



December 2, 2011

U.S. Department of Transportation
Docket Operations
1200 New Jersey Avenue, S.E.
West Building, Ground Floor
Room W12-140
Washington, DC 20590

RE: Docket No. FTA-2009-0030

Dear Docket Clerk:

On behalf of the American Public Transportation Association (APTA), I write to provide comments on the Federal Transit Administration's (FTA) Notice of Proposed Rulemaking (NPRM) concerning Capital Project Management, published September 13, 2011 at 76 FR 56363.

About APTA

APTA is a non-profit international trade association of more than 1,500 public and private member organizations, including public transit systems; high-speed intercity passenger rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than ninety percent of Americans who use public transportation are served by APTA member transit systems.

General Comments

APTA appreciates FTA's vision of an enhanced, risk-informed project management oversight (PMO) program. The concept of focusing resources on those projects and grantees that will benefit most from oversight will optimize the federal government's substantial investment in oversight assets.

The proposed changes to the PMO program allow the Administrator to exercise significant discretion in determining the level of oversight a project should receive. In exercising this flexibility, FTA must remain vigilant in guarding against the uncertainty in timing that could result if a sponsor does not know which projects will be subject to a risk assessment or other potentially time-consuming reviews or require more detailed documentation. It is also critical for FTA that the rule is implemented uniformly across FTA regions.

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It is very important that the FTA make every effort to ensure that the rule does not conflict with the FTA's goal to streamline project delivery. The planning for and use of PMO resources must not compromise the cost and schedule of transit projects or the timing of the grant process; otherwise, the oversight process itself could lead to delays and cost over-runs. FTA should, in addition to gauging the relative skill and experience levels of grantees, also look to the relative skill and experience levels of its PMO assets to further maximize the value received for each oversight dollar. It is not uncommon for a grantee to have more expertise in a certain area than the Project Management Oversight Contractor (PMOC) assigned to them. A fully collaborative approach to oversight would address this type of situation and also help avoid multiple rounds of reviews, comments and redrafted documents.

In the interest of utilizing oversight resources only where they are most needed, wherever possible, the FTA should take advantage of grantees' internal oversight procedures, particularly where grantees have retained their own consultants to conduct risk assessments or conduct risk assessments internally. In these cases, we suggest that the FTA partner with the project sponsor.

Definitions – Section 633.3

We support FTA's proposal to limit the definition of major capital projects to those which include at least \$100M of federal investment, rather than overall investment. However, some projects within this category are routine in nature and do not merit oversight beyond what is currently provided through routine reviews and meetings. For instance, life-cycle rehabilitation of system infrastructure by an agency that conducts such projects on a recurring basis, and that involves no aspect of new technology, is essentially routine and low risk. These state of good repair and normal replacement projects do not carry the type or magnitude of risk typical of expansion projects and the oversight measures outlined in the NPRM should not be applied.

Because the FTA Administrator is given discretion to determine which projects are subject to the rule, a procedure is needed so grantees can anticipate the level of oversight their formula-funded projects will receive. To this end, and to minimize the possibility of delay and build predictability into the grant cycle, we suggest that the FTA and grantee collaboratively determine which formula-funded "major capital projects" would be subject to the proposed rule. This discussion could be part of the annual Program of Projects meeting that occurs at the start of the grant cycle. By coming to agreement at the beginning of the grant cycle, FTA, its PMOC and the grantee will be better able to plan their upcoming work and use resources more efficiently. This meeting could be followed by the development of a joint schedule of oversight activities for those projects determined to be subject to the rule and also a discussion of what level of detail is required in the Project Management Plan (PMP). Knowing as much information as possible very early in the process will help FTA, the PMOC, and grantees plan their workloads and allocate resources appropriately.

Project Management Capacity and Capability – Section 633.9

The discussion of management capacity and capability in this proposed section is overly broad. The text suggests virtually all staff forecast through the life of a project will be assessed against arguably subjective criteria in advance of awarding funds. This is generally impractical and

fails to account for the fact that support may be available from capable contractors and presumes agency staff will remain static. This assessment process would be a substantial undertaking for FTA itself, and may well inject unnecessary, expensive delay in project execution (or continuation, in the case of critical life-cycle state of good repair programs). Moreover, funding delays could impede an agency's efforts to attract and retain capable staff. In the case of New Starts projects, this problem is compounded by the approval points that occur prior to the Full Funding Grant Agreements (FFGA). For example, a grantee may not know who will be working on Final Design until they receive FTA approval to advance into Final Design.

