

ISSUE BRIEF: Monitoring Report for Policy 2.11: Construction Monitoring Period: May 2020 - August 2021

Due to the Board in October 2021

**Service Committee Meeting Review Date: October 6, 2021
Board of Directors Meeting Review Date: October 21, 2021**

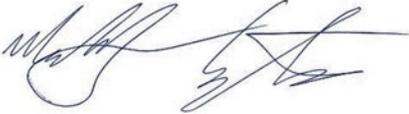
INFORMATION TYPE
Monitoring
RECOMMENDED ACTION(S)
Consider accepting monitoring report with determination that compliance “cannot be determined” due to absence of evidence.
BACKGROUND
This construction policy was created in November 2020. This is the first monitoring report for this policy and the CEO’s interpretations have not been seen by the Board previously.
ISSUE SUMMARY
<p>TheRide’s Board of Directors establish policies that define what methods are unacceptable to use to achieve expected results, called Executive Limitations. This monitoring report provides the CEO’s interpretations of those policies, evidence of achievement, and an assertion on compliance with the Board’s written goals. As with other monitoring reports, the Board decides whether the interpretations are reasonable, and the evidence is verifiable.</p> <p>I certify that the information is true and complete. Given the lack of any meaningful construction projects, Rose Mercier has advised that the Board may want to consider a conclusion such as:</p> <p><i>The Board has assessed the CEO’s interpretations of the Board’s policy 2.11 as reasonable and agrees that that there has been virtually no activity and therefore no data (or evidence) of compliance or non-compliance and assessing compliance is not necessary at this time.</i></p> <p>Instead, the Board may want to focus on deciding whether these new interpretations are reasonable.</p> <div style="display: flex; justify-content: space-between; margin-top: 20px;"> <div style="text-align: center;"> <p>CEO’s Signature</p>  <p>_____</p> </div> <div style="text-align: center;"> <p>Date</p> <p>September 29, 2021</p> <p>_____</p> </div> </div>
ATTACHMENTS
1. Monitoring report for Policy 2.11: Construction

Table of Contents

POLICIES:	Page #	Compliance
<p>2.11 CONSTRUCTION</p> <p>The CEO shall not allow construction of a new building or facility or major renovation that is inconsistent with industry standards and grantor expectations, environmentally irresponsible, risks financial jeopardy, or is not aligned with achievement of the Board’s Ends.</p> <p>Further, without limiting the scope of the above by the following list, the CEO shall not:</p>	4	
<p>2.11.1 Proceed with grant applications, detailed architecture or engineering, procurement of construction services, or real-estate transactions for a construction or major renovation project.</p>	5	
<p>2.11.1.1 Request authorization to proceed with a project prior to providing information that demonstrates that such construction is fiscally responsible and aligned with achievement of the board’s Ends, and without providing data that supports an informed decision by the board – including but not limited to clearly articulated information about the following:</p> <ul style="list-style-type: none"> A. Definition of the project’s purpose and goals. B. Definition of the project’s key elements and rationale for their inclusion. C. Definition of the project’s strategic context, and contribution to advancing the board’s Ends or other policies. D. Explanation of the project’s priority relative to other capital needs. E. Estimates of the capital cost, ongoing operating and maintenance costs, and expected useful life associated with the project. F. Explanation of anticipated funding sources and financing mechanisms. G. Definition of risks associated with the project. H. Project timeline. I. Public involvement process. 	7	
<p>2.11.1.2 Request authorization to proceed with a project without incorporating it into an annual budget or a budget amendment.</p>	8	
<p>2.11.2 Expend funds on a construction project prior to having confirmed funding for that stage.</p>	9	

2.11.3 Proceed with construction that does not minimize inconvenience to the travelling public and those businesses and residences directly impacted to the extent that is reasonably practicable.	9	
2.11.3.1 Proceed without providing timely and accurate information to the travelling public, residents and business owners.	10	
2.11.3.2 Proceed with construction project or changes to the project that could be foreseen to create significant resistance from the traveling public and external stakeholders because they had not had the opportunity for consultation.	10	
2.11.4 Allow the board to be unaware of political, residents' and businesses' issues related to the proposed construction.	11	
2.11.5 Allow the board to be without regular reports on the project's implementation, including but not limited to: A. Changes to the anticipated cost of the project. B. Changes to the elements/scope of the project. C. Changes to scheduled completion, delays or impacts to timelines. D. Timely notice of possible cost overruns and planned action to reduce impact.	11	

 Fully Compliant
  Partially Compliant
  Non-Compliant
  Cannot be determined

Preliminary CEO Interpretations and Evidence

2.11 CONSTRUCTION

The CEO shall not allow construction of a new building or facility or major renovation that is inconsistent with industry standards and grantor expectations, environmentally irresponsible, risks financial jeopardy, or is not aligned with achievement of the Board’s Ends.

