proceed with the following stipulations:

Initial Requirements:

- Consultant selection must comply with federal Qualifications-Based Selection (QBS) requirements. See Chapter 5-5.06 of the Bureau of Local Roads and Streets Manual and attached QBS check sheet.
- The engineering agreement shall be submitted to the district office for processing. Verification of proper QBS procedures is required with the submittal and shall include the following documentation:
 - completed QBS check sheet
 - copy of the public notice
 - criterion and weighting for evaluation
 - composition of the selection committee
 - listing and rating of the top three firms
 - selection justification
- All National Environmental Policy Act of 1969 (NEPA) requirements shall be adhered to. Projects shall follow normal BLRS Phase I procedures.
- Phase II engineering activities may not commence until Phase I is complete.
- All design requirements shall follow BLRS policy.
- Failure to comply with Federal requirements will nullify Federal participation in the engineering contract.

Appendix A

Prior to requesting reimbursement:

Joint funding agreements must be executed and Engineering Agreements approved prior to requesting reimbursement.

Backup information required with reimbursement request shall be in accordance with Chapter 5-10 of the Bureau of Local Roads and Streets Manual. Items must include but not limited to:

- Copies of all cancelled checks paid for the project,
- List and itemization of all direct costs and unit rates for each direct cost item,
- List of employees by classification, time spent by each employee on the project, and the hourly rate of each employee.

Please direct questions to your district Bureau of Local Roads and Streets office.

Sincerely,

George A. Tapas, P.E., S.E.
Engineer of Local Roads and Streets

cc: Joe Miner, Village Engineer
Jeffrey Myers Region 4 Attn: Brian Wright - District 6
Attn: Project Control

Appendix B



Illinois Department of Transportation

2300 South Dirksen Parkway / Springfield, Illinois / 62764

[Date]

Ms. Bertha Sample
Village Clerk
Village of Example
Example, Illinois 60000

Subject: Preliminary Engineering Agreement
Village: Example
Section: 20-12345-00-PV
Project: ABCD(123)
Job: P-90-000-00
Consultant: M.U.S.T Engineering Inc.
\$100,000 (federal share \$80,000)

Dear Ms. Sample:

Funds for the enclosed engineering agreement were approved by the department on June 1, 2021. The approved amount will be used as the upper limit of reimbursement for the project.

Please contact Debbie Jarvis (Debbie.Jarvis@illinois.gov) if you have any questions.

Sincerely,

George A. Tapas, P.E., S.E.
Engineer of Local Roads and Streets

Enclosure

cc: Joe Miner, Village Engineer
Jeffrey Myers Region 4 Attn: Brian Wright - District 6
Attn: Project Control

Appendix C



Illinois Department of Transportation

2300 South Dirksen Parkway / Springfield, Illinois / 62764

[Date]

Ms. Bertha Sample
Village Clerk
Village of Example
Example, Illinois 60000

Subject: Joint Agreement
Village: Example
Section: 20-12345-00-PV
Project: ABCD(123)
Job: C-90-000-00

Dear Ms. Sample:

Federal authorization was granted on April 25, 2021 under the provisions of Section 1440 of the FAST Act. The department executed the subject agreement on May 1, 2021.

A copy of the agreement is enclosed.

Sincerely,

George A. Tapas, P.E., S.E.
Local Project Implementation Engineer

Enclosure

cc: Ima Paragon, Village President
Jeffrey Myers - Region 4 Attn: Brian Wright - District 6
Attn: Programming (Jeanne.Dennison@illinois.gov)
Attn: Project Control (Sara.Reynolds@illinois.gov)
Tim Kell (Attn: Shona.Ayers@illinois.gov)