



U.S. Department
of Transportation

**Federal Railroad
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

January 6, 2012

Thomas Fellenz, Esq.
Chief Counsel
California High-Speed Rail Authority
770 L Street, Suite 800
Sacramento, CA 95814

Re: Proposed "Targeted Unemployed Worker" Program and "First Source"
Transparency Requirements

Dear Mr. Fellenz:

This letter is in response to your request for the Federal Railroad Administration's (FRA) views of the proposal described in the September 8, 2011 Memorandum to the Fresno Works Consortium (Memorandum) from the Fresno Regional Workforce Investment Board (FRWIB) staff recommending that the California High Speed Rail Authority (CHSRA) implement a "Targeted Unemployed Worker" Program and "First Source" transparency requirements for the California High Speed Rail Project (Project) funded in part by the Federal Railroad Administration (FRA). For the reasons set out below, we have concluded that while not specifically precluded as a matter of applicable federal law, the "Targeted Unemployed Worker" Program conflicts with the U.S. Department of Transportation's (U.S. DOT)—and FRA's—general disapproval of local or in-state geographic preferences because of the potential negative impacts on open and competitive procurement procedures.

Through its Memorandum, the FRWIB has proposed that CHSRA include "Targeted Unemployed Worker" hiring criteria and a "first source" transparency requirement in the Request for Proposals (RFP) for the Project. "Targeted Unemployed Workers" are defined as workers who: (1) are unemployed and (2) reside in "Targeted Unemployment Areas." A "Targeted Unemployment Area" is "an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate", as designated by the California Employment Development Department. 8 C.F.R. § 204.6(e) (defining Targeted employment area). FRWIB recommends that the RFP require that (1) thirty percent (30%) of all construction

work hours be performed by "targeted unemployed workers" and (2) a minimum of fifty percent (50%) of all hours worked by construction apprentices, as defined and approved by the State of California, Division of Apprenticeship Standards, be performed by "Targeted Unemployed Workers."

FRWIB has also proposed to include "First Source" transparency requirements in the RFP, which would require that construction and professional service contractors notify CHRSA and "authorized referral entities" of job openings. "Authorized referral entities" include workforce investment boards, community colleges, Migrant Seasonal Farm Worker grantees, Housing Authorities, County Welfare offices, community action agencies, and any other entities authorized by CHSRA within the six-county first phase construction area. In practice, FRA believes FRWIB's proposed policy would advance the interests of local job seekers to the disadvantage of other prospective employees outside of this one area in California and undercut the preference of U.S. DOT and its modal administrations for procurement practices that encourage open and competitive procedures.

In implementing the High-Speed Intercity Passenger Rail (HSIPR) Program, the financial assistance program under which the CAHSRA has received grant funding, FRA relies on the Common Grant Rule. See 49 C.F.R. Part 18. As FRWIB's letter recognizes, Section 18.36(a) differentiates between state grantees—that "follow the same policies and procedures it uses for procurements from its non-federal funds" and "other grantees and subgrantees"—that will follow the specific procurement requirements provided for in subsections 18.36(b) through (i). Therefore for purposes of the Common Rule, Section 18.36(c)(2), which prohibits the use of statutorily or administratively imposed in-state or local geographic preferences, only applies to non-state grantees or subgrantees and thus does not apply to the CHRSA which is an instrumentality of the State of California. However, the FRWIB proposal ignores the Common Grant Rule's focus on open and competitive procurement practices and that the important federal policy underlying Section 18.36(c)(2), that local preferences are disfavored which is rooted in the concern that such preferences undermine open and competitive procurements.¹

In addition to Section 18.36(c)(2)'s general prohibition on local preferences for non-state grantees and subgrantees, it is also useful to examine statutes and regulations

¹ We disagree with FRWIB that its recommendations are not prohibited local preferences. FRWIB contends that the definition of "Targeted Unemployment Areas" is not limited to California residents and, thus, does not run afoul of the local preference prohibition; however, since a California agency must make the "Targeted Unemployment Designation" it appears unlikely that areas outside of California would benefit from the designation. Similarly, the "First Source" transparency requirements create "authorized referral entities" that, based on the provided definition, appear only to exist in California.

used by other U.S. DOT modal administrations. For example, the Federal Transit Administration (FTA) prohibits a grant awarded under Title 49 Chapter 53 to be used "to support a procurement that uses an exclusionary or discriminatory specification." 49 U.S.C. § 5325(h). *See also*, Federal Transit Administration Third Party Contracting Guidance, FTA Circular 4220.1F (February 15, 2011). Subsection (i) goes further and states "No State law requiring buses to be purchased through in-State dealers shall apply to vehicles purchased with a grant under this chapter." 49 U.S.C. § 5325(i). Through these sections, in implementing the grant program under Chapter 53, FTA prohibits both procurements using discriminatory specifications and, for specific procurements, in-state preference.

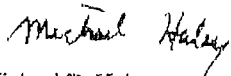
Also instructive are Federal Highway Administration (FHWA) regulations describing the requirements, and procedures relating to Federal-aid Highway Projects. *See* 23 C.F.R. Part 635. Specifically, Section 635.117(b) prohibits the imposition of procedures or requirement by "any State which will operate to discriminate against the employment of labor from any other State, possession or territory of the United States, in the construction of a Federal-aid project." 23 C.F.R. 635.11(b). *See also* 23 U.S.C. § 112; Memorandum from FHWA Chief Counsel, Theodore A. McConnell on Local Hiring Preferences (April 20, 1994). The Authority should keep in mind that if any components related to the overall project are funded by an FHWA grant or other financial assistance, such components may be subject to direct statutory or regulatory prohibitions on in-state or local prohibitions. FHWA and FTA statutory and regulatory procurement structures clearly demonstrate U.S. DOT's support for procurements that encourage open competition and, where applicable, explicit prohibitions strongly indicate that local or in-state preferences undermine this important policy goal.

From a policy perspective, FRA does not see any reason to diverge from the approach taken by other modal administrations supporting open competition and discouraging local or in-state preferences. While FRA agrees with FRWIB that one of the primary purposes of the Recovery Act is to "preserve and create jobs" and "to assist those most impacted by the recession", we do not concur that this constitutes an "express" mandate for geographical preferences. Pub. L. No. 111-5, § 3(a)(1), (2); *see* 49 C.F.R. 18.36(c)(2). Nor do we believe that the Recovery Act mandates or encourages that State recipients of ARRA funds give preferential treatment to their citizens. *See* Pub. L. No. 111-5.

The end result of the analysis provided above is that under the currently authorized HSIPR program, FRA does not support in-state or local preferences from a policy perspective because of the potentially negative impacts on open competition in procurements.

Please call me or Christopher Van Nostrand of my staff if you have any further questions.

Sincerely,

A handwritten signature in cursive script that reads "Michael Haley".

Michael T. Haley
Acting Chief Counsel