
Section 5.10

**ACQUISITION OF RIGHTS OF WAY FROM FEDERAL AND
TERRITORIAL GOVERNMENTAL AGENCIES**

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Section 5.10

ACQUISITION OF RIGHTS OF WAY FROM FEDERAL AND TERRITORIAL GOVERNMENTAL AGENCIES

PURPOSE

This section establishes the process the Guam Department of Public Works (Department) must follow when acquiring right of way from Federal and Territorial Government agencies.

AUTHORITY

23 CFR, Part 710.509
23 United States Code 107(d)
23 United States Code 317
5 GCA, Chapter 20, Article 5, Surplus Property (Federal)

SCOPE

The principal users of this document are Department of Public Works Office of Right of Way employees and those persons contracted by the Department to perform parcel acquisition functions and the Office of the Attorney General.

REFERENCES

23 United States Code 107 (d)
23 United States Code 317
Historical Preservation Act, 16 United States Code 470 (f)
National Environmental Policy Act of 1969, 42 United States Code 4332
Preservation of Parklands, 49 United States Code 1653 (f)
Right of Way Manual, Section 4.1, Appraisal and Appraisal Review
Right of Way Manual, Section 7.1, Relocation Assistance
Uniform Relocation Assistance and Real Property Acquisition Policies Act
5 GCA, Chapter 60, Land Management
5 GCA, Chapter 65, Land Management Act
21 GCA, Chapter 17, Relocation Assistance Act
21 GCA, Chapter 75, Chamorro Land Trust Commission

FORMS

None specific to this section.

DEFINITIONS

Federal Lands: All lands controlled by the Federal Government or any of its agencies, such as the U.S. Military.

Functional Replacement: The replacement of real property, acquired for a transportation facility or purpose, with lands or facilities, or both, which will provide equivalent utility. The replacement may be accomplished by

construction of a new facility or renovation of an existing facility, whichever is cost effective, feasible and agreed to by the parties to the functional replacement agreement.

Territorial Proprietary Property: Property owned by a Territory of Guam governmental entity for a specific purpose other than a transportation facility, such as a school, office or park.

Publicly Owned Lands: Real property owned by any Territory of Guam or Federal governmental entity, owning agency, except for public utilities. Governmental entities may include any Territory of Guam or Federal agency or any other political subdivision.

Reasonable Prevailing Standards: Enforceable rule or criterion established by authority or by custom; regularly and widely used.

Submerged Lands: Territory of Guam lands lying below the ordinary high water line of fresh waters and below the mean high water line of salt waters and any other lands defined as submerged lands.

5.10.1 Acquisition From Territorial Governmental Entities

5.10.1.1 The Department shall obtain a Transfer of Property Document, signed and authorized by the Governor of Guam from any Territorial governmental entity holding title to real property dedicated or acquired for public use as right of way on all roads designated in the Guam Highway System. If the governmental agency is autonomous and governed by a board a board resolution authorizing the transfer such lands is required.

The payment of compensation is only for the taking of private property for a public purpose. Publicly owned property shall be acquired without monetary payment when the intended use is consistent with the use for which it was dedicated or acquired. If title will not be transferred to the Department, a written permission to use the right of way from the Territorial governmental entity holding title to said right of way must be received by the Department.

5.10.1.2 When negotiating to acquire a parcel of property held by a Territorial governmental entity in the nature of a proprietary property, the assigned negotiator shall follow all procedures applicable to the acquisition of any privately owned property. The agent shall specifically request a donation of the parcel at the initiation of negotiations.

5.10.1.3 If Federal funding will be involved in any phase of the project, whether for design, right of way, or construction, all property to be conveyed to the Department must have been acquired by the Territorial governmental entity according to Federal regulations. The Department shall require a written statement from the Territorial governmental agency confirming that all applicable Federal procedures were followed before accepting the conveyance of the property from the Territorial governmental entity.

5.10.2 Acquisition of Right of Way from Chamorro Land Trust Commission

5.10.2.1 When Chamorro Land Trust owned property is to be used for transportation purposes the provisions of **21 GCA § 75107 (c)(1)** must be considered. The Board of Trustees of the Chamorro Land Trust Commission (Commission) administers and controls all Territory of Guam Lands with the exception of certain lands held and controlled by the Department of Agriculture and Department of Administration.

