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(b) All right-of-way clearance, utility, and railroad work performed separately from the contract for the physical construction of the project are to be accomplished in accordance with provisions of the following:

- (1) 23 CFR part 140, subpart I;
- (2) 23 CFR part 646, subpart B;
- (3) 23 CFR 710.403; and
- (4) 23 CFR part 645, subpart A.

[40 FR 17251, Apr. 18, 1975, as amended at 40 FR 25585, June 17, 1975; 64 FR 71289, Dec. 21, 1999]

§ 635.309 Authorization.

Authorization to advertise the physical construction for bids or to proceed with force account construction thereof shall normally be issued as soon as, but not until, all of the following conditions have been met:

(a) The plans, specifications, and estimates (PS&E) have been approved.

(b) A statement is received from the State, either separately or combined with the information required by paragraph (c) of this section, that either all right-of-way (ROW) clearance, utility, and railroad work has been completed or that all necessary arrangements have been made for it to be undertaken and completed as required for proper coordination with the physical construction schedules. Where it is determined that the completion of such work in advance of the highway construction is not feasible or practical due to economy, special operational problems or the like, there shall be appropriate notification provided in the bid proposals identifying the ROW clearance, utility, and railroad work which is to be underway concurrently with the highway construction.

(c) Except as otherwise provided for design-build projects in § 710.309 of this chapter and paragraph (p) of this section, a statement is received from the State certifying that all individuals and families have been relocated to decent, safe, and sanitary housing or that the State has made available to relocatees adequate replacement housing in accordance with the provisions of the 49 CFR part 24 and that one of the following has application:

(1) All necessary ROW, including control of access rights when pertinent, have been acquired including legal and

physical possession. Trial or appeal of cases may be pending in court but legal possession has been obtained. There may be some improvements remaining on the ROW but all occupants have vacated the lands and improvements and the State has physical possession and the right to remove, salvage, or demolish these improvements and enter on all land.

(2) Although all necessary ROW have not been fully acquired, the right to occupy and to use all ROW required for the proper execution of the project has been acquired. Trial or appeal of some parcels may be pending in court and on other parcels full legal possession has not been obtained but right of entry has been obtained, the occupants of all lands and improvements have vacated and the State has physical possession and right to remove, salvage, or demolish these improvements.

(3) The acquisition or right of occupancy and use of a few remaining parcels is not complete, but all occupants of the residences on such parcels have had replacement housing made available to them in accordance with 49 CFR 24.204. Under these circumstances, the State may request the Federal Highway Administration (FHWA) to authorize actions based on a conditional certification as provided in this paragraph.

(i) The State may request approval for the advertisement for bids based on a conditional certification. The FHWA will approve the request unless it finds that it will not be in the public interest to proceed with the bidding before acquisition activities are complete.

(ii) The State may request approval for physical construction under a contract or through force account work based on a conditional certification. The FHWA will approve the request only if FHWA finds there are exceptional circumstances that make it in the public interest to proceed with construction before acquisition activities are complete.

(iii) Whenever a conditional certification is used, the State shall ensure that occupants of residences, businesses, farms, or non-profit organizations who have not yet moved from the

ROW are protected against unnecessary inconvenience and disproportionate injury or any action coercive in nature.

(iv) When the State requests authorization under a conditional certification to advertise for bids or to proceed with physical construction where acquisition or right of occupancy and use of a few parcels has not been obtained, full explanation and reasons therefor, including identification of each such parcel, will be set forth in the State's request along with a realistic date when physical occupancy and use is anticipated as well as substantiation that such date is realistic. Appropriate notification must be provided in the request for bids, identifying all locations where right of occupancy and use has not been obtained. Prior to the State issuing a notice to proceed with construction to the contractor, the State shall provide an updated notification to FHWA identifying all locations where right of occupancy and use has not been obtained along with a realistic date when physical occupancy and use is anticipated.

(v) Participation of title 23 funds in construction delay claims resulting from unavailable parcels shall be determined in accordance with § 635.124. The FHWA will determine the extent of title 23 participation in costs related to construction delay claims resulting from unavailable parcels where FHWA determines the State did not follow approved processes and procedures.

(d) The State transportation department (SDOT), in accordance with 23 CFR 771.111(h), has submitted public hearing transcripts, certifications and reports pursuant to 23 U.S.C. 128.

(e) An affirmative finding of cost effectiveness or that an emergency exists has been made as required by 23 U.S.C. 112, when construction by some method other than contract based on competitive bidding is contemplated.

(f) Minimum wage rates determined by the Department of Labor in accordance with the provisions of 23 U.S.C. 113, are in effect and will not expire before the end of the period within which it can reasonably be expected that the contract will be awarded.

