

(3) The certification of final indirect costs shall read as follows:

*Certificate of Final Indirect Costs*

This is to certify that I have reviewed this proposal to establish final indirect cost rates and to the best of my knowledge and belief:

1. All costs included in this proposal (identify proposal and date) to establish final indirect cost rates for (identify period covered by rate) are allowable in accordance with the cost principles in 2 CFR part 200 subpart E; and
2. This proposal does not include any costs which are expressly unallowable under applicable cost principles of 2 CFR part 200 subpart E.

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AUTHORITY: Sec. 1503 of Pub. L. 109–59, 119 Stat. 1144; Sec. 1307 of Pub. L. 105–178, 112 Stat. 107; 23 U.S.C. 101, 109, 112, 113, 114, 115, 119, 128, and 315; 49 CFR 1.48(b).

SOURCE: 67 FR 75926, Dec. 10, 2002, unless otherwise noted.

### Subpart A—General

#### § 636.101 What does this part do?

This part describes the FHWA's policies and procedures for approving design-build projects financed under title 23, United States Code (U.S.C.). This part satisfies the requirement of section 1307(c) of the Transportation Equity Act for the 21st Century (TEA–21), enacted on June 9, 1998. The contracting procedures of this part apply to all design-build project funded under title 23, U.S.C.

#### § 636.102 Does this part apply to me?

(a) This part uses a plain language format to make the rule easier for the general public and business community to use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Unless otherwise noted, the pronoun “you” means the primary recipient of Federal-aid highway funds, the State Transportation Department (STD). Where the STD has an agreement with a local public agency (or other governmental agency) to administer a Federal-aid design-build project, the term “you” will also apply to that contracting agency.

#### § 636.103 What are the definitions of terms used in this part?

Unless otherwise specified in this part, the definitions in 23 U.S.C. 101(a) are applicable to this part. Also, the following definitions are used:

*Adjusted low bid* means a form of best value selection in which qualitative aspects are scored on a 0 to 100 scale expressed as a decimal; price is then divided by qualitative score to yield an “adjusted bid” or “price per quality point.” Award is made to offeror with the lowest adjusted bid.

*Best value selection* means any selection process in which proposals contain both price and qualitative components and award is based upon a combination of price and qualitative considerations.

*Clarifications* means a written or oral exchange of information which takes place after the receipt of proposals when award without discussions is contemplated. The purpose of clarifications is to address minor or clerical revisions in a proposal.

*Communications* are exchanges, between the contracting agency and offerors, after receipt of proposals, which lead to the establishment of the competitive range.

*Competitive acquisition* means an acquisition process which is designed to foster an impartial and comprehensive evaluation of offerors' proposals, leading to the selection of the proposal representing the best value to the contracting agency.

*Competitive range* means a list of the most highly rated proposals based on the initial proposal rankings. It is

based on the rating of each proposal against all evaluation criteria.

*Contracting agency* means the public agency awarding and administering a design-build contract. The contracting agency may be the STD or another State or local public agency.

*Deficiency* means a material failure of a proposal to meet a contracting agency requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.

*Design-bid-build* means the traditional project delivery method where design and construction are sequential steps in the project development process.

*Design-build contract* means an agreement that provides for design and construction of improvements by a contractor or private developer. The term encompasses design-build-maintain, design-build-operate, design-build-finance and other contracts that include services in addition to design and construction. Franchise and concession agreements are included in the term if they provide for the franchisee or concessionaire to develop the project which is the subject of the agreement.

*Design-builder* means the entity contractually responsible for delivering the project design and construction.

*Discussions* mean written or oral exchanges that take place after the establishment of the competitive range with the intent of allowing the offerors to revise their proposals.

*Final design* means any design activities following preliminary design and expressly includes the preparation of final construction plans and detailed specifications for the performance of construction work.

*Fixed price/best design* means a form of best value selection in which contract price is established by the owner and stated in the Request for Proposals document. Design solutions and other qualitative factors are evaluated and rated, with award going to the firm offering the best qualitative proposal for the established price.

*Intelligent Transportation System (ITS) services* means services which provide for the acquisition of technologies or systems of technologies (e.g., computer

hardware or software, traffic control devices, communications link, fare payment system, automatic vehicle location system, etc.) that provide or contribute to the provision of one or more ITS user services as defined in the National ITS Architecture.

*Modified design-build* means a variation of design-build in which the contracting agency furnishes offerors with partially complete plans. The design-builders role is generally limited to the completion of the design and construction of the project.

*Organizational conflict of interest* means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the owner, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

*Preliminary design* defines the general project location and design concepts. It includes, but is not limited to, preliminary engineering and other activities and analyses, such as environmental assessments, topographic surveys, metes and bounds surveys, geotechnical investigations, hydrologic analysis, hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, general estimates of the types and quantities of materials, and other work needed to establish parameters for the final design. Prior to completion of the NEPA review process, any such preliminary engineering and other activities and analyses must not materially affect the objective consideration of alternatives in the NEPA review process.

*Prequalification* means the contracting agency's process for determining whether a firm is fundamentally qualified to compete for a certain project or class of projects. The prequalification process may be based on financial, management and other types of qualitative data. Prequalification should be distinguished from short listing.

*Price proposal* means the price submitted by the offeror to provide the required design and construction services.

*Price reasonableness* means the determination that the price of the work for any project or series of projects is not excessive and is a fair and reasonable price for the services to be performed.