NOTE: Lands held and controlled by the Department of Agriculture shall be dealt with on a case by case basis through the Department of Agriculture and Department of Administration.

5.10.2.2 After the determination is made that Chamorro Land Trust lands are needed for transportation purposes, the Department shall submit an application to the Commission. The following information must be included in the submittal:

- (A) The legal description for each parcel;
- (B) A marked right of way map for each parcel with ties to appropriate subdivision and section corners;
- (C) A reproducible legal size (8 1/2" X 14") drawing or map for each parcel. It must be totally legible as it will be attached to the legal description and recorded;
- (D) The name of any using agency, such as: Department of Education, University, etc;
- (E) A statement of need for the parcel or parcels.

5.10.2.3 This application requests conveyance of the necessary interests to the Department.

5.10.2.4 When this application is submitted the Department shall request written concurrence from any using agency or agencies, or seek a release or acquire the interest of the using agency.

5.10.2.5 When the Commission has reviewed and accepted the Department's application and has furnished a letter of approval, the Department of Land Management (DLM) will execute the necessary right of way document conveying adequate quality and quantity of title to support the transportation project.

5.10.2.6 When the Department identifies a valid road reservation within the area of the proposed construction, the Director Department of Public Works (DDPW) shall request transfer of the needed portion of the reservation to the Department. This procedure outlines the process for requesting the transfer. The following steps must be taken to insure the validity of the reservation:

- (A) The deed containing the reservation must be thoroughly examined to determine the extent and applicability of the road reservation.
- (B) Determination must be made that a designated road, lying within sufficient proximity of the parcel as set forth in the deed, existed on the date of the deed.
- (C) Determination must also be made on the boundaries of any other Territorial agency that might affect the reservation.
- (D) A thorough examination of the Territorial public records must be made for any release or partial release of the road reservation. While this search is within the scope of a normal title search, it is recommended that each reservation be verified by the Department before the right of way maps are transmitted to the Department of Land Management. The Department of Public Works Right of Way Supervisor (DPWRS) should attempt to verify with each property owner affected by a road reservation that the road reservation still exists and that a reservation release has not been granted.
- (E) All Chamorro Land trust lands on a project should be addressed together in a single submittal.
- (F) The following information is to be sent by the DDPW:
 - (1) A memorandum requesting the transfer of the reservation to the Department. The

memo should also set forth the necessity for the transfer, such as to widen the existing facility, to use for new construction, etc.;

- (2) A legal description of the portions of the roadway reservation to be transferred for each affected deed;
 - (3) Recordation number, a DLM Official Records book and page number is not acceptable; and
 - (4) A right of way map or drawing clearly depicting the portion of the roadway reservation being transferred.
- (G) An appraisal will not be prepared regarding the land value for right of way located within the area encumbered unless fee title is being acquired. An appraisal will not be prepared for the value of any improvements located in the area of the reservation unless the improvements are not encroachments as set forth in **Section 5.10.2.6(H)**.
- (H) If any improvements have been made to the property encumbered by the reservation after the original sale, all such improvements shall be considered to be encroachments on the Territory of Guam's reservation. The encroaching improvements must be removed by their owner and no compensation for the encroaching improvements will be paid. If the encroachments are not removed by their owner, the Department shall remove the encroachments. However, if the improvements were placed upon the property before the original sale, compensation may be appropriate through the appraisal process.
- (I) There will be no negotiations conducted for improvements that are encroachments on the reservation area. However, an explanation of the Department's exercise of the reservation may be necessary.
- (J) Negotiations shall be conducted in accordance with applicable right of way acquisition procedures, with the owner(s) of improvements that are not encroachments on the reservation area. If negotiations are successful and an agreement is reached for the acquisition of improvements only, the grantor shall deliver a bill of sale to the Department to conclude the transaction. A deed is not required.
- (K) In the case of improvements on the reservation that are not encroachments, if acquisition negotiations fail, procedures for acquisition by eminent domain shall be followed.
- (L) Relocation Assistance shall be provided as applicable in accordance with the **Right of Way Manual, Section 7.1, Relocation Assistance Program**, regardless of the encroachment status of the improvements.

