INSTRUCTIONAL MEMORANDUMS
To Local Public Agencies

To:	Counties and Cities	Date: February 11, 2014
From:	Office of Local Systems	I.M. No. 3.650
Subject:	Federal-aid Participation in Utility Relocations	

Contents: This Instructional Memorandum (I.M.) provides a summary of the requirements and procedures for Local Public Agencies (LPAs) to obtain Federal participation in the cost of utility relocations on Federal-aid transportation projects, as specified in Title 23 of the Code of Federal Regulations, Part 645, Subpart A (23 CFR 645 A). Topics addressed include eligibility of utility relocations, utility agreements, and the procedures for obtaining Federal participation in utility relocations. This I.M. includes the following attachments:

Attachment A – Utility Relocation Federal-aid Eligibility Flowchart
Attachment B – FHWA Authorization of Utility Relocation Costs Flowchart

Note: For additional instructions and procedures related to utility accommodation and coordination, refer also to I.M. 3.640, Utility Accommodation and Coordination.

Eligibility

To determine if the costs associated with a utility relocation are eligible for Federal-aid reimbursement, three questions must be answered: 1) Do the circumstances of the relocation allow for Federal reimbursement? 2) Are the activities associated with the relocation eligible? and 3) Are the specific cost items associated with those activities eligible? Each question is further explained below.

Eligible Relocations

Relocation of a utility facility may or may not be eligible for Federal-aid reimbursement, depending on the specific circumstances of that relocation. These circumstances include a number of variables, such as ownership, location, reasons for relocation, and the applicable Federal and State laws, regulations, and policies.

The questions listed below are designed to assist in determining the eligibility of a proposed utility relocation. Additional explanation and information is provided below each question. To obtain the correct determination of eligibility, these questions must be answered in the order indicated. The same decision making process is also illustrated graphically in Attachment A to this I.M.

1. *Is the utility relocation part of a safety project?* If yes, the relocation is eligible. If no, go to the next question.

   A "safety project" is initiated specifically for the purpose of reducing the roadside hazards of utility facilities to the transportation facility users. Only those facilities that pose a safety hazard would be eligible, and the safety benefit of such relocations must be supported by a site-specific crash history or a safety study.

2. *Is the utility relocation required to construct the project?* If no, the relocation is not eligible. If yes, go to the next question.

   Except for safety corrective measures, the need for the utility relocation must be caused by the transportation project. That is, the utility facilities must be relocated in order for the proposed transportation project to function properly. Relocations that are solely for the benefit of the utility, the utility's contractor, or the LPA's contractor are not eligible.

   For example, the project construction may be more convenient or efficient for the utility or the contractor if certain utility relocations are made, but such reasons by themselves are not sufficient to allow Federal reimbursement.

3. *Is the utility relocation required to construct an Interstate Highway project?* If yes, the relocation is eligible. If no, go to the next question.

The utility itself does not have to be located on the Interstate, but the cause for the relocation must be due to an Interstate project. Such relocations are eligible for Federal reimbursement because this is explicitly permitted by Iowa Code Section 306A.10.

4. *Is the utility located within the existing right-of-way of a non-Interstate primary highway?* If yes, the relocation is not eligible. If no, go to the next question.

   This question pertains to utilities located on primary highways, except those highways that are part of the Interstate. This includes extensions of primary highway inside city corporate limits. For such projects, the Iowa DOT's Policy for Accommodating and Adjustment of Utilities on the Primary Road System will apply. This policy requires all utilities that occupy the primary highway right-of-way to relocate at their own expense.

5. *Does the utility occupy publicly owned land?* If no, the relocation is eligible. If yes, go to the next question.

   For purposes of this question, publicly owned land includes the LPA's road or street right-of-way, or any other property that is owned by a political subdivision of the State.

   If a utility is not located on any road right-of-way or other publicly owned lands, the utility will have rights to the property it is located on, either by fee title or an easement. In this case, if a transportation project damages or takes the utility's property, the utility is entitled to compensation under eminent domain, and therefore such costs paid by the LPA are eligible.

6. *Is the utility required to relocate at its own expense?* If yes, the relocation is not eligible. If no, go to the next question.