*Proposal modification* means a change made to a proposal before the solicitation closing date and time, or made in response to an amendment, or made to correct a mistake at any time before award.

*Proposal revision* means a change to a proposal made after the solicitation closing date, at the request of or as allowed by a contracting officer, as the result of negotiations.

*Public-private agreement* means an agreement between a public agency and a private party involving design and construction of transportation improvements by the private party to be paid for in whole or in part by Federal-aid highway funds. The agreement may also provide for project financing, at-risk equity investment, operations, or maintenance of the project.

*Qualified project* means any design-build project (including intermodal projects) funded under Title 23, United States Code, which meets the requirements of this part and for which the contracting agency deems to be appropriate on the basis of project delivery time, cost, construction schedule, or quality.

*Request for Proposals (RFP)* means the document that describes the procurement process, forms the basis for the final proposals and may potentially become an element in the contract.

*Request for Qualification (RFQ)* means the document issued by the owner in Phase I of the two-phased selection process. It typically describes the project in enough detail to let potential offerors determine if they wish to compete and forms the basis for requesting qualifications submissions from which the most highly qualified offerors can be identified.

*Short listing* means the narrowing of the field of offerors through the selection of the most qualified offerors who have responded to an RFQ.

*Single-phase selection process* means a procurement process where price and/or technical proposals are submitted in response to an RFP. Short listing is not used.

*Solicitation* means a public notification of an owner's need for information, qualifications, or proposals related to identified services.

*Stipend* means a monetary amount sometimes paid to unsuccessful offerors.

*Technical proposal* means that portion of a design-build proposal which contains design solutions and other qualitative factors that are provided in response to the RFP document.

*Tradeoff* means an analysis technique involving a comparison of price and non-price factors to determine the best value when considering the selection of other than the lowest priced proposal.

*Two-phase selection process* means a procurement process in which the first phase consists of short listing (based on qualifications submitted in response to an RFQ) and the second phase consists of the submission of price and technical proposals in response to an RFP.

*Weakness* means a flaw in the proposal that increases the risk of unsuccessful contract performance. A significant weakness in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.

*Weighted criteria process* means a form of best value selection in which maximum point values are pre-established for qualitative and price components, and award is based upon high total points earned by the offerors.

[67 FR 75926, Dec. 10, 2002, as amended at 72 FR 45336, Aug. 14, 2007]

**§ 636.104 Does this part apply to all Federal-aid design-build projects?**

The provisions of this part apply to all Federal-aid design-build projects within the highway right-of-way or linked to a Federal-aid highway project (*i.e.*, the project would not exist without another Federal-aid highway project). Projects that are not located within the highway right-of-way, and not linked to a Federal-aid highway project may utilize State-approved procedures.

**§ 636.105 Is the FHWA requiring the use of design-build?**

No, the FHWA is neither requiring nor promoting the use of the design-build contracting method. The design-

build contracting technique is optional.

**§ 636.106 [Reserved]**

**§ 636.107 May contracting agencies use geographic preference in Federal-aid design-build or public-private partnership projects?**

No. Contracting agencies must not use geographic preferences (including contractual provisions, preferences or incentives for hiring, contracting, proposing, or bidding) on Federal-aid highway projects, even though the contracting agency may be subject to statutorily or administratively imposed in-State or local geographical preferences in the evaluation and award of such projects.

[72 FR 45336, Aug. 14, 2007]

**§ 636.108 [Reserved]**

**§ 636.109 How does the NEPA process relate to the design-build procurement process?**

The purpose of this section is to ensure that there is an objective NEPA process, that public officials and citizens have the necessary environmental impact information for federally funded actions before actions are taken, and that design-build proposers do not assume an unnecessary amount of risk in the event the NEPA process results in a significant change in the proposal, and that the amount payable by the contracting agency to the design-builder does not include significant contingency as the result of risk placed on the design-builder associated with significant changes in the project definition arising out of the NEPA process. Therefore, with respect to the design-build procurement process:

(a) The contracting agency may:

(1) Issue an RFQ prior to the conclusion of the NEPA process as long as the RFQ informs proposers of the general status of NEPA review;

(2) Issue an RFP after the conclusion of the NEPA process;

(3) Issue an RFP prior to the conclusion of the NEPA process as long as the RFP informs proposers of the general status of the NEPA process and that no commitment will be made as to any alternative under evaluation in the

NEPA process, including the no-build alternative;

(4) Proceed with the award of a design-build contract prior to the conclusion of the NEPA process;

(5) Issue notice to proceed with preliminary design pursuant to a design-build contract that has been awarded prior to the completion of the NEPA process; and

(6) Allow a design-builder to proceed with final design and construction for any projects, or portions thereof, for which the NEPA process has been completed.