5.10.2.7 An easement must be obtained before construction of any structure on such parcels.

In obtaining an easement to the required land, submerged lands can be conveyed only to the owners of the abutting upland. Therefore, the Department must acquire either fee title or a permanent easement to the abutting upland.

The following information shall be included in the application submitted to the Commission:

- (A) Legal description for each parcel. Ties to appropriate subdivisions and section corners must be shown;

- (B) A reproducible legal size (8 1/2" X 14") drawing or map of each parcel. It must be totally legible as it is attached to prepared description and recorded after execution by the Trustees;
- (C) A statement of when title to the upland parcels will be acquired;
- (D) A statement of the need for the parcel or parcels; and
- (E) Copies of permits that are required from other agencies such as U.S. Coast Guard, and U.S. Corps of Engineers.

5.10.2.8 The following steps must be taken when acquiring a parcel that is within the Recreation and Conservation Area:

- (A) The Department shall prepare and send a memorandum to Director of Administration and Director of Parks and Recreation providing the location and design of the transportation facility that requires crossing the recreation and conservation area;
- (B) The memorandum shall clearly state that the transportation use is necessary to serve a public need;
- (C) If the land is owned by the Territory of Guam, the Department shall pay fair market value for the land based upon an appraisal; and
- (D) If the lands are privately owned and are within the right of way needed for the transportation facility, acquisition shall occur following the procedures applicable to any other privately owned property.

5.10.3 Federal Land Transfers

5.10.3.1 The Department shall file an application for lands or interests in lands needed for highway purposes and owned by the United States. The application shall be filed with the Federal Highway Administration (FHWA) pursuant to **23 United States Code (U.S.C.) 107(d)** and **23 U.S.C.317**. An exception to this directive will be made for lands or interests that are managed or controlled by the Army, Air Force, Navy or Veterans Administration. In those cases the application shall be made as follows:

- (A) Army or Air Force: The application should be submitted directly to the Installation Commander and the appropriate District Engineer, Corps of Engineers, Department of the Army.
- (B) Navy: The application should be submitted directly to the Public Works Officer of the Naval District involved.
- (C) Veterans Administration: The application should be submitted directly to the Director, Veterans Administration, Washington, D.C.

5.10.3.2 All requests for Federal Land Transfers shall contain the following information:

- (A) The purpose for which the lands are to be used;
- (B) The estate or interest in the land required by Guam statute;

- (C) The Federal aid project number;
- (D) The name of the Federal agency exercising jurisdiction over the land and identity of the installation or activity in possession of the land;
- (E) The name and phone number of the contact person at the Federal agency exercising jurisdiction;
- (F) A commitment to construct the highway on or to remove materials from the lands to be transferred within a period of not more than ten (10) years following the transfer of the lands to the Territory of Guam;
- (G) One copy of the drawing or map of the lands to be acquired. The map must correspond with all information in the legal description. Each course and distance in the legal description must appear on the map, or be readily derived from it;
- (H) One copy of a legal description of the land needed. A metes and bounds description is preferred by FHWA and should be used when possible;
- (I) A statement regarding compliance with the **National Environmental Policy Act of 1969, 42 U.S.C. 4332, et seq.**, and the **Historical Preservation Act, 16 U.S.C. 470(f)** with provisions for **Preservation of Parklands, 49 U.S.C. 1653(f)**, if applicable; and
- (J) One copy of reproducible legal size (8 1/2 " X 14") drawing or map.

5.10.3.3 The following steps are necessary for each transfer:

- (A) After FHWA concurs in the application for the transfer, the Department prepares the deed of conveyance. Before this is done, a list of special conditions for the transfer should be obtained from the agency with jurisdiction. These special conditions are incorporated in the deed of conveyance.
- (B) After the deed for the conveyance has been prepared, it along with a copy of the Department's approved right of way map is transmitted to FHWA. FHWA then reviews and concurs in the deed.
- (C) After FHWA concurs in the deed, the Department transmits the deed to the agency with jurisdiction for concurrence. A letter of concurrence is secured from the agency.
- (D) The letter of concurrence and two originals of the approved deed with maps are then transmitted to FHWA. FHWA executes the deeds and transmits them to the Department.
- (E) One of the deeds is recorded by the Department with the DLM. The other executed deed is transmitted to the agency with jurisdiction.
- (F) A copy of the recorded deed and map with the recording evidence is then transmitted to FHWA.

