

**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration****23 CFR Parts 627, 635, 636, 637 and 710**

[FHWA Docket No. FHWA-2000-7790]

RIN 2125-AE79

**Design-Build Contracting**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM); request for comments.

**SUMMARY:** The FHWA is proposing to implement regulations for design-build contracting as mandated by section 1307(c) of the Transportation Equity Act for the 21st Century (TEA-21), enacted on June 9, 1998. The TEA-21 requires the Secretary of Transportation (Secretary) to issue regulations to allow design-build contracting for selected projects. The regulations list the criteria and procedures that will be used by the FHWA in approving the use of design-build contracting by State Transportation Departments (STDs).

The regulation would not require the use of design-build contracting, but allows STDs to use it as an optional technique in addition to traditional contracting methods. The FHWA is soliciting comments on its proposed regulation which would establish prescribed policies and procedures for utilizing the design-build contracting technique on Federal-aid highway projects.

**DATES:** Written comments must be received on or before December 18, 2001.

**ADDRESSES:** Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001, or submit electronically at <http://dmses.dot.gov/submit>. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped envelope or postcard or you may print the acknowledgment page that appears after submitting comments electronically.

**FOR FURTHER INFORMATION CONTACT:** For technical information: Mr. Gerald Yakowenko, Office of Program

Administration (HIPA), (202) 366-1562. For legal information: Mr. Harold Aikens, Office of the Chief Counsel (HCC-32), (202) 366-1373, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590-0001. Office hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:****Electronic Access and Filing**

You may submit or retrieve comments online through the Document Management System (DMS) at: <http://dmses.dot.gov/submit>. Acceptable formats include: MS Word (versions 95 to 97), MS Word for Mac (versions 6 to 8), Rich Text File (RTF), American Standard Code Information Interchange (ASCII)(TXT), Portable Document Format (PDF), and WordPerfect (versions 7 to 8). The DMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the web site.

An electronic copy of this document may also be downloaded by using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may also reach the Office of the Federal Register's home page at: <http://www.nara.gov/fedreg> and the Government Printing Office's web page at: <http://www.access.gpo.gov/nara>.

**Background**

Section 112(b)(1) of title 23, United States Code, requires highway construction contracts to be awarded competitively to the lowest responsive bidder. A State must use competitive bidding procedures, unless it demonstrates that some other method is more cost effective or that an emergency exists. Similarly, 23 U.S.C. 112(b)(2) requires engineering service contracts to be awarded using qualifications-based selection procedures. Under the "design-build contracting method," one entity (known as the design-builder) performs both engineering and construction of a project under a single contract with the owner. Prior to the TEA-21 (Public Law 105-178, 112 Stat. 107 (1998)), the design-build contracting method did not fully comply with existing statutes; however, the FHWA allowed the States to evaluate the design-build method on an experimental basis under Special Experimental Projects Number 14 (SEP-

14)—Innovative Contracting.<sup>1</sup> Under SEP-14, twenty-four States and several local public agencies evaluated the design-build contracting technique.

**Transportation Equity Act for the 21st Century**

Section 1307 of the TEA-21 defines the term "design-build contract" as "an agreement that provides for design and construction of a project by a contractor, regardless of whether the agreement is in the form of a design-build contract, a franchise agreement, or any other form of contract approved by the Secretary." In addition, section 1307 amends 23 U.S.C. 112 to allow the design-build contracting method after the FHWA promulgates a regulation prescribing the policies and procedures for utilizing the design-build contracting method on qualified Federal-aid highway projects. The TEA-21 defined qualified projects as projects that comply with the criteria in this regulation and whose total costs are estimated to exceed: (1) \$5 million for intelligent transportation system projects, and (2) \$50 million for any other project. It also provides certain key requirements that the FHWA must address in the development of these regulations. These requirements include, but are not limited to, the following:

- Prior to initiating the rulemaking process, the FHWA must consult with representatives from the American Association of State Highway and Transportation Officials (AASHTO) and representatives from other affected industries;
- The FHWA must complete the rulemaking process within three years of the date of TEA-21 enactment, or by June 9, 2001; and
- The regulation must: (1) Identify the criteria to be used by the Secretary in approving design-build projects, and (2) establish the procedures to be followed by Federal-aid recipients in seeking the FHWA's approval.

In addition, section 1307 modifies FHWA's statutes with several other key provisions regarding the use of the design-build contracting method, including the following:

- In general, an FHWA recipient may award a design-build contract for a "qualified" project using any procurement process permitted by applicable State and local law;
- Section 112(e)(2) of title 23, U.S.C., Standardized Contract Clause

<sup>1</sup> Information concerning Special Experimental Project No. 14 (SEP-14), "Innovative Contracting Practices," is available on FHWA's home page: <http://www.fhwa.dot.gov>. Additional information may be obtained from the FHWA Division Administrator in each State.

Concerning Site Conditions, does not apply to design-build contracts;

- Final design under a design-build contract shall not commence before compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*); and
- Prior to the final rule and for projects outside of the qualified project limits, the FHWA may continue experimental evaluation and approval procedures under Special Experimental Project No. 14 (SEP-14)—Innovative Contracting.

#### Report to Congress

Section 1307(f) of the TEA-21, "Report to Congress," requires the FHWA to assess the impacts of design-build contracting by June 9, 2003. Specifically, the FHWA is required to report on the following items:

- An assessment of the effect of design-build contracting on project quality, project cost, and timeliness of project delivery;
- Recommendations on the appropriate level of design for design-build procurements;
- An assessment of the impact of design-build contracting on small businesses;
- An assessment of the subjectivity used in design-build contracting; and
- Such recommendations concerning design-build contracting procedures as the Secretary determines to be appropriate.

Presently the FHWA has little data available concerning the cost-effectiveness of design-build contracting in the transportation industry. Transportation Research Record No. 1351, titled "Final Evaluation of the Florida Department of Transportation's Pilot Design/Build Program,"<sup>2</sup> documents the Florida DOT's (FDOT) early experience with eleven State-funded design-build projects. This study was performed by the University of Florida, Gainesville, FL in 1992.

In a comparison with FDOT's traditional design-bid-build projects, the researchers found that the average design-build direct cost was 4.59 percent greater than the average design-bid-build cost. However, the statistical analysis of the data did not confirm the difference in means (because of the

small sample size and the data variability, the direct cost comparison was inconclusive). However, the average design-build construction time was 21.1 percent less than the average for design-bid-build projects. Also, the researchers noted significant differences in the average increases for contract cost. The design-build projects had an average cost increase of 4.09 percent versus FDOT's 1990 design-bid-build project average cost increase of 8.78 percent.

By the time the report to Congress is developed, the FHWA anticipates that there will be more experience with the design-build contracting technique. The FHWA will be in a better position to assess the true impacts of design-build contracting on the transportation industry.

The FHWA welcomes comments on this subject. The agency invites recommendations concerning how we might assess the cost effectiveness of design-build contracting. Also, we invite comment on what techniques and procedures should be used in assessing the issues identified by Congress in section 1307(f).