(b) If the contracting agency proceeds to award a design-build contract prior to the conclusion of the NEPA process, then:

(1) The contracting agency may permit the design-builder to proceed with preliminary design;

(2) The contracting agency may permit any design and engineering activities to be undertaken for the purposes of defining the project alternatives and completing the NEPA alternatives analysis and review process; complying with other related environmental laws and regulations; supporting agency coordination, public involvement, permit applications, or development of mitigation plans; or developing the design of the preferred alternative to a higher level of detail when the lead agencies agree that it is warranted in accordance with 23 U.S.C. 139(f)(4)(D);

(3) The design-build contract must include appropriate provisions preventing the design-builder from proceeding with final design activities and physical construction prior to the completion of the NEPA process (contract hold points or another method of issuing multi-step approvals must be used);

(4) The design-build contract must include appropriate provisions ensuring that no commitments are made to any alternative being evaluated in the NEPA process and that the comparative merits of all alternatives presented in the NEPA document, including the no-build alternative, will be evaluated and fairly considered;

(5) The design-build contract must include appropriate provisions ensuring that all environmental and mitigation

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measures identified in the NEPA document will be implemented;

(6) The design-builder must not prepare the NEPA document or have any decisionmaking responsibility with respect to the NEPA process;

(7) Any consultants who prepare the NEPA document must be selected by and subject to the exclusive direction and control of the contracting agency;

(8) The design-builder may be requested to provide information about the project and possible mitigation actions, and its work product may be considered in the NEPA analysis and included in the record; and

(9) The design-build contract must include termination provisions in the event that the no-build alternative is selected.

(c) The contracting agency must receive prior FHWA concurrence before issuing the RFP, awarding a design-build contract and proceeding with preliminary design work under the design-build contract. Should the contracting agency proceed with any of the activities specified in this section before the completion of the NEPA process (with the exception of preliminary design, as provided in paragraph (d) of this section), the FHWA's concurrence merely constitutes the FHWA approval that any such activities complies with Federal requirements and does not constitute project authorization or obligate Federal funds.

(d) The FHWA's authorization and obligation of preliminary engineering and other preconstruction funds prior to the completion of the NEPA process is limited to preliminary design and such additional activities as may be necessary to complete the NEPA process. After the completion of the NEPA process, the FHWA may issue an authorization to proceed with final design and construction and obligate Federal funds for such purposes.

[72 FR 45337, Aug. 14, 2007]

### **§ 636.110 What procedures may be used for solicitations and receipt of proposals?**

You may use your own procedures for the solicitation and receipt of proposals and information including the following:

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(a) Exchanges with industry before receipt of proposals;

(b) RFQ, RFP and contract format;

(c) Solicitation schedules;

(d) Lists of forms, documents, exhibits, and other attachments;

(e) Representations and instructions;

(f) Advertisement and amendments;

(g) Handling proposals and information; and

(h) Submission, modification, revisions and withdrawal of proposals.

### **§ 636.111 Can oral presentations be used during the procurement process?**

(a) Yes, the use of oral presentations as a substitute for portions of a written proposal can be effective in streamlining the source selection process. Oral presentations may occur at any time in the acquisition process, however, you must comply with the appropriate State procurement integrity standards.

(b) Oral presentations may substitute for, or augment, written information. You must maintain a record of oral presentations to document what information you relied upon in making the source selection decision. You may decide the appropriate method and level of detail for the record (e.g., videotaping, audio tape recording, written record, contracting agency notes, copies of offeror briefing slides or presentation notes). A copy of the record should be placed in the contract file and may be provided to offerors upon request.

### **§ 636.112 May stipends be used?**

At your discretion, you may elect to pay a stipend to unsuccessful offerors who have submitted responsive proposals. The decision to do so should be based on your analysis of the estimated proposal development costs and the anticipated degree of competition during the procurement process.

### **§ 636.113 Is the stipend amount eligible for Federal participation?**

(a) Yes, stipends are eligible for Federal-aid participation. Stipends are recommended on large projects where there is substantial opportunity for innovation and the cost of submitting a

proposal is significant. On such projects, stipends are used to:

- (1) Encourage competition;
- (2) Compensate unsuccessful offerors for a portion of their costs (usually one-third to one-half of the estimated proposal development cost); and
- (3) Ensure that smaller companies are not put at a competitive disadvantage.

(b) Unless prohibited by State law, you may retain the right to use ideas from unsuccessful offerors if they accept stipends. If stipends are used, the RFP should describe the process for distributing the stipend to qualifying offerors. The acceptance of any stipend must be optional on the part of the unsuccessful offeror to the design-build proposal.

(c) If you intend to incorporate the ideas from unsuccessful offerors into the same contract on which they unsuccessfully submitted a proposal, you must clearly provide notice of your intent to do so in the RFP.

[67 FR 75926, Dec. 10, 2002, as amended at 73 FR 77502, Dec. 19, 2008]

**§ 636.114 What factors should be considered in risk allocation?**

(a) You may consider, identify, and allocate the risks in the RFP document and define these risks in the contract. Risk should be allocated with consideration given to the party who is in the best position to manage and control a given risk or the impact of a given risk.

(b) Risk allocation will vary according to the type of project and location, however, the following factors should be considered:

- (1) Governmental risks, including the potential for delays, modifications, withdrawal, scope changes, or additions that result from multi-level Federal, State, and local participation and sponsorship;
- (2) Regulatory compliance risks, including environmental and third-party issues, such as permitting, railroad, and utility company risks;
- (3) Construction phase risks, including differing site conditions, traffic control, interim drainage, public access, weather issues, and schedule;

(4) Post-construction risks, including public liability and meeting stipulated performance standards; and

(5) Right-of-way risks including acquisition costs, appraisals, relocation delays, condemnation proceedings, including court costs and others.

**§ 636.115 May I meet with industry to gather information concerning the appropriate risk allocation strategies?**

(a) Yes, information exchange at an early project stage is encouraged if it facilitates your understanding of the capabilities of potential offerors. However, any exchange of information must be consistent with State procurement integrity requirements. Interested parties include potential offerors, end users, acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.

(b) The purpose of exchanging information is to improve the understanding of your requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy your requirements, and enhancing your ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.