5.10.4 Functional Replacement of Real Property in Public Ownership

5.10.4.1 When lands, buildings, or other improvements are needed for transportation purposes, but are held

by a governmental entity and utilized for public purposes other than transportation, the Department may compensate the entity for such properties by providing functionally equivalent replacement facilities. The providing of replacement facilities may only be undertaken with the agreement of the governmental entity affected.

5.10.4.2 Costs of increases in capacity and other betterments are not eligible for reimbursement except those necessary to replace utility; those required by existing codes, laws, and zoning regulations; and those related to reasonable prevailing standards for the type of facility being replaced.

5.10.4.3 When functional replacement is considered, the following conditions must be met:

- (A) The property to be replaced must be publicly owned;
- (B) The use of functional replacement must be in the public's interest. This is the consideration that the public interest is well served by the functional replacement and that the proposed solution is cost effective. There must be a clear showing that the public function to be replaced is essential to the affected community;
- (C) On projects pursuing Federal participation in right of way, FHWA must agree that functional replacement is in the public's interest and must concur with the Department's assessment of its use;
- (D) On projects pursuing Federal participation in right of way, FHWA must grant authorization to proceed with functional replacement prior to incurring any functional replacement costs;
- (E) The functional replacement must actually take place, the costs of replacement must actually be incurred; and
- (F) Replacement sites and construction must be in compliance with existing codes, laws, and zoning regulations for the area in which the facility is located.

5.10.4.4 All publicly owned real property must be identified during the project development and environmental phase of a project. When publicly owned lands must be acquired for a project, notification shall be submitted to the DPWRS at the earliest practicable time. The DPWRS will make the determination of whether the acquisition of the property using functional replacement is feasible.

5.10.4.5 During the early stages of project development, when functional replacement is being considered, the following must occur:

- (A) Representatives from the Department must meet with representatives of the owning agency to discuss the effect of a possible acquisition and potential application of functional replacement.

5.10.4.6 At the earliest practicable time, the Department will have the existing facility's real property appraised and shall establish an amount it believes to be just compensation. The parcel and the appraisal shall be reviewed in accordance with the requirements of the ***Right of Way Manual, Section 4.1, Appraisal and Appraisal Review***.

5.10.4.7 After just compensation for the parcel is established, the DPWRS shall advise the owning agency, in writing, of the amount. The owning agency shall have the option of accepting the just compensation established by the appraisal process or accepting functional replacement.

5.10.4.8 The owning agency may waive its right to have an estimate of compensation established by the appraisal process if it prefers functional replacement.

5.10.4.9 When an owning agency selects functional replacement of an existing facility, a written request for functional replacement must be provided to the Department. The Department shall be responsible for obtaining the written request of the functional replacement of the existing facility from the owning agency. This request must fully explain why functional replacement is in the public's interest.

5.10.4.10 In all cases when functional replacement is utilized the Department shall be responsible for review of the plans, specifications and estimates to demonstrate that betterments are not included.

5.10.4.11 On projects pursuing Federal participation in right of way, if functional replacement is selected, the DPWRS shall recommend submittal, by DDPW, of a specific request to FHWA for concurrence in the use of functional replacement. The request must include the following:

- (A) The cost estimate data for the replacement;
- (B) Any agreements reached at meetings between the Department and the owning agency;
- (C) An explanation of the basis for the request; and
- (D) A statement that any replacement property will be acquired in accordance with the provisions of the ***Uniform Relocation Assistance and Real Property Acquisition Policies Act*** and applicable FHWA regulations.