Further, without limiting the scope of the above by the following list, the CEO shall not:

Degree of Compliance: N/A

Interpretation

The Board has interpreted “financial risk” and “alignment with Ends achievement” in the lower-level policies below. Evidence of compliance with those policies, along with the following demonstrates compliance with this policy.

In the context of this policy, I interpret key terms in the following way:

1. A new “**building**” is an edifice or structure with walls and a roof which remains in one place and is intended to be permanent. This does not include structures such as bus shelters or temporary storage structures.
2. A new “**facility**” is a *significant* piece of infrastructure that remains in one place (e.g., a bus terminal platform, a park n ride lot, a storage yard, a rail line, roads, power lines, sewers, etc.) and is intended to be permanent. A building can be a part of a larger facility. Due to their ubiquity and small scale, bus stops, pads, shelters and benches, and adjoining sidewalks are excluded.
3. A “**major renovation**” is a significant, permanent change to an existing building or facility that 1) changes the exterior dimensions, or 2) fundamentally changes the function of part or all of a building or facility. This does not include maintenance activities, repairs or routine upgrades, replacement of worn-out elements, or cosmetic updates, etc. (e.g., roof replacement, remodeling offices). Such relatively minor changes are addressed through annual facility maintenance budgets and are not reported on under this policy. Any individual maintenance project costing more than \$250,000 will be identified individually in an annual budget proposal to increase transparency.

These interpretations are reasonable because they categorize all major types of construction that a transit agency might pursue.

Compliance will be demonstrated when close-out letters, Triennial Reviews or other official correspondence from the Federal Transit Administration (FTA) verifies that their expectations with respect to **industry standards, environmentally responsible** construction, and **grantor expectations** have been met. This is reasonable because 1) the FTA will mostly likely be the primary grantor for most major construction and capital projects, 2) the FTA’s expectations will be laws and regulations that are either legal requirements or conditions of receiving federal funding and will have to be met anyway, 3) the FTA promulgates a great deal of information about standards that can be understood in advance and followed, and 4) the FTA will provide outside verification as to whether their expectations were met.

Evidence

There were no construction projects during this monitoring period.

2.11.1 Proceed with grant applications, detailed architecture or engineering, procurement of construction services, or real-estate transactions for a construction or major renovation project.

Degree of Compliance: Not compliant

Interpretation

I interpret this policy to mean that Board approval must be secured *before* the CEO can proceed with work related to the *implementation* of a construction project. Compliance with this policy will be demonstrated when the minutes from the meeting date at which formal Board approval (annual budget or amendment) for implementation activities (as defined below) was granted before contracts are signed initiating implementation activities. This interpretation is reasonable because the Board has retained the authority to for the decision of whether to proceed with certain major commitments, and the board’s decisions are recorded in its minutes

Further, I interpret this policy to allow exploratory planning to be conducted at the CEO’s discretion. Broadly, construction is a Means. By requiring board approval to proceed, the Board has introduced a control mechanism whereby it decides if this specific means (construction) can be used in the pursuit of Ends achievement, possibly compromising the clarity of delegation to and accountability of the CEO (policy 4.0) or slowing the CEO’s pursuit of the Ends. It is therefore necessary to provide additional clarity via this interpretation.

While defining “construction activities” may be self-evident (i.e., closures, site prep, demolition, earthworks, excavation, utility changes, paving, construction, etc.), there is a continuum of *planning* activities that *could* lead to a construction project, and it can sometimes be unclear where decisions move from CEO authority to Board authority. To highlight this distinction, we can describe planning work as *exploratory* or *implementation* work:

- **Exploratory** work allows the CEO to evaluate and refine early ideas to the degree necessary to inform staff’s decisions or conclusions. Such work can include staff investigations, conceptual/preliminary planning, legal investigations, consultant studies, site evaluation, regulatory reviews, real estate queries, soil testing, and some precursor engineering work (although all policies and budget constraints still apply). This work is the purview of the CEO for two main reasons:
 - The Board has delegated means to the CEO (4.3.3) who needs to have the latitude to explore ideas independently. The CEO needs to be free to abandon or advance ideas, or the delegation to and accountability of the CEO is compromised. Requiring board approval at this stage also slows the organization’s pursuit of the Ends.
 - Much of the evidence required by the Board in policy 2.12.1.1 would be developed at this exploratory stage such as general scoping of a project, preliminary cost estimates, land requirements, building/facility scaling, procurement plans, and requirements for further planning work. Such work can also be considered research and development or business case development.