(c) An early exchange of information can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules. This also includes the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions. Some techniques to promote early exchanges of information are as follows:

- (1) Industry or small business conferences;
- (2) Public hearings;
- (3) Market research;
- (4) One-on-one meetings with potential offerors (any meetings that are substantially involved with potential

contract terms and conditions should include the contracting officer; also see paragraph (e) of this section regarding restrictions on disclosure of information);

- (5) Presolicitation notices;
- (6) Draft RFPs;
- (7) Request for Information (RFI) ;
- (8) Presolicitation or preproposal conferences; and
- (9) Site visits.

(d) RFIs may be used when you do not intend to award a contract, but want to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these notices are not offers and cannot be accepted to form a binding contract. There is no required format for an RFI.

(e) When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information shall be made available to all potential offerors as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. Information provided to a particular offeror in response to that offeror's request must not be disclosed if doing so would reveal the potential offeror's confidential business strategy. When a presolicitation or preproposal conference is conducted, materials distributed at the conference should be made available to all potential offerors, upon request.

**§ 636.116 What organizational conflict of interest requirements apply to design-build projects?**

(a) State statutes or policies concerning organizational conflict of interest should be specified or referenced in the design-build RFQ or RFP document as well as any contract for engineering services, inspection or technical support in the administration of the design-build contract. All design-build solicitations should address the following situations as appropriate:

(1) Consultants and/or sub-consultants who assist the owner in the preparation of a RFP document will not be allowed to participate as an offeror or join a team submitting a proposal in response to the RFP. However, a con-

tracting agency may determine there is not an organizational conflict of interest for a consultant or sub-consultant where:

(i) The role of the consultant or sub-consultant was limited to provision of preliminary design, reports, or similar "low-level" documents that will be incorporated into the RFP, and did not include assistance in development of instructions to offerors or evaluation criteria, or

(ii) Where all documents and reports delivered to the agency by the consultant or sub-consultant are made available to all offerors.

(2) All solicitations for design-build contracts, including related contracts for inspection, administration or auditing services, must include a provision which:

(i) Directs offerors attention to this subpart;

(ii) States the nature of the potential conflict as seen by the owner;

(iii) States the nature of the proposed restraint or restrictions (and duration) upon future contracting activities, if appropriate;

(iv) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation; and

(v) Requires offerors to provide information concerning potential organizational conflicts of interest in their proposals. The apparent successful offerors must disclose all relevant facts concerning any past, present or currently planned interests which may present an organizational conflict of interest. Such firms must state how their interests, or those of their chief executives, directors, key project personnel, or any proposed consultant, contractor or sub-contractor may result, or could be viewed as, an organizational conflict of interest. The information may be in the form of a disclosure statement or a certification.

(3) Based upon a review of the information submitted, the owner should make a written determination of whether the offeror's interests create an actual or potential organizational conflict of interest and identify any actions that must be taken to avoid, neutralize, or mitigate such conflict. The



owner should award the contract to the apparent successful offeror unless an organizational conflict of interest is determined to exist that cannot be avoided, neutralized, or mitigated.

(b) The organizational conflict of interest provisions in this subpart provide minimum standards for STDs to identify, mitigate or eliminate apparent or actual organizational conflicts of interest. To the extent that State-developed organizational conflict of interest standards are more stringent than that contained in this subpart, the State standards prevail.

(c) If the NEPA process has been completed prior to issuing the RFP, the contracting agency may allow a consultant or subconsultant who prepared the NEPA document to submit a proposal in response to the RFP.

(d) If the NEPA process has not been completed prior to issuing the RFP, the contracting agency may allow a subconsultant to the preparer of the NEPA document to participate as an offeror or join a team submitting a proposal in response to the RFP only if the contracting agency releases such subconsultant from further responsibilities with respect to the preparation of the NEPA document.

[67 FR 75926, Dec. 10, 2002, as amended at 72 FR 45337, Aug. 14, 2007]

**§ 636.117 What conflict of interest standards apply to individuals who serve as selection team members for the owner?**

State laws and procedures governing improper business practices and personal conflicts of interest will apply to the owner's selection team members. In the absence of such State provisions, the requirements of 48 CFR Part 3, Improper Business Practices and Personal Conflicts of Interest, will apply to selection team members.

**§ 636.118 Is team switching allowed after contract award?**

Where the offeror's qualifications are a major factor in the selection of the successful design-builder, team member switching (adding or switching team members) is discouraged after contract award. However, the owner may use its discretion in reviewing team changes or team enhancement re-

quests on a case-by-case basis. Specific project rules related to changes in team members or changes in personnel within teams should be explicitly stated by the STD in all project solicitations.

**§ 636.119 How does this part apply to a project developed under a public-private partnership?**

(a) In order for a project being developed under a public-private agreement to be eligible for Federal-aid funding (including traditional Federal-aid funds, direct loans, loan guarantees, lines of credit, or some other form of credit assistance), the contracting agency must have awarded the contract to the public-private entity through a competitive process that complies with applicable State and local laws.

(b) If a contracting agency wishes to utilize traditional Federal-aid funds in a project under a public-private agreement, the applicability of Federal-aid procurement procedures will depend on the nature of the public-private agreement.

(1) If the public-private agreement establishes price, then all subsequent contracts executed by the developer are considered to be subcontracts and are not subject to Federal-aid procurement requirements.