#### Pre-Rule Workshop and Outreach

Throughout 1998, 1999, and 2000, the FHWA representatives met with representatives from the AASHTO and other affected industries. During these meetings, the FHWA, the AASHTO and industry discussed issues relating to design-build contracting. The FHWA was invited to attend numerous association annual meetings and also met individually at the request of some industry representatives. The FHWA employees attended the following meetings:

- The American Consulting Engineer's Council (ACEC), March 5, 1999, Washington, DC;
- The Associated General Contractors of America (AGC), March 23, 1999, Las Vegas, NV;
- The American Road Builders and Transportation Association (ARTBA), March 24, 1999, Las Vegas, NV;
- The Design-Build Institute of America (DBIA), March 25, 1999, Las Vegas, NV;
- AASHTO's Standing Committee on Highways, April 17, 1999, Little Rock, AR;
- AASHTO's Subcommittee on Design, June 22, 1999, Dewey Beach DE;
- AASHTO's Value Engineering Conference, July 14, 1999, Branson, MO; and
- AASHTO's Subcommittee on Construction, August 2, 1999, New Orleans, LA.

In 1999, employees from the FHWA's Fort Worth, Texas office performed a

field review of existing design-build projects. This team interviewed engineers and administrators who are involved with design-build projects in seven States: Arizona, California, Colorado, Florida, Michigan, Ohio, and Utah. Representatives from construction contractors, design consultants, the STDs, toll road agencies and other individuals were interviewed to share experiences and capture the lessons learned regarding the design-build contracting technique.

The FHWA representatives attended outreach sessions related to the design-build rulemaking effort at two national conferences. The first annual "Design-Build for Transportation Conference" was held April 21-23, 1999, in Salt Lake City, UT. This conference was sponsored by the Design-Build Institute of America, the American Society of Civil Engineers, and the FHWA. A special two-hour outreach session was sponsored by the FHWA to seek comments and suggestions concerning our development of this regulation. The second annual "Design-Build for Transportation Conference" was held March 29-31, 2000, in Tampa, FL. This conference was sponsored by the Design-Build Institute of America, the AASHTO, and the FHWA. An FHWA representative presented an update on the status of the rulemaking effort and several members of the audience expressed their recommendations for items that should be considered in the rulemaking process.

In addition, on December 16, 1999, the FHWA sponsored a one-day pre-rule workshop for the design-build regulation in Washington, D.C. More than 100 registrants from 26 States, Puerto Rico, and the District of Columbia attended. They represented 13 STDs, 1 county, 3 Federal agencies, 2 construction organizations, 12 construction companies, 16 engineering firms, and 1 engineering organization. Representatives from law firms, auditing agencies, insurance companies, and the media also attended the December 16 workshop. Representatives from the AASHTO and each of the major industry associations presented their viewpoints on issues that should be considered in the rulemaking process.

Many of the comments received at these meetings have been incorporated into this document. A summary of the minutes from the December 16, 1999 meeting is available on the FHWA's web page at the following address: [http://www.fhwa.dot.gov/infrastructure/progadmin/contracts/d\\_build.htm](http://www.fhwa.dot.gov/infrastructure/progadmin/contracts/d_build.htm).

<sup>2</sup> R. D. Ellis, Jr. and A. Kumar, "Final Evaluation of the Florida Department of Transportation's Pilot Design/Build Program," 1992, pp. 94-105 of the Transportation Research Record No. 1351, Transportation Research Board (TRB). This publication is out of print, but a photocopy may be purchased from the TRB Publications Sales Office at Lockbox 289, Washington, DC 20055. Telephone (202) 334-3213. See TRB web site at URL: <http://nationalacademies.org/trb>. A copy is in the file for FHWA Docket No. 2000-7790.

### Section-by-Section Analysis

This section includes a section-by-section analysis of the proposed requirements and incorporates summary information regarding comments received during the FHWA's pre-rule workshop and outreach sessions. The comments are, of necessity, summarized in each of the relevant sections of the proposed rule and are intended to provide an overall perspective on the comments submitted to the FHWA concerning design-build contracting.

### General Comments

During the pre-rule workshop, many individuals and associations recommended that the FHWA keep the rules simple and flexible. It is apparent that States which have evaluated design-build under SEP-14 have their own unique needs and preferences. Each would like to maintain that flexibility and not be limited by any regulation which might hinder project delivery, innovation, or cost savings. The industry associations, on the other hand, raised specific issues concerning the procurement process and the importance of minimizing subjectivity in the selection process. Position papers for the AASHTO and the major industry associations, which participated in the December 16, 1999, pre-rule workshop meeting are posted on the FHWA's web site at: [http://www.fhwa.dot.gov/infrastructure/progadmin/contracts/d\\_build.htm](http://www.fhwa.dot.gov/infrastructure/progadmin/contracts/d_build.htm).

In general terms, the AASHTO expressed the need for a simple, yet flexible rule which will create a framework for encouraging the development of a design-build process in each State. The rule should not impede project delivery, innovation, or cost savings. The AASHTO encouraged the FHWA to develop a rule which would foster the mainstreaming of the design-build process into the transportation arena. Finally, the AASHTO asserted that a rule cannot be written to ensure complete fairness in the procurement process, but AASHTO noted that STDs must make every reasonable effort to provide an open and understandable process.

The construction industry was represented at the pre-rule workshop meeting by the Associated General Contractors of America (AGC) and the American Road and Transportation Builders Association (ARTBA). They echoed similar comments and reservations regarding issues that should be considered in the proposed rule. The ARTBA stated that there is no clear industry consensus regarding the design-build contracting method.

Construction firms often have different opinions depending on such factors as their size and culture. Both the ARTBA and the AGC stated that the traditional "design-bid-build"<sup>3</sup> system is the preferred delivery system for publicly financed transportation construction projects and should be used whenever possible. The AGC said that States should demonstrate how a specific project would benefit from the use of the design-build method before a delivery system is chosen. Both associations are concerned with the potential for subjectivity in the selection process and the need for a fair, equitable, and consistent procurement process.

The ACEC recommended that the proposed rule be crafted in a manner to allow the STDs to evaluate and select the project delivery system which will represent the best value for a specific project. The proposed rule should promote a best value/value-based selection process that evaluates cost, technical qualifications, technical approach, and quality. In broad terms, the ACEC recommended a process which would encourage innovation in addition to design and construction flexibility.

The Design-Build Institute of America (DBIA) illustrated the positive aspects of the design-build process and hoped that the FHWA's proposed rule would provide STDs and local agencies with maximum flexibility in structuring their procurement processes. The DBIA strongly supports the use of a best value selection process in procurement. It blends the attributes of price, qualifications and other technical properties to arrive at the best value for the project owner.

Based on a review of all of the comments received during the pre-rule workshop process, the FHWA proposes to give Federal-aid recipients as much flexibility as possible in the selection of the appropriate form of design-build contracting for their individual projects. We have developed the proposed regulation with two goals in mind:

- Continue the flexibility that exists under the current SEP-14 design-build program, and
- Develop a model for the appropriate use of the design-build process in each State.

