



AMERICAN COUNCIL OF ENGINEERING COMPANIES

March 10, 2006

U.S. Department of Transportation  
Dockets Management Facility  
Room PL-401  
400 Seventh Street, SW  
Washington, DC 20590

**Re: Federal Transit Administration Docket No. FTA-2006-23636**

**ACEC Comments on FTA's New Starts Guidance  
Relating to the Certification of Technical Methods**

The American Council of Engineering Companies (ACEC) appreciates the opportunity to submit comments to the Federal Transit Administration on its January 11, 2006 Guidance on New Starts Policies and Procedures. In this letter ACEC will be commenting specifically on Chapter 1.3 of the FTA Guidance document, concerning the Certification of Technical Methods, Planning Assumptions, and Project Development Procedures.

ACEC is the business association of America's engineering industry, representing approximately 5,500 independent engineering companies with 300,000 employees throughout the United States engaged in the development of America's transportation, environmental, industrial, and other infrastructure. Founded in 1910 and headquartered in Washington, D.C., ACEC is a national federation of 51 state and regional organizations.

ACEC's member companies perform important services encompassing the full range of engineering disciplines and land surveying, for clients large and small. We represent small businesses, large international firms, minority, disadvantaged and women owned professional engineering and surveying firms. We are an important and integral component in the delivery of the nation's infrastructure facilities.

SUMMARY

ACEC is very concerned about FTA's proposal to require the individual (often a consulting firm employee) responsible for the development of alternatives, travel demand forecasts, capital and operating cost estimates, and the financial plan made in support of decision-making relative to a proposed project, "certify that they have been properly

developed and applied according to professional standards and conventions and FTA guidelines.” (Chapter 1.3, page 10) This would become effective on April 30, 2006.

ACEC appreciates and supports FTA’s desire to enhance the quality of analysis and data that are used to justify New Start projects. However, the proposed requirement of a *certification* by the individual(s) responsible for these activities will lead to a host of unintended consequences that will delay the delivery of projects, promote conflicts among project teams, and substantially increase costs, all without providing a measurable improvement in the quality of the work.

ACEC is particularly concerned that a “certification” will mean that the consultant “guarantee” or “warranty” their projections and estimates. We have been told by companies that insure engineering firms that certifications are forms of warranty or guarantee, and both are excluded in all professional liability policies. Essentially, the certification requirement would effectively abolish insurance coverage for consultants working on these documents.

Consultants strive to use the best available data, methodologies and assumptions in predicting future ridership and cost estimates. However, consultants cannot be expected to turn into a guarantor of future results or outcomes. Many factors, including the inputs and data that are used in the analyses, economic trends and material costs, and how well the project sponsor operates their system, are simply out of the control of consultants. Particularly troubling is that the FTA expects the certification to be based on “professional standards and conventions” that do not exist. These and other concerns are further outlined below.

ACEC strongly urges the FTA to withdraw the certification requirement contained in Chapter 1.3 of the New Starts Guidance document. We believe that the FTA is overstepping the intent of Congress and the law since this requirement is not identified in SAFETEA LU or Title 49. Also, it is not appropriate for FTA to implement this requirement in a guidance document. At a minimum, the FTA should consider a formal rulemaking process to allow for an opportunity to further review and comment on this issue.

Furthermore, ACEC is concerned that FTA failed to provide a detailed explanation in the guidance document on how it will conduct the annual contractor Performance Assessment Report (CPAR), and more importantly, how the agency will use the information contained in the report. The consulting community should be provided an opportunity to examine and comment on FTA’s implementation plan.

ACEC again supports FTA’s goals of improving ridership and cost estimating practices, and we would appreciate the opportunity to meet with FTA to discuss the certification requirement and explore possible opportunities to collaborate on identifying best practices and procedures.

## BACKGROUND

In developing comments on the certification requirement contained in Chapter 1.3 of FTA's New Starts Guidance, ACEC staff reached out to members of the ACEC Transportation Committee, the ACEC Risk Management Committee, individual engineering firms, and companies that insure engineering firms. Below is a compilation of comments and concerns that were raised by the consulting community, grouped according to central themes.

### **The Certification is Based on Unknown Standards and Conventions:**

The guidance calls for certification by consultants according to "professional standards and conventions." There are concerns that the FTA is requiring individuals or entities to certify work based on standards and conventions that are not published or universally accepted practices. Questions have arisen as to whether these professional standards even exist for some or all of these activities.

There are many instances when FTA's or the project sponsor's guidance or direction on these documents is unclear or still in flux. How can a consultant certify a document based on a "moving target" of interpretations, standards or practices? How can any individual entity certify or be held legally liable to a standard, convention or practice that isn't documented or accepted within the transit industry?