(2) If the public-private agreement does not establish price, the developer is considered to be an agent of the owner, and the developer must follow the appropriate Federal-aid procurement requirements (23 CFR part 172 for engineering service contracts, 23 CFR part 635 for construction contracts and the requirements of this part for design-build contracts) for all prime contracts (not subcontracts).

(c) The STD must ensure such public-private projects comply with all non-procurement requirements of 23 U. S. Code, regardless of the form of the FHWA funding (traditional Federal-aid funding or credit assistance). This includes compliance with all FHWA policies such as environmental and right-of-way requirements and compliance with such construction contracting requirements as Buy America, Davis-

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Bacon minimum wage rate requirements, for federally funded construction or design-build contracts under the public-private agreement.

[67 FR 75926, Dec. 10, 2002, as amended at 72 FR 45337, Aug. 14, 2007]

### Subpart B—Selection Procedures, Award Criteria

#### § 636.201 What selection procedures and award criteria may be used?

You should consider using two-phase selection procedures for all design-build projects. However, if you do not believe two-phase selection procedures are appropriate for your project (based on the criteria in § 636.202), you may use a single phase selection procedure or the modified-design-build contracting method. The following procedures are available:

Selection procedure	Criteria for using a selection procedure	Award criteria options
(a) Two-Phase Selection Procedures (RFQ followed by RFP).	§ 636.202 .....	Lowest price, Adjusted low-bid (price per quality point), meets criteria/low bid, weighted criteria process, fixed price/best design, best value.
(b) Single Phase (RFP).	Project not meeting the criteria in § 636.202.	All of the award criteria in item (a) of this table.
(c) Modified Design-Build (may be one or two phases).	Any project .....	Lowest price technically acceptable.

#### § 636.202 When are two-phase design-build selection procedures appropriate?

You may consider the following criteria in deciding whether two-phase selection procedures are appropriate. A negative response may indicate that two-phase selection procedures are not appropriate.

- Are three or more offers anticipated?
- Will offerors be expected to perform substantial design work before developing price proposals?
- Will offerors incur a substantial expense in preparing proposals?
- Have you identified and analyzed other contributing factors, including:

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- The extent to which you have defined the project requirements?
- The time constraints for delivery of the project?
- The capability and experience of potential contractors?
- Your capability to manage the two-phase selection process?
- Other criteria that you may consider appropriate?

#### § 636.203 What are the elements of two-phase selection procedures for competitive proposals?

The first phase consists of short listing based on a RFQ. The second phase consists of the receipt and evaluation of price and technical proposals in response to a RFP.

#### § 636.204 What items may be included in a phase-one solicitation?

You may consider including the following items in any phase-one solicitation:

- The scope of work;
- The phase-one evaluation factors and their relative weights, including:
  - Technical approach (but not detailed design or technical information);
  - Technical qualifications, such as—
    - Specialized experience and technical competence;
    - Capability to perform (including key personnel); and
    - Past performance of the members of the offeror's team (including the architect-engineer and construction members);
  - Other appropriate factors (excluding cost or price related factors, which are not permitted in phase-one);
  - Phase-two evaluation factors; and
  - A statement of the maximum number of offerors that will be short listed to submit phase-two proposals.

#### § 636.205 Can past performance be used as an evaluation criteria?

- Yes, past performance information is one indicator of an offeror's ability to perform the contract successfully. Past performance information may be used as an evaluation criteria in either phase-one or phase-two solicitations. If you elect to use past performance criteria, the currency and relevance of the information, source of the information, context of the data,

and general trends in contractor's performance may be considered.

(b) Describe your approach for evaluating past performance in the solicitation, including your policy for evaluating offerors with no relevant performance history. You should provide offerors an opportunity to identify past or current contracts (including Federal, State, and local government and private) for efforts similar to the current solicitation.

(c) If you elect to request past performance information, the solicitation should also authorize offerors to provide information on problems encountered on the identified contracts and the offeror's corrective actions. You may consider this information, as well as information obtained from any other sources, when evaluating the offeror's past performance. You may use your discretion in determining the relevance of similar past performance information.

(d) The evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the current acquisition.

**§ 636.206 How do I evaluate offerors who do not have a record of relevant past performance?**

In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance.

**§ 636.207 Is there a limit on short listed firms?**

Normally, three to five firms are short listed, however, the maximum number specified shall not exceed five unless you determine, for that particular solicitation, that a number greater than five is in your interest and is consistent with the purposes and objectives of two-phase design-build contracting.

**§ 636.208 May I use my existing prequalification procedures with design-build contracts?**

Yes, you may use your existing prequalification procedures for either construction or engineering design firms as a supplement to the procedures in this part.

**§ 636.209 What items must be included in a phase-two solicitation?**

(a) You must include the requirements for technical proposals and price proposals in the phase-two solicitation. All factors and significant subfactors that will affect contract award and their relative importance must be stated clearly in the solicitation. Use your own procedures for the solicitation as long as it complies the requirements of this part.

(b)(1) At your discretion, you may allow proposers to submit alternative technical concepts (ATCs) in their proposals if:

(i) The ATCs:

(A) Provide an equal or better solution; and

(B) Do not conflict with criteria agreed upon in the environmental decisionmaking process; and

(ii) The RFP document clearly describes your:

(A) Requirements for ATC content, submission, and review;

(B) Procedures for confidential meetings (if used); and

(C) Methods for evaluating ATCs in the proposal review process.