This proposed rule would provide a general framework for the procurement of design-build projects, ranging from simple projects which may be awarded on a low-bid basis to complex projects,

<sup>3</sup> Design-bid-build" means the traditional delivery method where design and construction are sequential steps in the project development process.

which may utilize a best-value selection process through competitive negotiation. Federal agencies, which contract directly with the private sector for goods and services, currently have such standards in the Federal Acquisition Regulations (FAR). These regulations define the standards for contracting in direct Federal procurement, including design-build and competitive negotiation. Specifically, the concepts in 48 CFR Part 15, Contracting by Negotiation, provide standards which have been tested by numerous contracting agencies and the courts.

The FHWA proposes to adopt a modified version of the FAR provisions. We believe our proposed rule would satisfy both of the above mentioned goals. Accordingly, the STDs will then have the same degree of flexibility in procurement as other Federal agencies which procure directly for contract services. Also, industry representatives who contract in both the direct Federal and Federal-aid transportation markets will be subject to the same standards of fairness in competitive negotiation.

### Specific Comments

#### Part 627—Value Engineering

It is necessary to amend the existing value engineering regulations in 23 CFR 627 to clarify how the FHWA's value engineering policies apply to design-build projects.

During the pre-rule workshop process, both the AASHTO and the AGC provided recommendations on this subject. The AASHTO believes that the STDs should have the flexibility to use value engineering clauses where appropriate. The AGC stated that value engineering proposals should not be permitted during the proposal stage of design-build procurement, but the AGC believes that post-award value engineering proposals may be acceptable.

The FHWA believes that flexibility is appropriate for this issue. New paragraph (e) in § 627.5 would provide several options for meeting the value engineering provision of § 627.1(a). This provision requires States to perform a value engineering analysis on all National Highway System (NHS) projects with an estimated cost of \$25 million or more. The first option noted in the proposed rule would allow STDs to perform a value engineering analysis prior to the initiation of the procurement process. In lieu of this, STDs may require the design-builder or other parties to perform a value engineering analysis at other points in the project development process. Also,

in keeping with the FHWA's existing philosophy regarding value engineering change proposal clauses, these provisions may be used at the STD's discretion, but are not required, for design-build projects.

### **Part 635—Construction and Maintenance**

#### *Section 635.102 Definitions*

It is necessary to amend the existing regulations to clarify how the FHWA's requirements for Federal-aid construction contracts will apply to design-build projects. A definition is added for "design-build project."

The term "certification acceptance" is removed. Section 1604 of the TEA-21, which replaced 23 U.S.C. 117 (formerly titled "Certification Acceptance"), removed this term and replaced it with the new program "High Priority Projects Program."

#### *Section 635.104 Method of Construction*

New paragraph (c) would be added to provide a reference to new part 636 and the contracting provisions for Federal-aid design-build projects.

#### *Section 635.107 Participation by Disadvantaged Business Enterprise*

During the design-build pre-rule workshop process, the AASHTO recommended that specific Disadvantaged Business Enterprise (DBE) commitments should not be mandated at the time of award. The AGC stated its belief that DBE requirements should be the same as for traditional projects; however, where STDs are meeting goals through race neutral means, contractual goals should not be stated in the Request for Proposals document. The AGC also stated that DBE utilization should not be a weighted factor in selecting the successful offeror.

The DBE program requirements under the U.S. DOT's DBE regulation in 49 CFR part 26 are applicable to FHWA design-build projects. The STDs may establish an overall DBE contract goal for design-build projects. The design-builder in turn may establish appropriate goals for the subcontracts it lets to meet the overall design-build contract goal. The STDs are to maintain oversight of the design-builder's activities to ensure compliance with the provisions of 49 CFR part 26.

We are proposing several different changes to § 635.107. First, we are proposing to change the title from "Small and disadvantaged business participation" to "Participation by disadvantaged business enterprise."

This is being done to be consistent with the terminology in the U.S. DOT's DBE program in 49 CFR part 26. Paragraph (a) would also be modified to provide the correct reference to 49 CFR part 26.

Second, we are proposing to add new paragraph (b) to clarify how DBE requirements will apply to design-build projects. These provisions would state that offerors do not need to furnish the specific commitment information required by 49 CFR 26.53(b)(2) prior to the award of a contract. However, the design-builder must indicate that it can obtain the necessary DBE commitments. If the design-builder cannot obtain the necessary commitments, it must document to the STD its good faith efforts, as described in 49 CFR 26.53. Under 49 CFR 26.53(e), the STD or contracting agency must maintain oversight to ensure contractual requirements are met throughout the life of the contract. Lastly, the proposed rule would prohibit STDs from providing additional credit during the proposal evaluation process for offerors who indicate that they will attain DBE participation above the contract goal. The DBE program requirements are one of many contractual requirements which are binding on the design-builder; however, STDs must not give preferences to offerors who exceed the DBE contract goals.

#### *Section 635.109 Standardized changed condition clauses*

Section 1307(b) of TEA-21 modified 23 U.S.C. 112(e)(2) such that the FHWA's requirement to utilize standardized changed condition clauses on all Federal-aid construction projects will not apply to design-build projects. However, depending on the level of risk sharing between the STD and the design-builder, modified versions of these clauses may be appropriate in certain circumstances.

During the pre-rule meeting with the AASHTO and industry, the AGC stated that the proposed rule should require the use of a changed condition clause in design-build contracts. The AGC asserted that such clauses will limit litigation and reduce overall project cost by precluding the need to include contingencies in prices for unknown conditions or for undertaking extensive pre-proposal geologic studies. The ACEC addressed this issue indirectly in recommending that the preliminary design should be advanced to the point where risks, such as differing site conditions, are identified and properly allocated. The other associations did not comment on this issue.

The FHWA believes that certain elements of the standardized changed

condition clauses may be appropriate for certain design-build projects. Others may be included at the discretion of the contracting agency depending on the risk allocation for a given project. Specifically, the differing site conditions clause (or a modified version of the clause in 23 CFR 635.109(a)(1)) may be specified by an owner depending on the specific risks and responsibilities which are being allocated to the design-builder.

The "Suspensions of Work Ordered by the Engineer" clause is appropriate in any situation where the contracting agency suspends or delays the work for an unreasonable time period. Therefore, the FHWA is requiring its use on all design-build contracts.

The intent of the "Significant Changes in the Character of Work" clause in 23 CFR 635.109(a)(3) is to provide equitable adjustments for changes in quantities and other alterations in the work (designed by the owner) as necessary to complete the project. In the case of a design-build project, the STD may have delegated this responsibility to the design-builder and it may not be appropriate to include such change clauses in a design-build contract. In addition, the "lump sum payment" structure of most design-build contracts does not correlate with the "unit price payment" structure of traditional design-bid-build contracts. In other cases, an owner may believe that it is appropriate to include provisions similar to the "significant changes in the character of work" clause in a design-build contract. However, such use would be optional under this proposed rule.

New paragraph (c) would be added to require the use of the standardized suspensions of work ordered by the engineer clause (23 CFR 635.109(a)(2)) for all design-build projects. However, the STDs would be encouraged to consider using differing site condition clauses and significant changes in the character of work clauses which are appropriate for the risk and responsibilities that are shared with the design-builder.

#### *Section 635.110 Licensing and Qualification of Contractors*

The FHWA proposes to amend this section to clarify how the requirements for licensing and qualification of contractors would apply to design-build contracts. During the pre-rule workshop process there were several comments on this issue.

