

## § 710.705

(b) *Concession agreement* means an agreement between a highway agency and a concessionaire under which the concessionaire is given the right to operate and collect revenues or fees for the use of a federally funded highway in return for compensation to be paid to the highway agency. A concession agreement may include, but not be limited to, obligations concerning the development, design, construction, maintenance, operation, level of service, and/or capital improvements to a facility over the term of the agreement. Concession agreement shall not include agreements between government entities, even when compensation is paid, where the primary purpose of the transaction is not commercial in nature but for the purpose of determining governmental ownership, control, jurisdiction, or responsibilities with respect to the operation of a federally funded highway. The highway agency's determination as to whether an agreement between government entities constitutes a concession agreement shall be controlling.

(c) *Concessionaire* means any private or public entity that enters into a concession agreement with a highway agency.

(d) *Fair market value* means the price at which a highway agency and concessionaire are ready and willing to enter into a concession agreement for a federally funded highway on, or as if in, the open market for a reasonable period of time and in an arm's length transaction to any willing, knowledgeable, and able buyer. For purposes of this subpart, a concession agreement based on best value shall be deemed fair market value.

(e) *Federally funded highway* means any highway (including highways, bridges, and tunnels) acquired with Federal assistance made available from the Highway Trust Fund (other than the Mass Transit Account). A highway shall be deemed to be acquired with Federal assistance if Federal assistance participated in either the purchase of any real property, or in any capital expenditures in any fixtures located on real property, within the right-of-way, including the highway and any structures located upon the property.

## 23 CFR Ch. I (4–1–24 Edition)

(f) *Highway agency* in this subpart means any SDOT or other public authority with jurisdiction over a federally funded highway.

[73 FR 77503, Dec. 19, 2008, as amended at 81 FR 57741, Aug. 23, 2016]

### § 710.705 Applicability.

This subpart applies to all concession agreements involving federally funded highways that are executed after January 18, 2009.

### § 710.707 Fair market value.

A highway agency shall receive fair market value for any concession agreement involving a federally funded highway.

### § 710.709 Determination of fair market value.

(a) Fair market value may be determined either on a best value basis, highest net present value of the payments to be received over the life of the agreement, or highest bid received, as may be specified by the highway agency in the request for proposals or other relevant solicitation. If best value is used, the highway agency should identify, in the relevant solicitation, the criteria to be used as well as the weight afforded to the criteria.

(b) In order to be considered fair market value, the terms of the concession agreement must be both legally binding and enforceable.

(c) Any concession agreement awarded pursuant to a competitive process with more than one bidder shall be deemed to be fair market value. Any concession agreement awarded pursuant to a competitive process with only one bidder shall be presumed to be fair market value. Such presumption may be overcome only if the highway agency determines the proposal to not be fair market value based on the highway agency's estimates. Nothing in this subpart shall be construed to require a highway agency to accept any proposal, even if the proposal is deemed fair market value. For purposes of this subsection, a competitive process shall afford all interested proposers an equal opportunity to submit a proposal for the concession agreement and shall comply with applicable State and local law.