

Work Zone Safety Contingency Funds: Q&A

The Infrastructure Investment and Jobs Act (IIJA) also known as the Bipartisan Infrastructure Law (BIL) created an opportunity for state transportation agencies to create work zone safety contingency funds to pay for additional safety needs on a project that were not anticipated when the project began. Contingency funds are not intended for contract extras or quantity overruns. The IIJA language is as follows:

PUBLIC LAW 117–58—NOV. 15, 2021
SEC. 11107. FEDERAL SHARE PAYABLE.

Section 120 of title 23, United States Code, is amended—

(1) in subsection (c)—

(A) in paragraph (1), in the first sentence, by inserting “vehicle-to-infrastructure communication equipment,” after “breakaway utility poles,”;

(B) in subparagraph (3)(B)—

- (i) in clause (v), by striking “or” at the end;
- (ii) by redesignating clause (vi) as clause (vii); and
- (iii) by inserting after clause (v) the following:
(vi) contractual provisions that provide safety contingency funds to incorporate safety enhancements to work zones prior to or during roadway construction activities;

Why are work zone safety contingency funds necessary? Change orders are typically used as a mechanism to address unforeseen conditions that arise during construction. Unfortunately, when unexpected traffic safety concerns are identified during the project, the time required for processing and approving a change order may impede efforts to address the safety problems quickly and efficiently. Safety contingency funds can be used to address those needs in a more expedited manner.

What does the IIJA require to create a fund? The language in the IIJA is quite open and gives the states broad discretion in creating and operating such a fund.

This new program is part of the “Innovative Project Delivery” initiative. There are three federal categories states can access to create their safety contingency funds:

- National Highway Performance Program (www.fhwa.dot.gov/specialfunding/nhpp/)
- Surface Transportation Block Grant Program (www.fhwa.dot.gov/specialfunding/stp/)
- Metropolitan Planning (www.fhwa.dot.gov/bipartisan-infrastructure-law/metro_planning.cfm)

These programs may allow up to 100% federal share, but states should note there are limitations. Typical Federal Share is 80/20 or 90/10; see—
<https://www.fhwa.dot.gov/fastact/factsheets/federalshare.cfm> and
<https://www.law.cornell.edu/uscode/text/23/120>

Is there “extra” money for work zone safety contingency funds, or does it come out of the current federal allocations? The program is an allowed use of allocated federal funds, so there are no “additional” funds for work zone safety contingencies. However, if funds set aside for a contingency are not used on a project, they can be reallocated for another use.

How does an agency fund a safety contingency? While the IIJA work zone safety contingency is a new program, several states including Texas and Michigan have operated similar programs previously.

In the case of the Texas Department of Transportation (TXDOT), their Construction Division instructs project engineers to incorporate a “Safety Allowance” force account line item (recommending a set aside of approximately 2–5 percent of the total project estimate). Each district has the authority to decide the amount to include for each project. The force account item is not mandatory, but if not used, the district must be able to provide a reason for not including it in the estimate.

Use of the TXDOT contingency is intended for work zone enhancements, to improve the effectiveness of the traffic control plan, which could not be foreseen in the project planning and design stage. These enhancements must be mutually agreed upon by the engineer and the contractor.

The Michigan DOT pilot program (MDOT) is much newer than the TXDOT initiative and uses a similar framework. The MDOT “Safety Contingency” pay item could be used for changes to a temporary traffic control plan for the addition of innovative traffic devices or for additional traffic control items. Safety contingency pay items are allowed only when both MDOT and the contractor agree there is a need to increase safety within the work zone for the motorists and/or workers, which would be documented and approved. Safety contingency pay items are not intended to be used to correct simple quantity deficiencies in traffic control items but to encourage innovative thinking to increase safety. Typically, upgraded personal protective equipment would not be considered for use of contingency funding.

What are some examples of how it might be used?

While the Texas and Michigan programs were developed prior to the IIJA authorization, their examples of allowed use are instructive and include but are not limited to:

- Shifting traffic onto the shoulder and away from workers, including pavement markings, filling rumble strips, temporary pavement, etc.
- Adding innovative traffic control such as intrusion detection systems, mobile barriers, remote-operated safety attendants, speed safety cameras, speed trailers, portable rumble strips, TMAs, etc.
- Detouring traffic (ramp or mainline).
- Different closure layouts.
- Repairing potholes in the travel lanes created by increased heavy construction traffic hauling materials to and from the workspace.
- Deploying additional portable changeable message signs and TMAs to provide advance warning about queues.
- Hiring off-duty police to assist with traffic control where there are high volumes of construction traffic.
- Implementing work zone intelligent transportation system (ITS) technology to warn drivers when construction vehicles are exiting the workspace and merging into the traffic stream.

Next Steps

By developing a safety contingency line item as part of the project estimate phase, state transportation agencies can address and mitigate numerous challenges during active construction operations, including protecting the health and lives of workers and roadway users, creating a streamlined process for resolving unanticipated safety challenges, and allowing the agency and its contractors to work cooperatively to change project plans when needed. While unforeseen safety needs often arise during the construction of a project, this new program creates an opportunity to make project enhancements without the need for expensive and time-intensive change orders. While prices would be negotiated up front, state DOTs are still required to perform and adequately document a cost analysis of each negotiated contract change or negotiated work order, so transparency and cooperation between the DOT and contractor will be foundational to a successful program.

FHWA district offices will play a key role in advising states about how such contingencies can be used. FHWA has signaled an intention to provide more detailed guidance on this program in the future.

It is anticipated that by implementing a work zone safety contingency fund program, states will see significant positive impacts in their ability to address infrastructure and roadside safety concerns in and around its work zones.

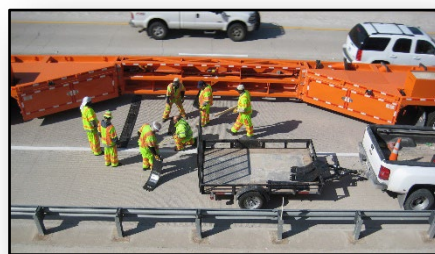


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