

## Federal-aid Highway Project - Non-Participating Cost Items

September 10, 2015



*Note: The following is a list of highway construction costs that are not eligible for funding provided under Title 23 of the US Code. This list is not intended to be all-inclusive and specific funding programs may have additional funding restrictions (i.e. Highway Bridge Program). In addition, numerous circumstances may arise during project delivery that may result in additional items being considered ineligible for federal funding.*

1. Work done prior to FHWA authorization of federal funds, including work on environmental review, preliminary engineering, right-of-way acquisition, construction, research, etc. (23 CFR 630.106)
2. Construction work done under a contract that does not have FHWA Form-1273, "Required Contract Provisions, Federal-Aid Construction Contracts," physically incorporated in the construction contract and not incorporated by reference (including Emergency Relief contracts). (23 CFR 633.102)
3. Work not included in the scope of work, or outside the project limits, as defined in the project's environmental document.
4. Costs that were not actually incurred prior to requesting reimbursement by FHWA. (23 CFR 1.9)
5. Work not done in accordance with approved plans, specifications and estimates, unless quality of methods/materials covered by the specifications is maintained and the work was performed under a properly approved Change Order (CO) approved before the work was initiated. (23 CFR 630.205, 23 CFR 635.120)
6. Work that is normally considered to be routine maintenance. Examples include, but are not limited to, ditch cleaning, snow plowing, graffiti removal, trash removal, and/or mowing roadsides. (23 CFR 633.208)
7. Non-conforming work such as non-standard details, designs determined undesirable or discontinued because of poor performance. Examples include, but are not limited to, sidewalks that do not meet requirements of the Americans with Disabilities Act, or devices within the clear zone that are not crash tested or are not crashworthy.
8. Work included on a CO or a contract addenda that was required to have prior approval by FHWA but did not obtain the prior approval. (23 CFR 635.120, 23 CFR 635.112)
9. Payment for work done by an unapproved subcontractor.
10. Utility work that is not a result of the highway or bridge work. Examples include, but are not limited to, replacing sewer leads that are not a result of the roadway construction activity.
11. Work on private facilities or outside of the highway right-of-way (signs, fences, lawn sprinklers, etc.) unless that work is included in a right-of-way agreement or permit.
12. Federal eligibility of costs associated with claims (compensation for time, attorney fees, and interest, etc.) will be determined on a case-by-case basis (23 CFR 635.124). Such costs may be eligible to the extent that any contract adjustments made are supported, and have a basis in terms of the contract and applicable State law.
13. Change order work performed using force account (FA), including costs associated with time extensions, without appropriate documentation of the need to use force account, analysis of costs, and/or use of labor, equipment, material rates, specified in the contract. (23 CFR 635.120(d))
14. Work that is performed by State or local agency using force account work in-lieu of hiring a contractor, that is not approved as cost effective and that does not conform to requirements of 23 CFR 635 Part B. (The term *cost effective* shall mean the efficient use of labor, equipment, materials and supplies to assure the lowest overall cost. The term *force account* shall mean the direct performance of highway construction work by a State transportation department, a county, a railroad, or a public utility company by use of labor, equipment, materials, and supplies furnished by them and used under their direct control.)
15. Acquisition/incorporation of iron or steel products that are subject to Buy America but have not been certified as compliant with Buy America requirements. **Note:** Making iron and steel products non-participating is generally **not** allowed as it circumvents the Buy America requirements and eligibility of the entire project to receive Federal-aid could be jeopardized. (23 CFR 635.410) See also Caltrans' guidance for implementing and certifying Buy America on utility relocations (<http://www.dot.ca.gov/hq/buyamerica/>).
16. Time extensions that do not have proper justification or a Time Impact Analysis, when required. For the time extension to be eligible for Federal-aid, the work must be eligible for Federal-aid and affect the "controlling operations" (or critical path). (23 CFR 635.121)
17. Costs incurred solely for the benefit of or of a railroad or utility. (23 CFR 646.212)
18. Payment for items that are the responsibility of others. Examples include, but are not limited to, relocation of utilities located within the right-of-way (unless part of an existing Joint Use Agreement or where prior rights have been determined), or collision damage that is the responsibility of others.