Finally, we are concerned that this "resume review" could be very arbitrary. We believe FTA should establish a reasonable time frame and criteria for making a determination of management capacity and capability so expectations may be reasonable and reliable.

This is an area where it is especially key to have a consistent group of reviewers to assess the grantee's capacity and capability. One way to accomplish this objective would be for the FTA to build the internal capacity of staff at FTA's regional offices who are already familiar with local conditions and internal agency procedures and therefore would have less of a learning curve than new PMOCs. In addition, the FTA must be very vigilant to ensure the rule is applied consistently across FTA regions.

Project Management Plan – Section 633.11

This section would require that a PMP be prepared or revised at the start of each phase of a Major Capital Investment project (e.g., preliminary engineering, final design, construction, and at other times as necessary and appropriate). The content of the PMP, as defined in this section, is unduly detailed and burdensome at the start of the PE phase. For example, the rule would require that grantees identify, even before undertaking PE and before completing the NEPA process (to cite a few examples):

1. Staff organization and structure required at each successive phase of project development;
2. Project budget including, specifically, the amounts budgeted for project management, contractors and consultants, property acquisition, utility relocation, systems demonstration, audits, contingencies, and all other necessary costs;
3. The master schedule for engineering, design and construction, including all items on the critical path for project development;
4. The change order procedure, including, specifically, the recipient's policy and procedure for managing change order requests and actual change orders for design, construction and capital acquisition;
5. The procedures for carrying out the environmental mitigation required for the project; and
6. Agreements with utilities, railroads, and other third parties, and inter-agency agreements necessary to project completion.

The level of project definition required by these and similar requirements in Section 633.11 would require grantees to, in essence, complete Preliminary Engineering (PE) before starting PE. Further, achieving this level of project definition before the start of PE and before the completion of necessary environmental analyses, documentation, and public and agency involvement is contrary to

the requirements of NEPA and the Council on Environmental Quality regulations. Instead, the rule should recognize that the grantee seeking PE approval will have adopted a locally preferred mode and general alignment, but that further development of the project scope, schedule, and budget is the natural product of the PE phase as defined in 49 CFR Part 611.5 and the concurrent NEPA process. At the start of PE, FTA should expect no more than a PMP covering the PE phase itself. As FTA has acknowledged, the PMP should be a living document so that the level of detail in the PMP would be expected to be modified as project development and construction progress.

Additionally we believe FTA should clarify its intent in this section. As drafted, the provision requires submission of substantial information – again adding to schedule and cost – without a clear purpose. Clarity of FTA’s intent will assist the industry in helping FTA fine tune these requirements to achieve a balance between the time and effort expended and the value obtained. Guidelines concerning the review process, standards to be applied, and potential responses by FTA are necessary to ensure agencies know what to expect and can plan accordingly.

FTA should be mindful that the level of detail required in the subplans should be sufficient only to oversee the project and should not cross the line to managing the project. Also, subplans should not be necessary for most formula-funded projects subject to this rule. Once FTA agrees to a grantee’s technical capacity and capability, it should not be necessary for the FTA to require grantees to provide great depth of detail on decisions that will be made in each subplan area. Wherever possible, subplans should be part of the PMP. This will limit the number of document approvals. For each subplan that needs to be approved, the specialized consultant would need to review, followed by the main PMOC, followed by the FTA. This is a very time consuming process, exacerbated by other work that FTA staff must handle, so the number of documents that must be approved should be limited to the extent possible. We suggest that the FTA allow for conditional approval of subplan information to allow grants to be awarded while the sponsor addresses comments on the PMP.

Special Requirements Based on Project Cost, Complexity, or Risk – Section 633.13

The proposal allows the administrator to impose additional requirements within the PMP. We believe FTA should establish a conditional PMP approval process in advance of the program year that would allow projects to advance through the grant process while any special requirements are being addressed. As noted above, by making specialized reviews part of the PMP, duplication between the PMP and the subplans will be minimized and a single FTA approval will be required.