The AASHTO recommended that contracting agencies be permitted to require contractor prequalification and licensed engineers in accordance with

the owner's requirements or State and local statutes. The ACEC recommended that flexibility be provided in prequalification and licensing requirements to allow a design firm to lead the design-build team. While the AGC did not specifically comment on this issue, it indicated that prequalification is a necessary element in the design-build process to limit the number of design-builders that will incur the expense of preparing proposals.

The ARTBA suggested that contracting agencies should use some type of screening process which might be based on prequalification, a surety bond system, or merely a demonstration of understanding technical requirements. However, the ARTBA recommended against a short listing process as it believes that anyone who is qualified to perform the work should be allowed to submit a proposal. The DBIA stated that prequalification is essential for effective design-build contracting. The DBIA recommended that the proposed rules provide that design-builders must clearly demonstrate their ability to become licensed or to practice professionally in the State in which the project is located.

In consideration of all of these comments, the FHWA has proposed to allow States to require certain prequalification requirements if required by their own statutes or procedures. Prequalification may be required as a condition of a proposal submission if it is required by State statute or policy; however, the STD must allow adequate time between project advertisement and the opening of cost/technical proposals for proposers to become prequalified.

In addition, new paragraph (f) would be added to allow the STDs to use their own bonding, insurance, licensing and qualification procedures for any phase of design-build procurement. Geographic preferences are prohibited. The STDs may require offerors to demonstrate their ability to become licensed; however, licensing procedures may not serve as a barrier to the consideration of otherwise responsive proposals.

#### *Section 635.112 Advertising for Bids*

During the pre-rule workshop process, the AASHTO recommended that the FHWA authorization should take place prior to offering the project for advertisement. The AASHTO suggested that this authorization should carry through the rest of the project's development.

We are proposing two changes to this section. First, this section would be

retitled to read "Advertising for bids and proposals." We prefer the term "proposal" rather than "bids" for design-build contracting. The term "bid" is usually associated with an invitation for bids under the design-bid-build method of contracting. The term "proposal" is usually associated with the design-build contracting method.

Second, we are proposing to add new paragraph (i). Paragraph (i) would amend the requirements of this section for a design-build project. The FHWA Division Administrator's approval of the Request for Proposals (RFP) document will constitute the FHWA's project authorization and the FHWA's approval of the STD's request to release the RFP document. The STD may decide the appropriate solicitation schedule for the project advertising, release of the request for proposals, and proposal submission deadlines.

#### *Section 635.113 Bid Opening and Bid Tabulations*

New paragraph (c) would be added to allow STDs to use their own procedures for the process of receiving, reviewing and processing design-build proposals. The STD will submit a tabulation of proposal costs to the FHWA Division Administrator as is presently done for traditional design-bid-build projects.

#### *Section 635.114 Award of Contract and Concurrence in Award*

New paragraph (k) would provide a reference to the design-build contracting requirements of part 636.

#### *Section 635.116 Subcontracting and Contractor Responsibilities*

The FHWA's current subcontracting provision requires the prime contractor to perform at least 30 percent of the work (less specialty items). During the pre-rule workshop process, the AASHTO recommended that the States be allowed to determine the required percentage of work to be performed by the design-builder and/or its subcontractors. The DBIA recommended that the FHWA not establish a requirement, but leave this issue to the discretion of the design-builder. The ACEC recommended flexibility in all procurement policies to allow the situation where a design firm serves as the leader on a design-build team. The AGC recommended no change in the existing requirement. The other associations did not provide comments on this issue.

The FHWA proposes to provide greater flexibility in this area for design-build contracts. We believe that the contract agency is in the best position to establish minimum percentages of work

that must be accomplished by the design-builder. Therefore, the proposed rule would not apply the existing 30 percent requirement to design-build projects. At their discretion, STDs may establish minimum percentages of the work which would be accomplished by the design-builder.

Accordingly, we propose to add new paragraph (d). Paragraph (d) would allow the STDs to determine the minimum amount of work which must be accomplished by the design-builder. In addition, the FHWA has also included a prohibition on any procedure, requirement, or preference which imposes minimum subcontracting requirements or goals (other than those necessary to meet the Disadvantaged Business Enterprise program requirements of 49 CFR part 26). Subcontracting goals may serve as a local contracting preference, thereby presenting an artificial contractual barrier to the design-builder's ability to manage an efficient contract. Therefore, we are proposing to prohibit subcontracting goals.

#### *Section 635.122 Participation in Progress Payments*

The proposed rule would add paragraph (c) which would require STDs to specify how progress payments will be made in the RFP document on lump sum design-build contracts.

#### *Section 635.309 Authorization*

This proposed rule would define the RFP document approval as the key point in the Division Administrator's authorization of a design-build project. The Division Administrator's approval of the RFP document would constitute the FHWA's authorization of the project. This includes approval to proceed with the advertisement /release of the RFP document and, subject to concurrence-in-award, proceed with the design and construction of the project. The requirements for authorization of a design-build project are added in a new paragraph (p).

#### *Section 635.411 Material or Product Selection*

In general, the associations supported the concept of applying the existing restrictions for proprietary products to design-build projects. The current requirement for traditional design-bid-build construction projects generally prohibits the STDs from specifying proprietary products in the plan and specifications, unless the proprietary product is: (1) Bid competitively with equally suitable unpatented products, (2) used for research, or (3) necessary for synchronization purposes. For design-

build projects, the prohibition on specifying proprietary products would apply to the requirements in the RFP document. The design-builder would be free to use a proprietary product if it met the requirements of the design-build contract.

The AASHTO stated that the proprietary product restrictions should be in accordance with current requirements. Any allowable exceptions should be clearly defined in the contract documents. The AGC stated that the specification of proprietary products in the RFP should be strongly discouraged. The AGC believed that specifying proprietary products undermines the design-builder's creativity in developing a proposal to meet the owner's needs. The DBIA stated the current prohibition for specifying proprietary products in the contract documents should be continued. The STDs employing design-build should be using performance specifications seeking quality end results in lieu of means and methods prescriptive specifications. The FHWA concurs with the recommendations of the associations and this proposed rule would extend the current requirements to the design-build RFP document. The requirements for material or product selection in design-build contracts are added in paragraph (f).

#### *Section 635.413 Warranty Clauses*

There was a difference of opinion among the associations regarding the use of warranty clauses on design-build projects. Some, but not all, of the associations elected to comment on the warranty issue. The AASHTO stated that the use of warranties should be at the owner's discretion. If an owner believes that warranties are desirable, they should carefully consider and clearly communicate the requirements in the RFP document. The ACEC expressed concern over any attempt to extend uninsurable warranty provisions to professional engineering services. The AGC stated that warranty requirements should not be addressed in the proposed rule. The AGC believes that this is a significant issue that should be addressed separately. The DBIA indirectly addressed this issue in the subject of risk allocation. The DBIA supports the concept of appropriate risk delegation by including warranty provisions only where certain design and construction features are within the control of the design-builder.

The FHWA recognizes the significant concern regarding warranty issues and agrees with the AASHTO that STDs should have the discretion to use warranties where appropriate. The proposed rule would not amend the

current warranty regulation in 23 CFR 635.413 which limits the application of warranties to specific products or construction features on NHS projects. The STDs would continue to use their own warranty procedures on non-NHS projects.