(g) A statement has been received that ROW has been acquired or will be

acquired in accordance with 49 CFR part 24 and part 710 of this chapter, or that acquisition of ROW is not required.

(h) A statement has been received that the steps relative to relocation advisory assistance and payments as required by 49 CFR part 24 have been taken, or that they are not required.

(i) The FHWA has determined that appropriate measures have been included in the PS&E in keeping with approved guidelines, for minimizing possible soil erosion and water pollution as a result of highway construction operations.

(j) The FHWA has determined that requirements of 23 CFR part 771 have been fulfilled and appropriate measures have been included in the PS&E to ensure that conditions and commitments made in the development of the project to mitigate environmental harm will be met.

(k) Where utility facilities are to use and occupy the right-of-way, the State has demonstrated to the satisfaction of the FHWA that the provisions of § 645.119(b) of this chapter have been fulfilled.

(l) The FHWA has verified the fact that adequate replacement housing is in place and has been made available to all affected persons.

(m) Where applicable, area wide agency review has been accomplished as required by 42 U.S.C. 3334 and 4231 through 4233.

(n) The FHWA has determined that the PS&E provide for the erection of only those information signs and traffic control devices that conform to the standards developed by the Secretary of Transportation or mandates of Federal law and do not include promotional or other informational signs regarding such matters as identification of public officials, contractors, organizational affiliations, and related logos and symbols.

(o) The FHWA has determined that, where applicable, provisions are included in the PS&E that require the erection of funding source signs, for the life of the construction project, in accordance with section 154 of the Surface Transportation and Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as

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amended (Pub. L. 91-646, 84 Stat. 1894; primarily codified in 42 U.S.C. 4601 *et seq.*;) (Uniform Act).

(p) In the case of a design-build or CM/GC project, the following certification requirements apply

(1) The FHWA's project authorization for final design and physical construction will not be issued until the following conditions have been met:

(i) All projects must conform with the statewide and metropolitan transportation planning requirements (23 CFR part 450).

(ii) All projects in air quality non-attainment and maintenance areas must meet all transportation conformity requirements (40 CFR parts 51 and 93).

(iii) The NEPA review process has been concluded. (*See* § 636.109 of this chapter).

(iv) The Request for Proposals document has been approved.

(v) A statement is received from the SDOT that either all ROW, utility, and railroad work has been completed or that all necessary arrangements will be made for the completion of ROW, utility, and railroad work.

(vi) If the STD elects to include right-of-way, utility, and/or railroad services as part of the design-builder's or CM/GC contractor's scope of work, then the applicable design-build Request for Proposals document, or the CM/GC solicitation document must include:

(2) During a conformity lapse, an Early Acquisition Project carried out in accordance with § 710.501 of this chapter or a design-build project (including ROW acquisition activities) may continue if, prior to the conformity lapse, the National Environmental Policy Act (NEPA) (42 U.S.C. 4321, *et seq.*) process was completed and the project has not changed significantly in design scope, FHWA authorized the early acquisition or design-build project, and the project met transportation conformity requirements (40 CFR parts 51 and 93).

(3) Changes to the design-build or CM/GC project concept and scope may require a modification of the transportation plan and transportation improvement program. The project sponsor must comply with the metropolitan

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and statewide transportation planning requirements in 23 CFR part 450 and the transportation conformity requirements (40 CFR parts 51 and 93) in air quality nonattainment and maintenance areas, and provide appropriate approval notification to the design builder or the CM/GC contractor for such changes.

[81 FR 57728, Aug. 23, 2016, as amended at 81 FR 86943, Dec. 2, 2016]

Subpart D—General Material Requirements

SOURCE: 41 FR 36204, Aug. 27, 1976, unless otherwise noted.

§ 635.401 Purpose.

The purpose of this subpart is to prescribe requirements and procedures relating to product and material selection and use on Federal-aid highway projects.

§ 635.403 Definitions.

As used in this subpart, the following terms have the meanings indicated:

(a) *FHWA Division Administrator* means the chief Federal Highway Administration (FHWA) official assigned to conduct business in a particular State;

(b) *Material* means any tangible substance incorporated into a Federal-aid highway project;

(c) *PS&E* means plans, specifications, and estimates;

(d) *Special provisions* means additions and revisions to the standard and supplemental specifications applicable to an individual project;

(e) *Standard specifications* means a compilation in book form of specifications approved for general application and repetitive use;

(f) *State* has the meaning set forth in 23 U.S.C. 101;

(g) *State transportation department* means that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction;

(h) *Supplemental specifications* means approved additions and revisions to the standard specifications.