(2) You must maintain the confidentiality of ATCs, except to the extent that disclosure is necessary to maintain compliance with Federal or State permitting and other legal requirements necessary for the delivery of the project. When disclosure is necessary, you must revise the RFP documents by releasing the minimal amount of information necessary to ensure:

(i) Compliance with Federal or State permitting and other legal requirements; and

(ii) All proposers are aware of the revised RFP requirements.

[67 FR 75926, Dec. 10, 2002, as amended at 79 FR 8266, Feb. 12, 2014]

## **§ 636.210**

### **§ 636.210 What requirements apply to projects which use the modified design-build procedure?**

(a) Modified design-build selection procedures (lowest price technically acceptable source selection process) may be used for any project.

(b) The solicitation must clearly state the following:

(1) The identification of evaluation factors and significant subfactors that establish the requirements of acceptability.

(2) That award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors.

(c) The contracting agency may forgo a short listing process and advertise for the receipt of proposals from all responsible offerors. The contract is then awarded to the lowest responsive bidder.

(d) Tradeoffs are not permitted, however, you may incorporate cost-plus-time bidding procedures (A + B bidding), lane rental, or other cost-based provisions in such contracts.

(e) Proposals are evaluated for acceptability but not ranked using the non-cost/price factors.

(f) Exchanges may occur (see subpart D of this part).

### **§ 636.211 When and how should tradeoffs be used?**

(a) At your discretion, you may consider the tradeoff technique when it is desirable to award to other than the lowest priced offeror or other than the highest technically rated offeror.

(b) If you use a tradeoff technique, the following apply:

(1) All evaluation factors and significant subfactors that will affect contract award and their relative importance must be clearly stated in the solicitation; and

(2) The solicitation must also state, at a minimum, whether all evaluation factors other than cost or price, when combined, are—

(i) Significantly more important than cost or price; or

(ii) Approximately equal to cost or price; or

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(iii) Significantly less important than cost or price.

[67 FR 75926, Dec. 10, 2002; 68 FR 7922, Feb. 19, 2003]

### **§ 636.212 To what extent must tradeoff decisions be documented?**

When tradeoffs are performed, the source selection records must include the following:

(a) An assessment of each offeror's ability to accomplish the technical requirements; and

(b) A summary, matrix, or quantitative ranking, along with appropriate supporting narrative, of each technical proposal using the evaluation factors.

## **Subpart C—Proposal Evaluation Factors**

### **§ 636.301 How should proposal evaluation factors be selected?**

(a) The proposal evaluation factors and significant subfactors should be tailored to the acquisition.

(b) Evaluation factors and significant subfactors should:

(1) Represent the key areas of importance and emphasis to be considered in the source selection decision; and

(2) Support meaningful comparison and discrimination between and among competing proposals.

### **§ 636.302 Are there any limitations on the selection and use of proposal evaluation factors?**

(a) The selection of the evaluation factors, significant subfactors and their relative importance are within your broad discretion subject to the following requirements:

(1) You must evaluate price in every source selection where construction is a significant component of the scope of work. However, where the contracting agency elects to release the final RFP and award the design-build contract before the conclusion of the NEPA process (see § 636.109), then the following requirements apply:

(i) It is not necessary to evaluate the total contract price;

(ii) Price must be considered to the extent the contract requires the contracting agency to make any payments

to the design-builder for any work performed prior to the completion of the NEPA process and the contracting agency wishes to use Federal-aid highway funds for those activities;

(iii) The evaluation of proposals and award of the contract may be based on qualitative considerations;

(iv) If the contracting agency wishes to use Federal-aid highway funds for final design and construction, the subsequent approval of final design and construction activities will be contingent upon a finding of price reasonableness by the contracting agency;

(v) The determination of price reasonableness for any design-build project funded with Federal-aid highway funds shall be based on at least one of the following methods:

(A) Compliance with the applicable procurement requirements for part 172, 635, or 636, where the contractor providing the final design or construction services, or both, is a person or entity other than the design-builder;

(B) A negotiated price determined on an open-book basis by both the design-builder and contracting agency; or

(C) An independent estimate by the contracting agency based on the price of similar work;

(vi) The contracting agency's finding of price reasonableness is subject to FHWA concurrence.

(2) You must evaluate the quality of the product or service through consideration of one or more non-price evaluation factors. These factors may include (but are not limited to) such criteria as:

(i) Compliance with solicitation requirements;

(ii) Completion schedule (contractual incentives and disincentives for early completion may be used where appropriate); or

(iii) Technical solutions.

(3) At your discretion, you may evaluate past performance, technical experience and management experience (subject to § 636.303(b)).

(b) All factors and significant subfactors that will affect contract award and their relative importance must be stated clearly in the solicitation.

[67 FR 75926, Dec. 10, 2002, as amended at 72 FR 45338, Aug. 14, 2007]

**§ 636.303 May pre-qualification standards be used as proposal evaluation criteria in the RFP?**

(a) If you use a prequalification procedure or a two-phase selection procedure to develop a short list of qualified offerors, then pre-qualification criteria should not be included as proposal evaluation criteria.

(b) The proposal evaluation criteria should be limited to the quality, quantity, value and timeliness of the product or service being proposed. However, there may be circumstances where it is appropriate to include prequalification standards as proposal evaluation criteria. Such instances include situations where:

(1) The scope of work involves very specialized technical expertise or specialized financial qualifications; or

(2) Where prequalification procedures or two-phase selection procedures are not used (short listing is not performed).