#### **Part 636—Design-Build Contracting**

This part would provide new requirements for Federal-aid design-build projects. The agency believes it is necessary to provide additional explanation for certain new requirements which are not self-explanatory. Specific comments on these new provisions follow.

##### *Section 636.102 Does This Part Apply to Me?*

This part is written in the plain-language format. The pronoun "you" refers to the STD, the primary recipient of Federal-aid funds in a State. 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.

##### *Section 636.103 What Are the Definitions of Terms Used in This Part?*

Many of the definitions used in this section are taken from the DBIA's "Design-Build Manual of Practice,"<sup>4</sup> Document Number 103. Modifications are made to certain terms to agree with the actual use in the Federal-aid highway program. Other definitions, such as the definition of a "qualified project," are taken from section 1307 of the TEA-21.

##### *Section 636.106 What Type of Projects May Be Used With Design-Build Contracting?*

In its recommendations to the FHWA, the AASHTO stated that the proposed rules for design-build should not limit a State's ability to gain maximum benefit from the process. States should not be prohibited from using the most effective selection process for each individual project. Similarly, the ACEC recommended that owners should be provided with the flexibility to adopt the project delivery method that offers the best value, given the unique opportunities, constraints, risks, and demands of a particular project. The DBIA strongly supported a process

which will encourage the use of design-build. On the other hand, both the ARTBA and the AGC expressed reservations with the design-build method and recommended that the traditional design-bid-build method remain the preferred method of contracting. The AGC stated that design-build should only be allowed for use on Federal-aid projects where it can be demonstrated that traditional contracting methods are not appropriate or where there are unique problems or circumstances associated with a particular project. The ARTBA recognized that there may be certain projects that will lend themselves to design-build including projects incorporating innovative financing arrangements (certainty in price and/or scheduling), and projects incorporating specific technical challenges. The ARTBA, however, believes that design-build should only be used where it would provide the public with a real advantage which is not readily provided by the traditional design-bid-build method. The ARTBA also recommended that the estimated contract amount should not be a determining factor in an owner's criteria to use design-build.

Considering the sharp division of comments offered by the associations, and the congressional mandate of section 1307, we propose providing broad discretion to the States regarding project selection criteria. We have not set specific criteria which limit the type of projects which are suitable for design-build contracting. This is a subject which is better addressed in non-regulatory guidance.

Under SEP-14, the States have evaluated more than 140 design-build projects since 1991. These projects include various types of surface transportation projects, including the following: simple roadway resurfacing, bridge replacements, interchange modifications, intelligent transportation system installation, roadways on new alignment, vehicle emission inspection stations, ferry boats, tunnel reconstruction and mega-construction projects, such as the I-15 reconstruction in Utah. Based on the FHWA's experience with the SEP-14 program, we do not believe that it is necessary or appropriate to limit the design-build contracting technique to projects with a certain type of work or contract size. Federal-aid recipients will be given the flexibility to choose the correct contracting method which is appropriate for the project objectives based on project delivery time, cost, construction schedule and/or quality.

<sup>4</sup>The Design-Build Manual of Practice," Document Number 103 (Design-Build Definitions), is available for purchase from the Design-Build Institute of America, 1010 Massachusetts Avenue, N.W., Suite 350, Washington, D.C. 20001 (\$9 for DBIA members; \$12 nonmembers). Online publication information is available at URL: <http://www.dbia.org/pubs>.

*Section 636.107 Does the Definition of a "Qualified Project" Limit the Use of Design-Build Contracting?*

The TEA-21 requires the FHWA to establish the procedures to be followed by an owner for obtaining the Secretary's approval for the use of design-build contracting. The procedures for obtaining the FHWA's approval for traditional project authorization are established and well known by the STDs. The procedures for requesting the FHWA authorization of Federal-aid design-build projects would be the same as any other project funded by the FHWA. However, after the effective date of the final rule, design-build projects which do not meet the TEA-21 definition of a "qualified project" must follow SEP-14 procedures.

The AASHTO recommended that all design-build projects be exempt from the SEP-14 process once a final rule is developed. If this is not possible, the AASHTO recommended that the FHWA Division Offices be granted approval authority for the SEP-14 program because they have a better understanding of State and local needs. The AASHTO also advocates a simplification of the SEP-14 process and a change in the "qualified project" limit from \$50 million to \$10 million.

The FHWA agrees with many of the AASHTO's recommendations; however, the definition of a "qualified project" is a statutory requirement which the FHWA cannot change. Under the proposed rule, the FHWA Division Offices would use the provisions of the final rule in approving "non-qualified" projects for inclusion under SEP-14. Projects which do not comply with the provisions of the final rule will be referred to the FHWA Headquarters for concept approval under SEP-14.

*Section 636.108 How Does the Definition of a "Qualified Project" Apply to ITS Projects?*

The AASHTO recommended that an ITS design-build project be defined as one that applies information and control technologies to improve the safety, efficiency, and operation of the transportation system.

In defining a "qualified project" in section 1307 of the TEA-21, the Congress did not provide additional guidance on the \$5 million limitation for ITS projects. For this reason, the FHWA is reluctant to provide further clarification in the proposed rule. However, we believe that for eligibility purposes, a design-build project with an estimated cost of \$5 million or more, which is primarily for ITS technology

purposes, complies with the definition of a "qualified project."

*Section 636.109 How Does the NEPA Review Process Relate to the Design-Build Procurement Process?*

Several of the associations provided comments regarding the application of the FHWA's National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) requirements to design-build projects. The following are the views of the industry associations concerning the relationship of the NEPA process and the design-build procurement process.

The AASHTO recommended that the NEPA process be completed prior to the award of a design-build project to ensure that all environmental concerns and remedial measures are sufficiently detailed for the design-builder. However, in cases where environmental impacts are expected to be minimal and the outcome of the NEPA review appears certain, the AASHTO believes the RFP document could be released after approval of the final environmental impact statement. The AASHTO stated that the responsibility for obtaining environmental approval rests with the owner. Also, the AASHTO recommended that the public's perception of the NEPA process and its relation to the design-build procurement process should be carefully considered. Additionally, the AASHTO suggested that the NEPA and design-build project delivery issues are best addressed by the individual project owner in consultation with the FHWA Division Office.

The AGC indicated that the NEPA process should be complete prior to the selection of the design-builder. The AGC supports the concept of the owner being responsible for all necessary environmental permits.

The ACEC was concerned about the potential adverse public perception where the design-build procurement process is initiated prior to the conclusion of the NEPA process. The ACEC recommended that the FHWA discourage owners from releasing the RFP document prior to the completion of the NEPA process. However, the ACEC suggested the solicitation of qualifications should be allowed at the discretion of the owner.

The FHWA agrees with many of the recommendations provided by the associations. Section 1307(a)(3)(B) of the TEA-21 states the following: "Final design under a design-build contract referred to in subparagraph (A) shall not commence before compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332)." The FHWA believes the

congressional intent of this provision was to ensure full compliance with NEPA for all design-build projects. To ensure a complete unbiased NEPA process, it is imperative that the STDs perform a level of design and environmental review which is necessary to fully evaluate the range of reasonable alternatives chosen to meet project goals and avoid adverse environmental impact. Project design activities beyond this stage involve a certain level of risk.