This work happens *prior* to a request for Board approval of a project and therefore the CEO cannot commit the organization to certain courses of action (i.e., land purchases, budget approvals, etc.). Board approval is *not* guaranteed. This work can be undertaken at the discretion of the CEO, however, the CEO must take care that exploratory work does not shape outside expectations to such a degree that the Board feels it has no choice but to continue a project.

- **Implementation** is work that can only be conducted *after* receiving Board approval, and includes efforts made to further refine the scope of a specific construction project in preparation for pursuit of funding, outside approvals, outside regulatory and federal review, final engineering or architecture, and eventual implementation. This includes work such as:
 - Grant applications or earmark requests (for implementation activities),
 - Architectural, planning or engineering services intended to *finalize* designs for a project.Such work is focused on a particular project with a clear scope, such as a particular building or corridor to be studied. It represents increasing commitment to a specific course of action. Examples of implementation work include:
 - Applications for competitive grants or earmarks.
 - Real estate transactions (purchase or long-term lease).
 - Formal entry into an FTA planning process such as New Starts or Small Starts (e.g., Alternatives Analysis, Conceptual Engineering, Detailed Engineering). These processes require significant formal studies that act as agency-endorsed evidence in support of major grant applications.
 - Environmental Reviews or Assessments (i.e., NEPA studies).
 - Actual changes to the physical environment (demolition, earthworks, utility changes, paving, construction, etc.)

Implementation planning requires an increasing degree of commitment and resources. While the Board is not directly involved in implementation work, such activities lead directly to issues where the Board has retained authority for approval, such as real estate decisions (policy 3.2.10), annual budget including capital budget decisions (3.2.7), and decisions about the use of the Capital Reserve (3.2.12).

This interpretation of exploratory planning and implementation planning is reasonable because it differentiates the CEO’s authority to determine whether to undertake the exploratory planning from the board’s authority to decide whether or not to proceed with the *initiation* of implementation planning.

Evidence

During the monitoring period only one element of implementation work occurred, but Board approval was not received beforehand. For this reason, this policy is not compliant.

In early 2021 the Federal government unexpectedly reversed 10 years of precedent and began soliciting earmarks. The deadlines involved were very short, sometimes only a matter of weeks. The CEO aggressively pursued earmark requests for the Blake Transit Center, Ypsilanti Transit Center, and fleet replacements. None were successful. Afterwards the CEO belatedly realized that such activity could be covered by this policy. At the time this policy was written there was not reason to include “earmarks”, and the interpretation had not yet been written. Earmarks are now explicitly included in the interpretation above. The CEO is reporting noncompliance with this policy solely due to this situation.

- 2.11.1.1 Request authorization to proceed with a project prior to providing information that demonstrates that such construction is fiscally responsible and aligned with achievement of the board’s Ends, and without providing data that supports an informed decision by the board – including but not limited to clearly articulated information about the following:**
- A. Definition of the project’s purpose and goals.**
 - B. Definition of the project’s key elements and rationale for their inclusion.**
 - C. Definition of the project’s strategic context, and contribution to advancing the board’s Ends or other policies.**
 - D. Explanation of the project’s priority relative to other capital needs.**
 - E. Estimates of the capital cost, ongoing operating and maintenance costs, and expected useful life associated with the project.**
 - F. Explanation of anticipated funding sources and financing mechanisms.**
 - G. Definition of risks associated with the project.**
 - H. Project timeline.**
 - I. Public involvement process.**

Degree of Compliance: N/A

Interpretation

Compliance with this policy will be demonstrated when the minutes of the Board meeting record that a CEO’s request for Board approval of an element of implementation of a construction project comes in the form of a single, proposal that addresses the questions identified for each of the elements interpreted below:

1. **Scope** – What is the nature of the project? What are the most important elements?
2. **Alignment with Ends & Rationale** – Description of how the project will advance specific goals identified by the Board
3. **Public Involvement** – How has the public been engaged in the development of the proposal thus far? How will the public be engaged going forward?
4. **Priority** – Why is this project being prioritized ahead of other projects? How would this project affect the 10-Year Capital Plan?
5. **Fiscal responsibility** –
 - a. What are the anticipated capital and operating costs during the life of the project?
 - b. How will the capital and operating costs of the project be paid for during the lifespan of the project? What assumptions are made regarding outside grant funding, funding from the Capital Reserve, or local millage funds?
 - c. How would the approval of this project impact the agency’s ability to maintain existing services and infrastructure, or afford other projects?
6. **Timeline** – What are the expected dates of major miles stones such as construction, opening/initiation, operating lifespan, decommissioning?
7. **Risks** – What social, environmental, financial, operational, or other risks have been identified? Are there ways to mitigate risks?