   The utility's obligations for relocation should be specified in the applicable permit, agreement, or utility accommodation policy.

   For projects located on the right-of-way of non-primary, Federal-aid highways, the Policy for Accommodating Utilities On the County and City Non-Primary Federal-Aid Road System will apply. Federal-aid highways include all roadway classifications on the Federal Functional Classification maps, except local roads and rural minor collectors. This policy requires all utilities located within the Federal-aid highway right-of-way to relocate at their own expense when required by a highway project.

   For projects that are neither on a primary highway nor a Federal-aid highway, this question will be determined by the provisions of the applicable permit or utility agreement between the LPA and the utility. Typically, these permits or agreements require that utilities occupying the public right-of-way must relocate at their own expense. However, the LPA should verify this by reviewing the terms of the applicable permit or agreement.

7. *Is the utility owned by the LPA?* If yes, the relocation is eligible. If no, go to the next question.

   LPA owned utilities are owned, operated, and controlled by either the LPA or a subdivision of the LPA's government. For example, a municipal utility for a city would be considered an LPA owned utility for that city.

8. *Does the LPA have legal authority to pay for the relocation?* If yes, the relocation is eligible. If no, the relocation is not eligible.

   To answer yes to this question, the LPA must have an existing local statute, ordinance, agreement, or some other legal basis for making a relocation payment to the utility. If in doubt, the LPA should consult with their attorney to determine if such payments are allowed.

   Note: If a request for Federal participation in utility relocations is based on this condition, the LPA shall include the following with its request for FHWA authorization of utility costs: copies of the relevant local statutes, ordinances, agreements, permits, or policies; and an explanation of how these allow the LPA to make payment to the utility. The Iowa DOT and / or the FHWA may request a written legal opinion that supports this determination.

Eligible Activities

After verifying that a particular relocation itself is eligible, it must be determined if the activity associated with that relocation is eligible. The following types of activities associated with eligible relocations may be eligible for Federal reimbursement, as detailed below.

Engineering

Federal funds may participate in the cost of preliminary engineering work required for the design of utility relocations and the associated construction engineering work. Such engineering work may be accomplished by one of the following methods, subject to mutual agreement between the utility and the LPA:

1. The LPA's engineering staff. If the LPA's engineering staff is used, these services must be reviewed and approved in accordance with I.M. 3.310, Federal-aid Participation in In-House Services.

2. The utility's engineering staff. If the utility's engineering staff is used, Federal participation in these costs will be subject to the limitations set forth in the "Eligible Costs" section below.

3. An engineering consultant contract that is procured and administered by the LPA with approval of the Iowa DOT Administering Office and the utility. In this case, the procedures in I.M. 3.305, Federal Participation in Consultant Costs, shall be followed.

4. An engineering consultant contract that is procured and administered by the utility with approval of the LPA. In this case, the consultant fees must be reasonable and not based on a percentage of construction cost. The utility may contract for the required engineering work on a project-specific basis, or as part of an existing continuing contract, if such work is regularly performed for the utility. Use of a qualifications-based selection, as outlined in I.M. 3.305, Federal Participation in Consultant Costs, is encouraged, but not required.

Right-of-Way

When required by the transportation project, the cost of providing replacement right-of-way for a utility is eligible for Federal reimbursement, provided both the following conditions are met:

1. The utility has a property interest in its current location, the damage or taking of which is compensable under eminent domain; or providing replacement right-of-way for the utility makes the project more cost effective as a whole; or the acquisition is necessary to meet the requirements of the project.

2. There will be no charge to the project for that portion of the utility's existing right-of-way that will be used for transportation purposes. In other words, the utility cannot "double-dip" by receiving both the replacement right-of-way and compensation for its former right-of-way that is being used for the transportation project.

The replacement right-of-way may be acquired by either the utility or the LPA. When the LPA will acquire the utility's property or replacement right-of-way for the utility, such acquisitions must follow the procedures outlined in I.M. 3.605, Right-of-Way Acquisition.