The FHWA's NEPA review process was developed to ensure that environmental impact information for any federally funded action is available to public officials and citizens before decisions are made and before actions are taken. The success of the NEPA process is based on the assumption that there will be an objective and unbiased review of all reasonable alternatives that address project needs and are prudent in terms of avoiding potential environmental effects. Moreover, the public perception of the NEPA review process is very important to the FHWA and STDs. The perception of an unbiased review process should not be compromised by a decision to release the design-build RFP prior to the conclusion of the NEPA review process. Therefore, the NEPA review process should be complete (an approval received for a Categorical Exclusion, Finding of No Significant Impact, or a Record of Decision as defined in 23 CFR 771.113(a)) prior to releasing the RFP document.

The FHWA's environmental regulations require the evaluation of alternatives, their environmental consequences, and the incorporation of mitigation measures (avoidance, minimization, and compensation) prior to proceeding with an action. Project activities beyond those necessary to answer environmental questions during the NEPA review process (for example: final design, right-of-way acquisition, and construction) are not permitted prior to the conclusion of the NEPA review process.

The FHWA also agrees with the association recommendations to ensure that the RFP document address all environmental commitments and mitigation measures. Due to the nature of the design-build process, proposers often expend significant effort preparing technical and cost proposals in response to an RFP. Therefore, STDs have a responsibility to: (1) Ensure that the RFP scope of work includes the details related to all environmental commitments and (2) assure proposers that the scope will not change as a result of the environmental review process.

This will minimize the need for proposers to include contingencies in their cost proposals.

The proposed rule would allow the request for qualifications (RFQ) solicitation to proceed prior to the conclusion of the NEPA process. However, the RFP should not be released prior to the conclusion of the NEPA process.

*Section 636.110 What Procedures May Be Used for Solicitations and Receipt of Proposals?*

Rather than adopting a modification of FAR provisions for this subject, the FHWA has elected to allow the States to use their own procedures for the solicitation and receipt of proposals.

*Section 636.111 Can Oral Presentations Be Used During the Procurement Process?*

The proposed language in this section is a modified version of the requirement in 48 CFR 15.102, Oral Presentations. The modifications provide flexibility for State procurement officials.

*Section 636.112 May Stipends Be Used?*

All of the associations which provided comments to the FHWA during the pre-rule workshop meeting supported both the owner's use of stipends and Federal-aid participation in the cost of stipends. The AASHTO indicated that the payment of stipends to firms submitting competitive proposals should be at the owner's discretion. The AGC recommended that the stipend be based on some formula related to the value of the project and not selected arbitrarily. The AASHTO also stated that owners should have full rights to retain and use ideas from proposals when stipends are accepted by the offerors. The DBIA said that stipends are an effective means for encouraging competition. When used in combination with short listing or prequalification procedures, the contracting agency will benefit from a cost effective procurement process.

Based on our preliminary experience with SEP-14 design-build projects, the FHWA agrees that stipends appear to be cost effective on large projects where offerors may be required to incur significant costs to submit a proposal. The use of stipends in such cases should: (1) Offset costs incurred by the offerors for their substantial efforts and thereby ensure a minimum level of competition through the end of the procurement process, (2) ensure that smaller companies are not put at a significant competitive disadvantage, and (3) send a message to potential

offerors that the owner is serious about awarding a contract and receiving a quality proposal.

*Section 636.113 Is the Stipend Amount Eligible for Federal Participation?*

The cost of stipends is eligible for Federal-aid participation. The FHWA has listed a range of costs based on the estimated proposal development costs. In addition, the proposed rule states that STDs may retain the right to use ideas from unsuccessful offerors if State law provides for this.

*Section 636.114 What Factors Should Be Considered in Risk Allocation?*

The AASHTO recommended that the assignment of risk be determined by the owner and clearly defined in the procurement and contract documents. The ACEC stated that the RFP document should clearly define the owner's requirements and assign risk to the party who is best able to manage it. The AGC cautioned against the temptation to shift all project related risk to the design-builder. The AGC recommended that contracts incorporate standardized change condition clauses to reduce the offeror's need to cover contingencies through increased project costs. The AGC also supports the concept of incentive and disincentive provisions to reduce the actual construction time and reduce impacts to the traveling public. The DBIA noted that an unfair allocation of risks to offerors may lead to increased bid prices, change order disputes, and litigation costs. According to the DBIA, studies have shown that the risk best belongs to the party who is best able to evaluate, control, and bear the cost of the risk. Many risks and liabilities are best shared. Every risk has an associated and unavoidable cost, which must be assumed somewhere in the process.

The FHWA concurs with the recommendations of the Associations. Section 636.114 would encourage STDs to identify, consider, and allocate risks in the procurement documents.

*Section 636.115 May I Meet With Industry To Gather Information Concerning the Appropriate Risk Allocation Strategies?*

The proposed requirements of this section are modified from 48 CFR 15.201, Exchanges with Industry Before Receipt of Proposals. This section will encourage the STDs to gather the appropriate information concerning risk allocation prior to the initiation of the procurement process. The FHWA is proposing modifications to the FAR

provisions to give the STDs the necessary flexibility in procurement.

*Section 636.116 What Organizational Conflict of Interest Requirements Apply to Design-Build Projects?*

The organizational conflict of interest subject generated significant comments from many associations. Several commenters requested that owners be required to list specific conflict of interest provisions in all solicitations for design-build projects. Most of the associations believed that the owner's consultant or sub-consultant (who was involved in the development or preparation of the RFP document) should be excluded from the proposal process because this may present a real or an apparent conflict of interest. In addition, the AASHTO recommended that consultants or sub-consultants who participate as offerors should not be involved in the evaluation of proposals or the administration of design-build contracts. However, the AASHTO suggested that, at the option of the owner, a consultant should be allowed to join multiple proposal teams.

The AGC recommended that the regulation should not prohibit consultants from working for more than one bidder or from participating on the successful design-build team if the consultant worked with a different firm during the proposal stage.

The ACEC is concerned about the potential for conflict of interest when an owner's consultant joins one of the prospective offerors. However, it identified cases where it may be appropriate to allow the owner's sub-consultants to participate in the proposal process. One example might be where the sub-consultant provides limited information in the project development process and this information is provided to all offerors (such as a geotechnical engineering firm).

The DBIA stated that, as an overall guideline, relationships between owner's consultants and design-build team members should be avoided. Owner's consultants should not be permitted to participate on design-build proposal teams. However, an exception may be made for certain consultants who assisted the owner with project development activities on very large projects with multiple designers, provided that the information prepared by these consultants is available to all offerors.

We incorporated many of these recommendations in the proposed rule; however, we also recognize that it is not practical to address every specific instance where the appearance of a

conflict, or an actual conflict of interest may arise. State statutes and practices in this area will govern. The proposed rule provides flexibility by requiring the apparent successful offerors to submit certifications regarding actual or apparent organizational conflicts of interest. The owners will then have the ability to make a determination regarding actual or apparent conflicts and take the appropriate action in accordance with State standards prior to the award of the contract.