**§ 636.304 What process may be used to rate and score proposals?**

(a) Proposal evaluation is an assessment of the offeror's proposal and ability to perform the prospective contract successfully. You must evaluate proposals solely on the factors and subfactors specified in the solicitation.

(b) You may conduct evaluations using any rating method or combination of methods including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation must be documented in the contract file.

**§ 636.305 Can price information be provided to analysts who are reviewing technical proposals?**

Normally, technical and price proposals are reviewed independently by separate evaluation teams. However, there may be occasions where the same experts needed to review the technical proposals are also needed in the review of the price proposals. This may occur where a limited amount of technical expertise is available to review proposals. Price information may be provided to such technical experts in accordance with your procedures.

### Subpart D—Exchanges

#### § 636.401 What types of information exchange may take place prior to the release of the RFP document?

Verbal or written information exchanges (such as in the first-phase of a two-phase selection procedure) must be consistent with State and/or local procurement integrity requirements. See § 636.115(a) for additional details.

#### § 636.402 What types of information exchange may take place after the release of the RFP document?

Certain types of information exchange may be desirable at different points after the release of the RFP document. The following table summarizes the types of communications that will be discussed in this subpart. These communication methods are optional.

Type of information exchange	When	Purpose	Parties involved
(a) Clarifications .....	After receipt of proposals .....	Used when award without discussions is contemplated. Used to clarify certain aspects of a proposal (resolve minor errors, clerical errors, obtain additional past performance information, etc.).	Any offeror whose proposal is not clear to the contracting agency.
(b) Communications .....	After receipt of proposals, prior to the establishment of the competitive range.	Used to address issues which might prevent a proposal from being placed in the competitive range.	Only those offerors whose exclusion from, or inclusion in, the competitive range is uncertain. All offerors whose past performance information is the determining factor preventing them from being placed in the competitive range.
(c) Discussions (see Subpart E of this part).	After receipt of proposals and after the determination of the competitive range.	Enhance contracting agency understanding of proposals and offerors understanding of scope of work. Facilitate the evaluation process.	Must be held with all offerors in the competitive range.

#### § 636.403 What information may be exchanged with a clarification?

(a) You may wish to clarify any aspect of proposals which would enhance your understanding of an offeror's proposal. This includes such information as an offeror's past performance or information regarding adverse past performance to which the offeror has not previously had an opportunity to respond. Clarification exchanges are discretionary. They do not have to be held with any specific number of offerors and do not have to address specific issues.

(b) You may wish to clarify and revise the RFP document through an addenda process in response to questions from potential offerors.

#### § 636.404 Can a competitive range be used to limit competition?

If the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, you may limit the number of proposals to the

greatest number that will permit an efficient competition. However, you must provide written notice to any offeror whose proposal is no longer considered to be included in the competitive range. Offerors excluded or otherwise eliminated from the competitive range may request a debriefing. Debriefings may be conducted in accordance with your procedures as long as you comply with § 636.514.

#### § 636.405 After developing a short list, can I still establish a competitive range?

Yes, if you have developed a short list of firms, you may still establish a competitive range. The short list is based on qualifications criteria. The competitive range is based on the rating of technical and price proposals.

**§ 636.406 Are communications allowed prior to establishing the competitive range?**

Yes, prior to establishing the competitive range, you may conduct communications to:

- (a) Enhance your understanding of proposals;
- (b) Allow reasonable interpretation of the proposal; or
- (c) Facilitate your evaluation process.

**§ 636.407 Am I limited in holding communications with certain firms?**

Yes, if you establish a competitive range, you must do the following:

- (a) Hold communications with offerors whose past performance information is the determining factor preventing them from being placed within the competitive range;
- (b) Address adverse past performance information to which an offeror has not had a prior opportunity to respond; and
- (c) Hold communications only with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain.

**§ 636.408 Can communications be used to cure proposal deficiencies?**

(a) No, communications must not be used to:

- (1) Cure proposal deficiencies or material omissions;
- (2) Materially alter the technical or cost elements of the proposal; and/or
- (3) Otherwise revise the proposal.

(b) Communications may be considered in rating proposals for the purpose of establishing the competitive range.

**§ 636.409 Can offerors revise their proposals during communications?**

(a) No, communications shall not provide an opportunity for an offeror to revise its proposal, but may address the following:

- (1) Ambiguities in the proposal or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes); and
- (2) Information relating to relevant past performance.

(b) Communications must address adverse past performance information to

which the offeror has not previously had an opportunity to comment.

**Subpart E—Discussions, Proposal Revisions and Source Selection****§ 636.501 What issues may be addressed in discussions?**

In a competitive acquisition, discussions may include bargaining. The term bargaining may include: persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.

**§ 636.502 Why should I use discussions?**

You should use discussions to maximize your ability to obtain the best value, based on the requirements and the evaluation factors set forth in the solicitation.

**§ 636.503 Must I notify offerors of my intent to use/not use discussions?**

Yes, in competitive acquisitions, the solicitation must notify offerors of your intent. You should either:

(a) Notify offerors that discussions may or may not be held depending on the quality of the proposals received (except clarifications may be used as described in § 636.401). Therefore, the offeror's initial proposal should contain the offeror's best terms from a cost or price and technical standpoint; or

(b) Notify offerors of your intent to establish a competitive range and hold discussions.