From a practical perspective, for the regulation to have meaning there would need to be a well-established, documented consensus of what constitutes "accepted practices". A legitimate question may indeed be -- is FTA in a position to clearly outline what constitutes the professional practice which the engineering firms are supposed to meet? Will FTA publish this? And what does this say about innovation or improvements? The regulation may have the effect of discouraging new techniques or methods precisely because they don't at the time constitute the standard of professional practice.

Similarly, who decides whether something meets practice? FTA staff? And is it practice at the time of performance, or is it with the benefit of hindsight? This will never be a black/white issue but one with multiple shades of gray and legitimate differences of opinion.

### **The Requirement Does Not Account for the Consultants' Limited Control Over Data Inputs and the Quality of Information:**

Many aspects of the analysis and available data are out of the consultants' control or are imposed by the client. Ultimately, the individual performing the work is relying on inputs from public agencies and has no control over the accuracy or reliability of the information received and utilized for developing ridership and cost estimates.

The consultant is not responsible for the criteria for the study – that is the responsibility of the project sponsor. It may be true that for a “development” study, the sponsor might have optimistic criteria in order to turn in a study which is favorable to development of the project. The discipline for this, however, is in the relationship of the sponsors with FTA and the “quality assurance” associated with the design, not on the consultant who is delivering in accordance with the sponsor’s requirements.

With respect to virtually any forecasting exercise even the best methods require assumptions, use simplifying models that can have large variances in their forecasting capabilities, and involve use of data with varying degrees of quality, none of which may be in control of the engineer or even the owner.

### **The Requirement Sets an Unreasonable Standard of Care Threshold:**

According to Victor O. Schinnerer’s *Managing Risk Through Contract Language*, “The common law standard of care applied to the performance of professional design services has been described as a ‘duty to exercise the degree of learning and skill ordinarily possessed by a reputable design professional practicing in the same or similar locality and under similar circumstances’...It is this common law standard of care that is imposed on a design professional if a contract is silent as to the standard of care.”

The legal system recognizes that a design professional cannot guarantee a perfect result, and professional liability insurance only provides coverage for damage caused by the design professional’s breach of a standard of reasonable care.

Transportation studies rely on available data and a significant number of economic, geographic, and sociological assumptions. Good studies will state the assumptions used, and will usually run sensitivity cases to test the impact of variability in those assumptions. However, the word “certification” means an essential guarantee of the documents/work in question.

The FTA’s certification requirement elevates the standard of care threshold to an unacceptable level. According to the *Design Professionals Insurance Company (DPIC) Contract Guide*: “By definition, the words certify, warrant or guarantee mean to assure the total accuracy of something or to confirm absolute compliance with a standard. Legally, these words and their derivatives are virtually synonymous. Therefore, if you certify or warrant something, you are guaranteeing that something is unequivocally true or correct or perfect.”

All efficacy study reports, including transportation studies, are drafted to contain the customary disclaimers with respect to received information, the nature of the assumptions used, and the inability to predict future uncertainties. But consultants cannot be turned into a guarantor of results or outcome.

For example, consultants providing an estimate of capital costs normally include appropriate exculpatory language in their contract which states that the engineer has no control over cost or price of labor and materials; unknown or latent conditions of existing equipment or structures that may affect operation or maintenance costs; competitive bidding procedures and market conditions; time or quality of performance by third parties; quality, type, management, or direction of operating personnel; and other economic and operational factors that may materially affect the ultimate project cost or schedule.

The certification requirement drastically changes the accepted practice that the engineer makes no warranty that the owner's actual project costs, financial aspects, economic feasibility, or schedules will not vary from the consultant's opinions, analyses, projections, or estimates.

### **A Certification Requirement Raises Liability Concerns and the Possibility of No Insurance Coverage:**

The certification requirement introduces a higher standard of care for engineers and raises many concerns about assignment of risk among the parties involved in the project development process and who will be responsible for indemnifying a party that is asked to certify.

Along with surely increasing litigation, the most troubling impact from the certification requirement is the possibility that insurance coverage will be voided.

All professional liability policies exclude from coverage those obligations "assumed by contract" which have the effect of increasing the design professional's standard of care. Contract requirements that engineers warranty, guarantee, or certify are routinely stricken from contracts once ownership realizes that it would impair their recourse to the liability insurance assets. The certification requirement could have that same effect.

ACEC received the following comment from an insurance company (this company and another carrier represent 60 percent of all engineering companies):

“Certifications are forms of warranty or guarantee. Both warranties and guarantees are excluded in all professional liability policies. The design professional's insurance does not cover breach of contract or breach of warranty claims. The only things design professionals can certify without running afoul of their insurance coverage are known facts such as their name, the fact that they are licensed to practice engineering, etc. Any certification of information that involves professional opinion or discretion is a type of warranty or guarantee.