When the utility will acquire its own replacement right-of-way, the procedures specified by I.M. 3.605 do not apply. However, before acquiring replacement right-of-way, the utility must prepare a written valuation of the property to be acquired and provide this to the LPA. The LPA shall submit this documentation to the Iowa DOT with the draft utility agreement.

If the transportation project requires acquisition of real property belonging to the utility, but does not require relocation of the utility's facilities, the cost of acquiring such property is also eligible, provided the utility has a real property interest in its current location, and the damage or taking of which is compensable under eminent domain. In such cases, the utility is treated like any other property owner whose property is needed for the project, and the Federal acquisition procedures outlined in I.M. 3.605 shall apply.

Construction

In general, the construction work associated with relocation or adjustment of utility facilities is eligible for Federal participation.

Construction work may be performed by the utility if the utility is adequately staffed and equipped to perform the work in a satisfactory manner (i.e., at a time convenient to and in coordination with the transportation project construction), and one of the following conditions is met:

1. The work is minor, involves existing facilities, and is routinely performed by the utility with its own forces. In this case, it has already been determined that it is cost effective for the utility to perform such work.

2. The Administering Office concurs that it is cost effective for the utility to perform the work, even if the work is not minor or involves installation of new facilities. In this case, the LPA shall submit the utility's justification for a cost effective determination to the Administering Office as part of its request for FHWA Authorization of utility costs.

If one of these conditions are not met, the work shall be accomplished by means of a construction contract. The contract may be procured in a number of different ways:

1. The LPA may award a separate utility relocation contract, or with permission of the utility, include the utility relocation work as part of the LPA's contract for the transportation project.

   In either situation, the contract must follow the same bidding and contract requirements that would apply for other Federally funded transportation projects. In most cases, this means the contract will have to be let through the Iowa DOT, as described in I.M. 3.730, Iowa DOT Letting Process. However, for those transportation projects that qualify, the procedures described in I.M. 3.720, Local Letting Process – Federal-aid, may be followed instead.

2. The utility may award a utility relocation contract using a competitive bidding process.

   In this case, the LPA should review the utility's bidding procedures and concur in the award of the contract. Neither the Iowa DOT nor the FHWA needs to review or concur in competitive contract awards made by the utility. For such contracts, the Federal bidding and contracting requirements that must be followed for LPA let contracts do not apply. This includes such provisions as Disadvantaged Business Enterprises (DBE), Equal Opportunity Employment (EEO), the Clean Air Act, Davis-Bacon Wage Rates, and other provisions, as shown on Form FHWA-1273.

   Nevertheless, this does not relieve the utility or its contractor from compliance with other Federal laws or regulations that apply regardless of whether Federal funds participate in the utility costs or not, such as the National Environmental Policy Act (NEPA), Title VI of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Buy America requirements, as per 23 U.S.C. 313 and 23 CFR 635.411. For more information on Buy America, refer to the "Agreements" section below.

3. The LPA or the utility may include the work as part of an existing continuing contract, provided the costs are reasonable and the LPA can demonstrate this to be the most cost-effective method.

4. For low-cost incidental work, the LPA or the utility may award a construction contract to a qualified contractor without a competitive bidding process, provided the costs are reasonable.

   For cases 3 and 4 above, the LPA shall submit a request to the Iowa DOT Administering Office that includes a cost estimate for the utility relocation work and an explanation of why this is the most cost-effective method to accomplish the utility relocations. Before proceeding with such work, the LPA must receive written concurrence from the Administering Office.

Eligible Costs

After determining the relocation is eligible, and the activity associated with the relocation is eligible, the cost elements of that activity (e.g., labor, overhead, materials, equipment, etc.) must also be evaluated for eligibility. The eligibility criteria for these cost elements is specified in 23 CFR 645.117. If a pre-audit is requested, the

eligibility of these cost elements will be reviewed by the Iowa DOT (see the "Pre-audit Procedures" subsection under the "Procedures for Federal Participation" section below). These cost items may also be reviewed as part of the project's final audit.

There are some elements of utility costs that may require credit to the Federal-aid project. These are briefly described below.