We do not agree with the proposal that annual New Starts allocations could be withheld from projects with FFGAs if the FTA does not believe that risk is being managed effectively. This proposed provision has the potential to erode public support for the project and would increase finance costs associated with the project. It is imperative that FTA oversight not result in increased agency costs that could lead to cuts and/or delayed implementation of state of good repair projects. If the FTA believes that risk is not being managed effectively, all parties should work collaboratively to establish the best path forward and conditional approvals should be used to allow grant funds to continue to flow.

Project Management Plan: Implementation – Section 633.15

Given the existing process and procedures, we believe monthly reporting would be excessive barring extraordinary circumstances. We are also concerned that the draft includes no standard for a triggering event leading to quarterly meetings.

FTA Use of Oversight Services – Section 633.19

Paragraph (a) states that, to conserve resources, FTA will generally defer the use of PMOCs on New Starts projects until those projects have requested FTA approval for entry into preliminary engineering. This strikes us as inconsistent with current practice and with 49 USC 5309(e) (6) and 5328(a) (2), under which FTA will approve/disapprove entry of a proposed project into preliminary engineering within 30 days of receipt of a formal request for PE approval. We suggest that that FTA assign PMOCs, when necessary, at the time that it becomes clear that a PE request will be submitted, and when the Locally Preferred Alternative (LPA) is known.

The Use of Risk Assessment in FTA's Risk-Informed Project Management Oversight – Appendix A to Part 633

As a general comment, we believe the level of detail provided in this Appendix is not appropriate for a rulemaking. This information should be incorporated into the Grant Management Circular, or perhaps posted on the FTA's website, rather than established as a regulation.

We believe that having an effective risk assessment process is extremely valuable to project success, and we very much appreciate the proposal to allow agencies to use their own established processes, as outlined in FTAs September 30, 2011, Dear Colleague letter. It is important to note that risk assessments are most valuable when they are a fully collaborative process in which the project team, the FTA, the PMOC and appropriate independent subject matter experts all play active roles. For agencies that have developed their own risk assessment methodology, we suggest that the FTA review these procedures and that all parties come to agreement on the methodology to be used for that grantee for a set program. This flexibility will also allow FTA to use its oversight resources more effectively. To the extent possible, the same methodology would be used throughout the duration of an individual project and any changes to the methodology would be the result of collaborative decision making. This will help ensure that switching methodologies midstream doesn't cause the risk assessment itself to be a risk. The risk assessment field is evolving and discussions of methodology can be very time-consuming and overly-theoretical.

In the spirit of utilizing agency oversight resources where they exist, we encourage the FTA to apply the principles in the Dear Colleague letter to formula-funded projects as well as Major Capital Investment projects. As such, the collaborative process described above would also apply to projects funded by formula programs.

The Dear Colleague letter suggests that different parties would conduct risk assessment at different phases of project development. We believe this would be counterproductive.

In the end, the project sponsor will be responsible for the risk register and associated mitigation measures. It is critical that the risk assessment is a fully collaborative process and the construction manager and other key staff “own” the risk process. For this reason, we request that the FTA clarify that all risk assessments will be conducted collaboratively. This will lead to a more effective process.

While we recognize that one application may not be applicable to all projects, in the interest of advancing projects and utilizing oversight resources as efficiently as possible, it is critical that the agencies and FTA also establish a criteria for the need to perform follow-up risk assessments in an approved manner (such as part of a recovery plan).

We appreciate the added flexibility to allow agencies to use their own methodology, but we also note that Appendix A states that FTA has had unsatisfactory experience with “bottom-up” models. Such bottom-up models have been shown to be good if done correctly and are widely accepted in many industries and government agencies, including NASA, DOE, and DOD. As such, we encourage the FTA to provide flexibility for agencies to utilize a bottom-up approach, which we believe allows for more detailed consideration of the risks and uncertainties, as well as the associated mitigations needed for specific project elements.

We appreciate the opportunity to assist FTA in this important endeavor. For additional information, please contact James LaRusch, APTA’s chief counsel and vice president corporate affairs, at (202) 496-4808 or jlarsch@apta.com.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael P. Melaniphy". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael P. Melaniphy
President and CEO

MPM/jpl/jr