The FTA presumably inserted the certification requirement to hold consultants accountable for their projections, etc. However, by demanding a certification, the FTA is effectively abolishing all the insurance coverage for those consultants. So

if there is a true error by the consultant that damages the client, the client will not be able to recover!

If the ‘certification’ is intended to create additional liability for the consultant, it will be of a type not covered by the consultant’s professional liability insurance. No insurance proceeds are likely to be available to respond to claims of this nature.”

### **The Requirement Does Not Account for Shifting Responsibilities and Roles Through Project Development:**

Different individuals and different firms are usually engaged in different aspects and parts of demand forecasts and project estimates. Moreover, these responsibilities shift as the project advances through each stage of development from AA to PE to final design, and often even within a particular phase.

Often new firms are brought in as the project progresses. With the certification requirement in place, these firms may be required to review and re-certify previous work and documents. Also, the assignment of risk and indemnification becomes particularly complicated as new parties are added, and the threat of litigation will increase. Overall, this will add time and costs to the projects, and will instill an atmosphere of mistrust and hostility among project teams.

### **The FTA Enforcement and Performance Ramifications Are Unknown:**

The FTA has not indicated how it would enforce this new requirement. The implication of the regulation as drafted is that FTA is going to give a score-card report on “the consistency and accuracy of cost and ridership estimates made by *each contractor* to public transportation agencies developing new fixed guideway capital projects.” While a general report to the applicable Congressional committees may be justified, reporting on “each contractor” implies denunciation and a blacklist. This is particularly troublesome since the FTA standards, conventions and guidelines are not known.

If that is where this process leads, then the consultants and the project sponsors must be granted adequate due process to defend themselves, to explain the process and validity of their studies, and to justify any differences which may have occurred between the estimate or prediction of their study, and the eventual results when the project is developed.

### **The Requirement Inappropriately Shifts Responsibility from the Project Sponsor:**

The project sponsor is ultimately responsible for the project and policy decisions, and the FTA requirement would fundamentally change this long-established practice. The consultant is hired by the sponsoring agency, not by FTA. The consulting agreement will contain appropriate limitations on liability for the consultant reasonably related to the

compensation received. The consultant cannot assume financial exposure to third parties with whom the consultant is not in privity of contract.

## CONCLUSION

ACEC supports the FTA's goal of improving the development of alternatives, travel demand forecasts, capital and operating cost estimates, and the financial plans made in support of decision-making relative to a proposed project. However, for the reasons outlined above, we are extremely concerned that the FTA's certification requirement contained in Chapter 1.3 of the New Starts Guidance document will not result in a measurable improvement in the quality of the documents, and will instead introduce more delays, litigation and costs into the project development process.

There are laws, regulations, and FTA policies currently in place that, if properly followed, will ensure that the best, most qualified engineering firms are selected to perform these critical activities. It is not clear why this regulation is necessary if agencies are contracting for these services using a qualifications based approach, and states have a professional regulatory process in place for engineers. It would seem enough for an agency to require submittal of information on all projects a firm and/or individual may have conducted within a given time frame; and then for that agency to check to see how well (or poorly) their previous work is. Having a technical selection process that addresses questions of methodology, practices, etc., and then carrying that forward into a proper scope of work will fulfill the intent of the proposed certification requirement.

We strongly recommend that FTA withdraw the certification requirement. ACEC would appreciate the opportunity to meet with FTA on this issue and work together to identify best practices and more appropriate accountability measures.

Finally, ACEC is concerned that FTA did not include guidance on how it will implement the new Contractor Performance Assessment Report (CPAR). Other than a brief mention of the SAFETEA-LU statutory requirement to produce an annual report, there is no indication how the information contained in the CPAR will be compiled, verified or used. Of particular interest is whether the implementation of the CPAR will include an opportunity for consultants to review and comment on agency performance assessments prior to the report being transmitted to Congress and that the consultant's comments/clarifications be presented in the CPAR along with the agency's, if there are substantial disagreements. Given its significant implications for contractors, we urge that the industry be given an opportunity to review and comment on the specifics of FTA's proposed implementation of the CPAR.

American Council of Engineering Companies  
Docket No. FTA-2006-23636  
March 10, 2006  
Page 8

Thank you for your consideration of ACEC's comments on the FTA Guidance on New Starts Policies and Procedures.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "T.J. Schulz". The signature is written in a cursive style with a large, stylized initial "T" and "S".

T.J. Schulz  
Director of Transportation Programs  
American Council of Engineering Companies