5.10.4.12 On projects with Federal participation in right of way, the use of functional replacement requires the following reviews and approvals:

- (A) Prior to entering into the functional replacement agreement, the proposed agreement with applicable supporting documentation, which has been reviewed by the Department to demonstrate no betterment is included, must be submitted by the DDPW, to FHWA for review and approval of the agreement. This review and approval shall be solely for the purpose of ensuring that betterments are not included in the proposed facility. The following must be included in the package as applicable:
 - (1) The proposed agreement;
 - (2) Typical construction plans and specifications for the facility;
 - (3) Any documentation necessary to support the estimated costs of replacement as reflected in the agreement.
- (B) After the functional replacement agreement is properly approved and executed by all parties and prior to commencement of construction of the replacement facility, the construction plans, estimates and any modifications thereto must be submitted by the DDPW to FHWA for approval. The DPWRS must have reviewed and approved all of this documentation prior to submission to the DDPW. This review and approval shall be solely for the purpose of ensuring that betterments do not exist. This review is not for the purpose of approving the quality or adequacy of the design or structural or material components. The review shall, among other applicable items, compare the size of the building, including the height and square footage, and the size of the site of the existing facility with the same components of the replacement facility. Approval shall be based upon the comparability of the facilities.

- (C) This procedure requires a review of the agency's bidding and letting process. Documentation of the owning agency's bidding and letting process must be submitted by the DDPW to FHWA for approval. When the process has been reviewed and approved by FHWA, the owning agency shall utilize its procedures in the bidding and letting of the construction contract. The owning agency may provide a summary, on its letterhead, of its process for review or it may submit copies of the applicable requirements. After review and approval by the Department, this documentation must be transmitted by the DDPW to FHWA.

NOTE: In order to shorten the total time necessary for the functional replacement process, it is recommended that the documentation for the owning agency's bidding and letting process be submitted for review and approval as early as possible after the determination has been made to utilize functional replacement and prior to execution of the Functional Replacement Agreement.

5.10.4.13 Prior to the Department's and, on projects with Federal participation in right of way, FHWA's concurrence in the award for actual construction, an agreement shall be entered into by the Department and the owning agency setting forth the rights, obligations and duties of each party with regard to the facility being acquired, the acquisition of the replacement site, and the construction of the replacement facility. The executed agreement shall include, but not be limited to, the following:

- (A) An explanation of how the cost of the new facility will be shared between the parties;
- (B) The point at which the title to the parcel of the existing facility will transfer to the Department;
- (C) An explanation of how the functional replacement on a project will be funded and at what point the payment(s) will be made;
- (D) Estimated costs to replace the facility and site, if applicable;
- (E) A statement that the owning agency shall follow its bidding and construction processes if the procedures are acceptable to the Department and, on projects with Federal participation in right of way, acceptable to FHWA; and
- (F) A statement of the Department's requirement for periodic inspections during the construction of the facility.

5.10.4.14 The following Departmental approvals shall be required for Functional Replacement Agreements:

- (A) The DPWRS, or designee having settlement authority included as a responsibility in their career service system position description, is authorized to approve functional replacement agreements that are less than \$500,000.
- (B) For functional replacement agreements from \$500,000 to \$1,000,000, approval by the DDPW is required in addition to the DPWRS.
- (C) For functional replacement agreements exceeding \$1,000,000, approval by the Attorney Generals Office is required in addition to the DDPW.

5.10.4.15 The Department is responsible during construction of the replacement facility for periodic on site inspections to note changes from the approved plans and to demonstrate that betterments that were not approved as items in the functional replacement agreement are not included.

5.10.4.16 If, during construction, change orders are needed, the Department shall be responsible for review of the change(s) to demonstrate that betterments are not included. Additionally, on projects with Federal

participation in right of way, all change orders must be transmitted to the DPWRS, for submission to FHWA for review and approval.

5.10.4.17 Prior to making the final payment to the owning agency, the Department shall obtain a statement signed by an appropriate official of the owning agency certifying that the cost of the replacement facility has actually been incurred in accordance with the provisions of the executed agreement. The statement must certify that a final inspection of the facility was made by a representative of the Department and a representative of the owning agency. The statement shall also certify that the Department is released from any further responsibility.

HISTORY

Original Issue Date; 2009