This interpretation is reasonable because minutes are the official record of the Board’s meetings and identify when a request is made. The elements of the proposal address all of the items specified by the Board in its policy.

Evidence

The CEO made no requests of the Board to approve construction projects during the monitoring period, and no proposals were produced.

2.11.1.2 Request authorization to proceed with a project without incorporating it into an annual budget or a budget amendment.

Degree of Compliance: N/A

Interpretation

Compliance with this policy will be demonstrated when

- a) All requests for Board approval are part of either the regular annual budget or an amendment to a budget. This is reasonable because most construction projects will cost more than the CEO’s signing authority (\$250,000) and amendments can be requested at any time.
- b) Should the circumstance arise where outside partners appear to need a level of informal non-binding commitment from the AAATA in order to advance a project into further exploratory work, the CEO is allowed to offer such assurances, provided they are acting in good faith and can reasonably assume preliminary Board support and provide updates to the Board. This is reasonable because some projects may not advance through an exploratory process without feelings of shared commitment

Evidence

During the monitoring period no *implementation* work was conducted, so no Board approval was sought or required.

In one instance the CEO has provided an informal non-binding commitment during an exploratory project, the effort to plan for a redevelopment of the Y-Lot and expansion of the Blake Transit Center. While the AAATA has not been formally committed to this project, it may soon become difficult to withdraw given the investment from project partners in the AAATA’s participation and potential impact to the agency’s credibility. That said, a formal proposal is not yet completed, cost estimates are not yet finalized, the project owners have not approved the project, and formal authorization by the AAATA Board may still be premature. Staff discussed this project with the Board on numerous occasions since 2017, the most recent update to the full Board was on February 18, 2021. The continuing work was described. The project has appeared in several recent budget documents (FY2021, p. 29, 33; FY2020, pgs. 26-38; FY2019, p. 29; FY2018, p. 44.) and Business Plans. The Board has not raised objections to the pursuit of the project. Funding for the next phase of implementation planning is being requested through the FY2022 Budget, and assumptions about capital costs are provided in the accompanying 10-Year Capital Plan.

2.11.2 Expend funds on a construction project prior to having confirmed funding for that stage.

Degree of Compliance: N/A

Interpretation

Compliance will be demonstrated when dates for the initial written notice-to-proceed orders and first invoices occur *after* confirmation that funding is available, such as Board approval of a budget or written confirmation from an outside funder (e.g., notice of award or full funding grant agreement from the FTA). This is reasonable because each stage of a project can have an initiation point with an initial notice-to-proceed order that is always in writing with a date, and dated invoices precede expenditures. Only the initial dates are warranted because there could be hundreds of subsequent invoices for various stages, but none could occur without the initial notice-to-proceed. Funding confirmations come from the Board vote, or state or federal government and should not be considered final until written notice is received.

Evidence

There were no eligible construction projects ongoing during the monitoring period, nor were any funds expended.

2.11.3 Proceed with construction that does not minimize inconvenience to the travelling public and those businesses and residences directly impacted to the extent that is reasonably practicable.

Degree of Compliance: N/A

Interpretation

The Board has partially interpreted “minimizing inconvenience” in its lower-level policies 2.11.3.1 and 2.11.3.2 below.

Compliance with those policies as well as the following will demonstrate compliance: Construction projects include a plan to minimize or mitigate public inconvenience that is deemed reasonable by the CEO extent in the context of the project. This is reasonable because construction projects almost always cause some level of disruption, vary in scale and impact, and therefore need to be developed in context. The requirement for a plan allows for this context while ensuring the issue is addressed beforehand.

Evidence

There were no eligible construction projects during the monitoring period and no corresponding plans.

2.11.3.1 Proceed without providing timely and accurate information to the travelling public, residents and business owners.

Degree of Compliance: N/A

Interpretation

I interpret this policy to reference communications about impacts of direct construction activity given that information about general public consultation is addressed in policy 2.2.9.4,

Compliance with this policy will be demonstrated when review of public notices about foreseeable construction-related disruptions (e.g., closures, changes to services, etc.) confirms that notices were provided at least 7 days before activities begin, or blanket notices about uncertain timing are provided at least 14 days in advance. Public notice includes, at a minimum: media releases, website and social media notices, hardcopy notices where applicable, attempts to inform nearby residents and property owners; these are our standard means of informing the public and are recognized as trustworthy source of information from TheRide. These time periods are reasonable because they allow the public to make alternate arrangements, and construction timelines can sometimes need to change to keep a project progressing on schedule or on budget.