**§ 636.504 If the solicitation indicated my intent was to award contract without discussions, but circumstances change, may I still hold discussions?**

Yes, you may still elect to hold discussions when circumstances dictate, as long as the rationale for doing so is documented in the contract file. Such circumstances might include situations where all proposals received have deficiencies, when fair and reasonable prices are not offered, or when the cost or price offered is not affordable.

## **§ 636.505**

### **§ 636.505 Must a contracting agency establish a competitive range if it intends to have discussions with offerors?**

Yes, if discussions are held, they must be conducted with all offerors in the competitive range. If you wish to hold discussions and do not formally establish a competitive range, then you must hold discussions with all responsive offerors.

### **§ 636.506 What issues must be covered in discussions?**

(a) Discussions should be tailored to each offeror's proposal. Discussions must cover significant weaknesses, deficiencies, and other aspects of a proposal (such as cost or price, technical approach, past performance, and terms and conditions) that could be altered or explained to enhance materially the proposal's potential for award. You may use your judgment in setting limits for the scope and extent of discussions.

(b) In situations where the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, you may hold discussions regarding increased performance beyond any mandatory minimums, and you may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the offered price decreased.

### **§ 636.507 What subjects are prohibited in discussions, communications and clarifications with offerors?**

You may not engage in conduct that:

- (a) Favors one offeror over another;
- (b) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;
- (c) Reveals an offerors price without that offeror's permission;
- (d) Reveals the names of individuals providing reference information about an offeror's past performance; or
- (e) Knowingly furnish source selection information which could be in vio-

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lation of State procurement integrity standards.

### **§ 636.508 Can price or cost be an issue in discussions?**

You may inform an offeror that its price is considered to be too high, or too low, and reveal the results of the analysis supporting that conclusion. At your discretion, you may indicate to all offerors your estimated cost for the project.

### **§ 636.509 Can offerors revise their proposals as a result of discussions?**

(a) Yes, you may request or allow proposal revisions to clarify and document understandings reached during discussions. At the conclusion of discussions, each offeror shall be given an opportunity to submit a final proposal revision.

(b) You must establish a common cut-off date only for receipt of final proposal revisions. Requests for final proposal revisions shall advise offerors that the final proposal revisions shall be in writing and that the contracting agency intends to make award without obtaining further revisions.

### **§ 636.510 Can the competitive range be further defined once discussions have begun?**

Yes, you may further narrow the competitive range if an offeror originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award. That offeror may be eliminated from the competitive range whether or not all material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision. You must provide an offeror excluded from the competitive range with a written determination and notice that proposal revisions will not be considered.

### **§ 636.511 Can there be more than one round of discussions?**

Yes, but only at the conclusion of discussions will the offerors be requested to submit a final proposal revision, also called best and final offer (BAFO). Thus, regardless of the length or number of discussions, there will be



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only one request for a revised proposal (*i.e.*, only one BAFO).

### § 636.512 What is the basis for the source selection decision?

(a) You must base the source selection decision on a comparative assessment of proposals against all selection criteria in the solicitation. While you may use reports and analyses prepared by others, the source selection decision shall represent your independent judgment.

(b) The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision.

### § 636.513 Are limited negotiations allowed prior to contract execution?

(a) Yes, after the source selection but prior to contract execution, you may conduct limited negotiations with the selected design-builder to clarify any remaining issues regarding scope, schedule, financing or any other information provided by that offeror. You must comply with the provisions of § 636.507 in the exchange of this information.

(b) Limited negotiations conducted under this section may include negotiations necessary to incorporate the ideas and concepts from unsuccessful offerors into the contract if a stipend is offered by the contracting agency and accepted by the unsuccessful offeror and if the requirements of section 636.113 are met.

[67 FR 75926, Dec. 10, 2002, as amended at 73 FR 77502, Dec. 19, 2008]

### § 636.514 How may I provide notifications and debriefings?

You may provide pre-award or post-award notifications in accordance with State approved procedures. If an offeror requests a debriefing, you may provide pre-award or post-award debriefings in accordance with State approved procedures.

## PART 637—CONSTRUCTION INSPECTION AND APPROVAL

### Subpart A [Reserved]

### Subpart B—Quality Assurance Procedures for Construction

Sec.

637.201 Purpose.

637.203 Definitions.

637.205 Policy.

637.207 Quality assurance program.

637.209 Laboratory and sampling and testing personnel qualifications.

APPENDIX A TO SUBPART B OF PART 637—  
GUIDE LETTER OF CERTIFICATION BY  
STATE ENGINEER

AUTHORITY: Sec. 1307, Pub. L. 105-178, 112 Stat. 107; 23 U.S.C. 109, 114, and 315; 49 CFR 1.48(b).

SOURCE: 60 FR 33717, June 29, 1995, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 637 appear at 67 FR 75934, Dec. 10, 2002.

### Subpart A [Reserved]

### Subpart B—Quality Assurance Procedures for Construction

#### § 637.201 Purpose.

To prescribe policies, procedures, and guidelines to assure the quality of materials and construction in all Federal-aid highway projects on the National Highway System.

#### § 637.203 Definitions.

*Acceptance program.* All factors that comprise the State transportation department's (STD) determination of the quality of the product as specified in the contract requirements. These factors include verification sampling, testing, and inspection and may include results of quality control sampling and testing.

*Independent assurance program.* Activities that are an unbiased and independent evaluation of all the sampling and testing procedures used in the acceptance program. Test procedures used in the acceptance program which are performed in the STD's central laboratory would not be covered by an independent assurance program.

*Proficiency samples.* Homogeneous samples that are distributed and tested