Betterment Credits

The additional costs associated with a betterment to utility facilities that are replaced or adjusted will require a credit. For example, if an 8" waterline must be relocated because of the project, and the utility chooses to increase the capacity of their facilities by replacing it with a 12" waterline, the estimated differential cost between the 8" and 12" lines must be deducted from the actual 12" waterline costs before the appropriate Federal share is calculated.

However, there are certain conditions under which a betterment to relocated utility facilities will not require a credit. Those include:

1. The betterment is required by the transportation project.
2. Replacement of devices or materials that are of equivalent standards but not identical.
3. Increases to the next higher grade or size when the existing devices or materials are no longer manufactured.
4. The betterment is required by law under governmental and appropriate regulatory commission code.
5. The betterment is required by the utility's current design practices and there is a direct benefit to the transportation project.

In addition to betterments, the accrued depreciation of utility buildings and associated equipment that are replaced may also require a credit. Such accrued depreciation is based on the ratio between the period of actual length of service and the total life expectancy applied to the original cost. Depreciation credit is not required for utility buildings or equipment that are rehabilitated or moved (i.e., not replaced) because of the transportation project.

Salvage Credits

Credit will also be required for the salvage value of materials removed. Materials recovered from temporary use and accepted for reuse by the utility shall be credited to the project at prices charged to the job, less a consideration for loss in service life at 10 percent. Materials recovered from the permanent facility of the utility that are accepted by the utility for return to stock shall be credited to the project at the current stock prices of such used materials. Materials recovered and not accepted for reuse by the utility, if determined to have a net sale value, shall be sold to the highest bidder by the LPA or utility, following an opportunity for inspection by the LPA and an appropriate solicitation for bids. If the utility practices a system of periodic disposal by sale, credit to the project shall be at the going prices supported by records of the utility.

Eligibility of Utility Relocations for Earmark Funds

Projects that are specially designated or "earmarked" by Congress for Federal funding usually follow the same utility relocation eligibility rules as any other Federal-aid project, as outlined above. However, if the funds for an earmarked project are specifically designated for utility relocations, this may override the normal rules of eligibility. To be eligible, such a designation must occur in the legislative description of the project itself or elsewhere in the authorizing legislation. Funding applications or Congressional letters are not sufficient to establish the eligibility of utility relocations that are otherwise ineligible under the normal rules.

Utility Agreements

In order for Federal funds to participate in utility relocation costs, a written agreement must be executed by the LPA and the utility. The agreement must also be reviewed and approved by the Iowa DOT Administering Office.

It is the responsibility of the LPA to initiate the agreement process with the utility. Some utility agreements can take a significant amount of time to negotiate and execute; therefore, the LPA should contact the utility as early as possible in the project development process.

Agreement Content

Many utilities have standardized agreements that may be used for this purpose. However, use of a standard format is not required. Regardless of the particular form of agreement used, all utility agreements for construction-type projects shall include the following provisions:

1. A statement of each party's responsibilities for accomplishing and paying for the cost of the utility relocations. This statement should include the basis of LPA's authority or obligation to pay for utility relocation costs.

2. The provisions of 23 CFR 645 and the Policy for Accommodating Utilities On the County and City Non-Primary Federal-Aid Road System incorporated by reference.

3. The method for performing the utility relocation work. The method used must be one of the options described in the "Construction" subsection under the "Eligible Activities" section above.

4. The method for developing utility relocation costs.

   The preferred method is based on actual direct and related indirect costs. However, subject to approval by the Iowa DOT, other methods may be used, provided they are based on generally accepted industry practices and can be reasonably supported by recent actual expenditures. The lump-sum method may be used if the work can be clearly defined and the cost accurately estimated. Unit costs may be used if they are developed by the LPA in cooperation with the utility and are updated annually based on actual cost data.

5. An itemized cost estimate of the utility relocation work.

   If the work will require any credits for the purposes of Federal-aid reimbursement, these shall be identified. The cost estimate should also include right-of-way, preliminary engineering, and construction engineering costs, if applicable. If the agreement is based on the utility's actual costs, the cost estimate should include a break-down of the estimated costs, such as direct labor, labor surcharges, overhead and indirect construction charges, materials, equipment, etc.

6. If the LPA and the utility will share in the cost of the utility relocation, the agreement shall identify the share to be paid by each party.