Evidence

There were no construction projects ongoing during the monitoring period, and no information was required or provided.

2.11.3.2 Proceed with construction project or changes to the project that could be foreseen to create significant resistance from the traveling public and external stakeholders because they had not had the opportunity for consultation.

Degree of Compliance: N/A

Interpretation

Compliance with this policy will be demonstrated when reasonable consultation opportunities are provided prior to finalizing construction plans and are publicized beforehand.

Consultation includes providing information on anticipated construction activities and plans, opportunities to provide feedback and identify concerns, efforts to mitigate impacts, and notice of final decision. Depending on the project context, this could include posted notices, website information, or public meetings. This interpretation is reasonable because it recognizes that construction is inherently disruptive and can cause resistance, requires consultation and attempts at mitigation before construction begins, and calls for communication with the public beforehand.

I interpret this policy to apply to the logistics and impacts of construction activities (i.e., closures, site prep, demolition, earthworks, excavation, utility changes, paving, construction, etc.), not earlier decisions about project need, scope, cost, location, etc., covered under 2.2.9.4 (general public consultation requirement). The policy does not require construction to stop due to resistance, only that there were reasonable opportunities for input beforehand, however construction may be paused if the CEO deems it necessary.

Evidence
 There were no construction projects ongoing during the monitoring period, and no consultation was required or provided. .

2.11.4 Allow the board to be unaware of political, residents’ and businesses’ issues related to the proposed construction.

Degree of Compliance: N/A

Interpretation
 Compliance with this policy will be demonstrated when Board minutes, accompanying documents, or communication to the Board between meetings indicate that, prior to the start of construction activities, staff had provided verbal or written information to the Board summarizing feedback and concerns with planned construction raised by elected leaders, directly affected residents, and business owners. This is reasonable Board documents (minutes, reports, special reports) are the means through which the Board is made aware.

I interpret this policy to apply only to the logistics and impacts of construction activities rather than the need or scope of the project. This is reasonable because it reflects the Board’s policy requirements, and earlier decisions about project need, scope, cost, etc., are covered under 2.2.9.4 (general public consultation requirement).

Evidence
 There were no construction projects ongoing during the monitoring period, and no briefing was required or provided.

2.11.5 Allow the board to be without regular reports on the project’s implementation, including but not limited to:

- A. Changes to the anticipated cost of the project.**
- B. Changes to the elements/scope of the project.**
- C. Changes to scheduled completion, delays or impacts to timelines.**
- D. Timely notice of possible cost overruns and planned action to reduce impact.**

Degree of Compliance: N/A

Interpretation

Compliance with this policy will be demonstrated when the Board receives at least monthly updates on board-approved construction implementation projects which must provide the details outlined in items A-D above, which would be compared with assumptions created at the beginning of the project and shared with the Board. This interpretation is reasonable because items A-D are self-explanatory and monthly updates can be provided at board meetings.

Evidence

Date of approval of project. Dates and locations of updates.

There were no construction projects ongoing during the monitoring period, and no updates were provided.

CEO Notes

The Board may wish to update policy 2.11.1 to refer specifically to earmarks or funding applications in general.

Board's Conclusion on Monitoring Report

Guidance on Determining “Reasonableness” of CEO Interpretations

The International Policy Governance Association has developed the following guidance for Board members to use in deciding whether a CEO's interpretation is “reasonable”:

An interpretation is deemed to be reasonable when it provides an operational definition which includes defensible measures and standards against which policy achievement can be assessed...

Defensible measures and standards are those that:

- *Are objectively verifiable (e.g., through research, testing, and/or credible confirmation of observable phenomena.)*
- *Are relevant and conceptually aligned with the policy criteria and the board's policy set.*
- *Represent an appropriate level of fulfillment within the scope of the policy.*

- “What makes an Interpretation Reasonable and What are the Expectations for the Operational Definition: Policy Governance Consistency Framework Report Number 2”. International Policy Governance Association. June 11, 2016. Available on the IPGA website.

Board's conclusion after monitoring the report.

Following the Board's review and discussion with the CEO, the Board finds that the CEO:

- A. Is in compliance.
- B. Is in compliance, except for item(s) noted.
- C. Is making reasonable progress toward compliance.
- D. Is *not* in compliance or is *not* making reasonable progress toward compliance.
- E. **Cannot be determined.**