*Section 636.117 What Conflict of Interest Standards Apply to Individuals Who Serve as Selection Team Members for the Owner?*

The ACEC recommended that members of the selection team sign non-disclosure statements, non-conflict-of-interest statements, and agreements not to become an employee, agent, or consultant to the successful designer-builder for the duration of the project.

The proposed rule provides flexibility for States to use their own standards regarding personal conflicts of interest; however, in the absence of such State provisions, the requirements of Title 48 CFR Part 3, Improper Business Practices and Personal Conflicts of Interest, will apply to selection team members.

*Section 636.118 Is Team Switching Allowed After Contract Award?*

The AASHTO recommended that successful offerors be allowed to add members to their teams after project award with approval of the owner. In addition, the AASHTO said that State rules related to changes in team members or changes in personnel within teams should be explicitly stated by the owner in the project advertisement. On the other hand, the ACEC recommended that the proposed rule prevent the switching of team members after selection. This recommendation was based on the ACEC's belief that if an owner uses qualifications and technical capabilities as a factor in the selection process, then steps need to be taken to prevent the restructuring of the team after project award.

In general, FHWA agrees with the ACEC recommendation. However, some flexibility is appropriate to provide owners with the ability to review team changes or team enhancements on a case-by-case basis. Accordingly, the FHWA believes the proposed rule provides the necessary flexibility.

*Section 636.119 How Does This Part Apply to a Project Developed Under a Public-Private Partnership?*

Under the proposed rule, the FHWA is making a distinction between: (1) Public-private partnership projects utilizing traditional Federal-aid funding and (2) public-private partnership projects utilizing some form of loan assistance from FHWA.

The FHWA recognizes the significant risks and responsibilities accepted by private entities in a public-private partnership agreement. Private entities must often consider the risks associated with financing, planning, designing, constructing, maintaining and operating public facilities for long time periods. In some situations, the FHWA's participation in such projects may be limited to a loan, loan assistance (guarantee), line of credit or other means of credit assistance. At the end of the loan period, the Federal investment in the project may be zero.

In the first case, the FHWA's procurement policies would apply to any project that utilizes traditional Federal-aid funding. If an owner utilizes traditional Federal-aid funding in the cost of work done under a public-private franchise agreement, then the FHWA procurement policies apply to the procurement of the franchise. If an owner elects to utilize traditional Federal-aid funding in only a portion of the work done under a franchise agreement (such as a design-build contract under the franchise agreement), then the FHWA procurement policies would only apply to that particular contract. The FHWA procurement policies include qualification-based-selection procedures for engineering service contracts, competitive bidding requirements for construction contracts, and the requirements of this part for design-build contracts.

In the second case, FHWA's procurement policies would not apply to work done under a public-private partnership agreement if the only form of FHWA funding is loan assistance. If the procurement process for the public-private partnership was a competitive process, then the public-private entity may select consultants, construction contractors or design-builders in whatever manner it sees fit. However, the public-private entity must comply with State laws and procedures. This policy is consistent with the FHWA's May 10, 1996, guidance memorandum concerning "Guidance on Section 313(b) of the National Highway System Act Loan Provisions under Section 129(a)(7) of Title 23" (see <http://>

[www.fhwa.dot.gov/innovativefinance/ifg.htm](http://www.fhwa.dot.gov/innovativefinance/ifg.htm)).

However, all Federal-aid recipients should be aware that general Title 23, U.S. Code, provisions (environment, right-of-way, etc.) will apply to all FHWA projects regardless of whether traditional Federal-aid funding or loan assistance is used. In addition, any construction or design-build contract which utilizes any form of FHWA funding must comply with the FHWA's requirements for construction contracts in 23 CFR part 635 including Buy America, Davis-Bacon minimum wage rates, and others.

*Subparts B through F*

These subparts propose additional requirements for the design-build procurement process. As previously noted in the General Comments section, the FHWA is adopting modified FAR provisions from 48 CFR Part 15, Contracting by Negotiation, and 48 CFR 36.3, Two-Phase Design-Build Selection Procedures. The industry representatives at the pre-rule workshop meeting did not voice particular concerns regarding the individual requirements in these subparts. However, the representatives did provide general comments regarding the design-build procurement process.

The AASHTO believes that the procurement process for design-build projects should be left to each STD's discretion. This will allow each State to adapt a procurement system to their needs and their legislative authority. In addition, the AASHTO believes that the selection criteria and award formulas should clearly be communicated to offerors in the RFP document.

The ACEC recommended that the FHWA develop rules and regulations for the design-build procurement process. The process should be flexible and allow the owners to select an appropriate procurement vehicle for the size and complexity of the project. However, the process should maintain a system of checks and balances to guarantee the integrity of the selection process. The ACEC believes that the following steps will assist in maintaining integrity:

(1) Develop specific judging rules and a fully pre-defined point award system that is specified in the Request for Qualifications (RFQ) and/or RFP documents.

(2) Place significant weight on qualifications and technical approach. The cost weight may vary from project to project; however, it should not be over-emphasized at the expense of other important criteria.

(3) Assign knowledgeable personnel to the selection team. Enforce integrity and conflict-of-interest standards to maintain a separation of interests between the owner and industry representatives.

(4) Require separate qualitative and cost proposal submissions. Do not open cost proposals until after the completion and publication of the qualitative scoring.

In addition, the ACEC recommended that the rule not give preferential treatment to a firm based on its size during the selection process.

The AGC indicated that the FHWA should define the specific procurement procedures that States would have to follow in the proposed rule. They believe STDs should have some administrative flexibility in developing their own procedures to meet State and local requirements. According to the AGC, prequalification is a necessary element in the design-build procurement process. The AGC supports the use of the two-step selection process. Costs must be a major factor in the selection process. The separate submission and evaluation of cost and technical proposals should help to minimize subjectivity. The selection criteria, and their relative weights, must clearly be presented to all potential offerors. The AGC believes that best-and-final-offer (BAFO) negotiation procedures should be prohibited in the regulation.

The ARTBA strongly believes that public owners should have the maximum flexibility in determining procurement methods. While the ARTBA recognized the FHWA's duty to ensure the appropriate expenditure of Federal tax dollars, it hoped that the FHWA would minimize Federal control and bureaucratic interference in procurement. At the same time the ARTBA expressed the need for a fair, equitable, and consistent procurement process which is free from the elements of subjectivity and favoritism. The ARTBA suggested several "guiding principles" which State and local units of government should consider if they elect to use design-build. These include the following:

(1) Use a two-step procurement. In the first step, prequalify offerors based on well-defined, objective, measurable criteria relevant to the project's size, value, duration, technical features, and complexity;

(2) Clearly communicate the prequalification criteria (and relative weights) in the solicitation;

(3) Owners should prequalify, but should not develop a short list of the most qualified firms. Anyone who is

prequalified should be able to submit a proposal;

(4) Proposal criteria should be as objective as possible; and

(5) Proposal cost should be the most significant factor in the final selection.