7. If the utility will make repayment of any costs that were initially paid by the LPA, the agreement shall specify the amount and terms of such repayments.

8. References to the plans, and if needed, specifications that describe the proposed work. These should be incorporated into the agreement as an attachment or exhibit.

9. A provision stating that the utility may not commence work until after receipt of written notification from the LPA that the relocation work has been approved by the Iowa DOT and received FHWA Authorization.

10. If the utility has a property interest in its current location, a provision that states the utility will provide a release or disclaimer of all property interests to the LPA after completion of the relocation and prior to final payment by the LPA.

11. Buy America provisions. The relocation agreement shall contain provisions that require the utility to certify compliance with the Buy America law at 23 U.S.C. 313 and its implementing regulations at 23 CFR 635.410. The agreement shall also require the utility to maintain records to support its certification(s). A sample agreement provision, where "COMPANY" is the utility and the "AGENCY" is the LPA, is provided below:

    "All portions of the project performed by the COMPANY shall be in compliance with the Buy America Requirements, as set forth in 23 CFR 635.410 and 23 USC 313, as amended by Section 1518 of P.L. 112-141. Before incorporating any iron or steel products into the work, the COMPANY shall provide the AGENCY with manufacturer's certifications indicating that all manufacturing processes for iron and steel, including the application of coatings, have occurred in the United States, unless granted a waiver pursuant to 23 CFR 635.410."

The Iowa DOT recommends the utility agreement require the utility company to use a step-certification process, whereby each corporate entity involved in the manufacturing process (from melting to fabrication) on transfer of the intermediate product, certify that its product complies with Buy America. This process produces a "chain of custody" documentation trail that can be used to verify compliance.

Regardless of the type of certification process used, the LPA shall retain the certifications provided by the utility as part of its Federal-aid project file for which the utility relocation was eligible. These records shall be retained for at least 3 years after FHWA approval of the final amendment / modification document for the project, as described in Section 9.3 of the Federal-aid Project Development Guide.

Buy America does not apply to manufactured products that are less than 90% iron or steel by weight.

For additional guidance concerning the Buy America requirements, refer to FHWA's Buy America Construction Program Guide.

For additional tools and information related to Buy America requirements, refer also to the Iowa DOT Office of Traffic and Safety's Buy America web site. This web site describes how the Iowa DOT will address these requirements on its projects involving utility relocations, but some of the information may be helpful for LPA projects too.

Changes to the Agreement

If there are changes to the scope of work approved by the agreement (e.g., extra work, significant changes to the plans, specifications, or estimates), an amendment to the agreement, written change, or extra work order must be approved by the LPA and the Iowa DOT. Absent such documentation, Federal funds may not participate in the additional costs associated with such changes.

Procedures for Federal Participation

To obtain Federal participation in utility relocation costs, follow the process illustrated in the flowchart included as Attachment B to this I.M. Like any other type of project work, FHWA Authorization must be obtained prior to beginning any utility work which will be reimbursed with Federal funds. Additional details and guidance concerning this process are provided below.

FHWA Authorization Request Submittal

To request FHWA Authorization for utility relocation costs, submit the following to the Administering Office:

1. A cover letter, memo, or e-mail that includes the project number and a description of the circumstances that require the utility relocation.
2. The draft utility agreement, including the proposed plans, specifications (if applicable), and an itemized estimate of utility relocation costs to be paid by the LPA.

Agreement Review Procedures

Administering Office Review

The Administering Office will review the agreement to determine if it includes the necessary agreement provisions, as set forth in this I.M. The Administering Office will also review the proposed relocations to ensure they are within the scope of the project, as defined by the Concept Statement or other environmental documents, if applicable.

Pre-audit

If the estimated total utility cost to be paid by the LPA is greater than $100,000, the Administering Office will forward a copy of the draft utility agreement to the Iowa DOT Office of Finance, External Audits, and request a pre-audit. If the estimated cost is less than $100,000, a pre-audit is usually not required, unless:

- the utility is to be paid on a lump-sum or unit price basis;
- there is insufficient knowledge of the utility's accounting system;
- there is a previous unfavorable experience regarding the reliability of the utility's accounting system;

- the utility agreement involves procurement of new equipment or supplies for which cost experience is lacking; or
- the Administering Office has concerns about any item in the proposed cost estimate.