19. Purchase of right-of-way under the following circumstances:
  - a. Right-of way that is not programmed in the current State Transportation Improvement Program.
  - b. Right-of-way acquisition for which the owner was previously compensated.
  - c. Land that is owned by a federal agency.
  - d. Land owned by a Local Public Agency which is currently part of a transportation facility.
20. Patented or proprietary items unless one of the following conditions has been met (23 CFR 635.411):
  - a. The item is purchased or obtained through competitive bidding with equally suitable proprietary items.
  - b. The plans or specification lists at least two proprietary items along with the words "or equal."
  - c. The proprietary item is used for experimental purposes and a Construction Evaluation Work Plan has been approved by FHWA for the item.
  - d. If more than one equally suitable item exists, Caltrans or FHWA must approve a Public Interest Finding that justifies the use of the item is in the public's interest. (Local agencies cannot sign these PIFs.)
  - e. The project owner certifies, based on proper justification, the proprietary the items are essential for synchronization with existing highway facilities or that no equally suitable alternate exists. (Synchronization is defined in "Questions and Answers Regarding Title 23 CFR 635.411.")
  - f. The contractor chooses the proprietary item.
21. Payment for betterments that do not have a transportation function and/or are not part of the project. Examples include, but are not limited to, payment for excess sizing of sanitary sewer adjustment for future development. (23 CFR 645.105, 23 CFR 710.509(d)(1))
22. Materials that do not meet the sampling and/or testing requirements except materials for which the Standard Specifications allow a deduction for diminished quality. (23 CFR 637)
23. Plant establishment periods exceeding three years from the date of contract acceptance. (23 CFR 752.4)
24. Costs associated with advertising, sales promotion, interest on borrowings, the issuance of stock, bad debts, uncollectible accounts receivable, contributions, donations, entertainment, fines, penalties, lobbying, and research programs unless the research is conducted under a Construction Evaluation Work Plan. (23 CFR 635.411 (a)(3) and 23 CFR 645.117 (d)(2))
25. Supplemental Work and State-Furnished Materials and Expenses not approved by FHWA. The use of State-furnished materials requires a finding by the Department that it is in the public interest to require the contractor to use materials furnished by the Department or from sources designated by the Department (23 CFR 635.407)
26. The use of publicly owned equipment in a contract unless it can be shown to be cost effective (23 CFR 635.106). Federal funds may participate in the costs associated with the use of publicly owned equipment provided that: the PS&E submittal clearly sets forth the proposed use, the specifications indicate the items of equipment that are available, the rates to be charged, and the point(s) of availability or delivery, the specifications include the express condition that the contractor has the option to rent all or part of the available equipment, or to provide the equipment, and the Department cannot benefit from the rental of its own equipment by virtue of a Federal-aid contract.
27. The use of noncompetitive negotiation to procure engineering and design related services on Federal-aid participating contracts unless it can be justified by demonstrating that: The service is available only from a single source; There is an emergency which will not permit the time necessary to conduct competitive negotiations; or after solicitation of a number of sources, competition is determined to be inadequate. (23 CFR 172.5(a)(3))
28. Construction contracts that are not advertised by the competitive bidding process unless pre-approved by FHWA. (23 CFR 635.204)
29. Informal contracts (less than 3 week advertisement) unless approved by FHWA. (23 CFR 635.112(b))
30. Mandatory use of borrow/disposal site unless approved by FHWA. FHWA approval requires a finding that uses of the mandatory borrow/disposal site is the most economical or that the environment would be substantially enhanced without excessive cost. (23 CFR 635.407)
31. Costs that arise from negligence, intentional acts or omissions, fraud, carelessness, incompetence or other actions by STA employees which are not consistent with the usual State practices.
32. Costs incurred for relocation of utilities are generally eligible for federal funding, except as provided in 23 CFR 645.
33. Time extensions and delay claims associated with utility and railroad work or ROW clearances since the state is required to provide a statement confirming proper coordination with these third parties before construction authorization.