External Audits may waive the need for a pre-audit based on its knowledge of the utility and its past audit history. A pre-audit typically includes:

- an analysis of the utility's cost proposal and financial records for the method of accounting in place to assure that the utility has the ability to adequately segregate and accumulate reasonable and allowable costs to be charged against the project; and
- an analysis of the utility's proposed direct costing rates and indirect overhead factors to assure their propriety and eligibility for Federal reimbursement, as required by 23 CFR 645.117.

If there are any questions about the pre-audit procedures, the LPA or Administering Office may contact External Audits for assistance.

Utility Section Review

The Administering Office will forward a copy of the draft agreement to the Office of Traffic and Safety, Utilities Section. The Utilities Section will review the agreement to determine if the estimated cost of the proposed utility relocations is reasonable. The Administering Office may also request assistance from the Utility Section in reviewing other provisions of the agreement. The Utilities Section will review and provide its comments to the Administering Office on the reasonableness of the estimated cost and other provisions of the agreement if requested or if deemed necessary.

Reimbursements

The LPA may request reimbursement for the costs of approved and authorized utility relocation work anytime after payments have been made to the utility. Before submitting a request for reimbursement, the LPA shall ensure the work completed to-date is in accordance with the authorized utility agreement. Each request for reimbursement shall include:

- A cover letter, memo, or e-mail that identifies the project number, the work for which reimbursement is being requested, and the total amount claimed for reimbursement.
- If the utility is performing the work with its own forces, include a copy of the utility's estimate of work completed to date.
- If the utility is using a contractor or consultant to perform the work, include a copy of the contractor or consultant invoices, and any applicable subcontractor or subconsultant invoices.
- A copy of the canceled check or check register to verify that the LPA has made payment to the utility.
- If the reimbursement includes iron or steel products subject to Buy America, include copies of Buy America certifications provided by the utility.

Completion of Utility Work

After all the utility relocation work is completed, the LPA shall submit a request for final reimbursement to the Administering Office. The final reimbursement request shall include:

- A cover letter, memo, or e-mail that identifies the project number, the work for which reimbursement is being requested, and the total amount claimed for reimbursement. The cover letter shall also include a statement by the LPA that the utility relocation work was completed in general conformance with the utility agreement.
- If the utility is performing the work with its own forces, include a copy of the utility's final costs.
- If the utility is using a contractor or consultant to perform the work, include a copy each of the contractor or consultant final invoice, and any applicable subcontractor or subconsultant final invoices.
- A copy of the canceled check or check register to verify that the LPA has made final payment to the utility.

Because the final audit process can require a significant amount of time, and the final audit will need to be complete before the project as a whole can receive final Federal-aid reimbursement, the LPA should submit their request for final reimbursement of utility relocation work as soon as possible.

Upon receipt of a request for final reimbursement of utility relocation costs, the Administering Office will forward a request for a final audit or final review to the Office of Finance, External Audits. Lump sum

agreements do not need a final audit, but may have a final review. External Audits may waive final audit requirements on utility agreements of less than $100,000. Final reimbursement for lump sum agreements under $100,000 can be made prior to the final audit or review (reimbursement set by agreement).

If a final audit is conducted, External Audits will review all invoiced charges to assure that the charges are adequately supported and are eligible for reimbursement. After the final audit is complete, External Audits will return the audit report to the Administering Office, which in turn will pass the report on to the LPA and the utility.

- If the final audit report finds that a balance is due to the utility, the utility may invoice the LPA for the balance due and the LPA may request reimbursement for the additional payment. Upon receipt of such a request, the Iowa DOT will reimburse the LPA for the appropriate Federal share.
- If the final audit report finds that the utility has been overpaid, the Iowa DOT will invoice the LPA for the appropriate Federal share or deduct this amount from the balance of reimbursement that is due to the LPA for other project costs. Likewise, the LPA may request reimbursement from the utility for the amount of overpayment.