The DBIA recommended that the regulations be structured to provide owners with maximum flexibility in structuring their procurement procedures and contracts. It further suggested that the FHWA should not try to impose its ideas regarding best contracting practices on State and local agencies. The FHWA should limit the proposed rule to addressing the TEA-21 requirements and clarifying how certain existing rules will apply in the context of design-build. The DBIA suggested that the FHWA produce an advisory guideline to assist the States in making procurement and contracting decisions. In contrast to the AGC and the ARTBA, the DBIA stated that low bid is the least desirable way to select a design-builder. The DBIA recommends best-value selections. However, the DBIA stated that if an owner requires a low bid selection system, then the prequalification process must be stringent.

The FHWA weighed the wide range of recommendations provided by the associations concerning procurement issues. Some of the recommendations appear to be diametrically opposed. We considered individual comments and weighed them in relation to the overall goals of maintaining flexibility and establishing a model for the use of design-build in each State. In the final analysis, we elected to allow flexibility to the maximum extent practical and adopt modified FAR provisions for design-build and competitive acquisition. This will establish an equitable framework that has been tested by the courts for the use of design-build contracting in the Federal-aid highway program.

#### **Part 637—Subpart B—Quality Assurance Procedures for Highway Construction**

The AASHTO said that owner oversight should be sufficient to certify that the project meets the owner's quality control/quality assurance (QC/QA) plan, as well as any associated Federal regulations. It was recommended that the design-builder furnish a QC/QA plan for the owner's approval. The AGC stated that the proposed rule should require owners to define oversight needs in the RFP. The AGC believes that the successful design-build team should have an approved QC/QA program and should do the

majority of the acceptance testing and inspection.

The FHWA recognizes the STD's responsibility to ensure that the final product meets contractual requirements. We also recognize that the design-build contracting method allows for risk allocation strategies which are not typical for traditional design-bid-build contracts. Therefore, it is appropriate for STDs to have the flexibility to require alternate contractual methods for oversight, acceptance procedures and verification testing. For this reason, we have expanded the language in Subpart B, Quality Assurance Procedures for Construction, to include alternate contractual methods such as warranties and operational requirements. However, the concept of STD responsibility for quality assurance procedures remains the same as for traditional design-bid-build projects. The provisions of § 637.205(d) requiring verification sampling and testing by the STD, or its agent, are maintained for design-build projects. The States should use their own discretion in listing oversight and acceptance testing procedures in the RFP document.

#### **Part 710—Right-of-Way; Subpart C—Project Development**

The AASHTO stated that the determination of who should have the responsibility for dealing with right-of-way acquisition issues should be left to the discretion of the STD. Some STDs, however, may believe that it is in the public interest to delegate this responsibility to the design-builder. The industry associations, on the other hand, urged caution or recommended that the STDs keep such responsibility. The ACEC stated that it is usually advantageous for the STDs to perform right-of-way acquisition prior to the notice-to-proceed for the design-build project; however, there may be certain cases where it is appropriate for the design-builder to carry this responsibility to promote innovation and cost-effective design alternatives. The ACEC stated that the RFP document should clearly address all responsibility issues concerning right-of-way acquisition. The AGC, on the other hand, stated that right-of-way acquisition should be the responsibility of the STDs.

The FHWA recognizes that there are many and varied concerns regarding responsibility and risk allocation for right-of-way issues. We have elected to provide as much flexibility as possible to the STDs who have the ultimate responsibility for right-of-way acquisition and ensuring compliance with the Uniform Relocation Assistance

and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601, *et seq.*). Thus, this proposed rule would provide this flexibility by requiring that certain responsibility allocation issues be clarified in the RFP document.

**Rulemaking Analyses and Notices**

All comments received before the close of business on the comment closing date shown above will be considered and will be available for examination using the docket number appearing at the top of this document in the docket room at the above address. Comments received after the comment closing date will be filed in the FHWA docket identified above and will be considered to the extent practicable, but the FHWA may issue a final rule at any time after the close of the comment closing period. In addition to late comments, the FHWA will also continue to file in the docket relevant information that becomes available after the comment closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after the close of the comment period.

**Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures**

The FHWA has determined preliminarily that this action would be a significant regulatory action within the meaning of Executive Order 12866, and within the meaning of the U.S. Department of Transportation's regulatory policies and procedures. The Office of Management and Budget has reviewed this document under E.O. 12866. The FHWA anticipates that the economic impact of this rulemaking would be minimal. However, this rule is

considered to be significant because of the substantial State and industry interest in the design-build contracting technique.

The FHWA anticipates that the proposed rule would not adversely affect, in a material way, any sector of the economy. However, at the present time the FHWA does not have sufficient data to make a conclusive statement regarding the economic impacts. Interested parties are invited to comment on the anticipated economic impact. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. This rulemaking merely allows the STDs to utilize the design-build contracting technique—a contracting method that has only been used on an experimental basis to date in the Federal-aid highway program. The proposed rule would not affect the total Federal funding available to the STDs under the Federal-aid highway program. Therefore, it is anticipated that an increased use of design-build delivery method will not yield significant economic impacts to the Federal-aid highway program. Consequently, a full regulatory evaluation is not required.

The increased usage of the design-build contracting method may result in certain efficiencies in the cost and/or time it normally takes to deliver a transportation project. However, as stated above, the FHWA presently does not have sufficient data to make a conclusive statement regarding economic impacts.

**Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the

FHWA has evaluated the effects of this proposed action on small entities and has preliminarily determined that the proposed action would not have a significant economic impact on a substantial number of small entities. However, we invite comment on this subject.

By its very nature, design-build contracting is best suited to large transportation projects. However, several STDs such as Pennsylvania, Ohio and Michigan have successfully completed several relatively small design-build contracts (less than \$5 million) under SEP–14. Approximately 50 percent of the projects approved under SEP–14 have been less than \$5 million. We expect that this trend will continue after the final rule is enacted.

Design-build contracts will present subcontracting opportunities which are similar to or greater than those available under design-bid-build contracts. In many cases, design-build contractors will subcontract for design services. Under the traditional design-bid-build system, owners typically prepare a design with their own staff or will contract with a design consultant for this work. Based on data provided by the Pennsylvania Department of Transportation (PennDOT), the average subcontracting amount for design-build contracts compares favorably with the average subcontracting amount for design-bid-build projects in the same contract size range. While the number of PennDOT completed design-build projects is small, this preliminary data (shown in Table 1) shows that there are comparable subcontracting opportunities for relatively small design-build projects.

TABLE 1

PennDOT projects	Design-Build		Design-Bid-Build	
	Number of projects	Subcontracting percentage	Number of projects	Subcontracting percentage
Contract Size:				
\$0–5 million .....	4	20	541	29
\$5–10 million .....	1	39	21	29
\$10–20 million .....	0	.....	13	30
>\$20 million .....	0	.....	10	40

Large design-build contracts will present significant subcontracting opportunities for firms of all sizes. Table 2 illustrates the subcontracting opportunities which have been associated with medium to large-sized highway design-build contracts.

TABLE 2

Project	Owner	Contract size (million)	Subcontracting percentages
Eastern Toll Road .....	Transportation Corridors Agency, CA .....	\$767	39

TABLE 2—Continued

Project	Owner	Contract size (million)	Subcontracting percentages
San Joaquin Hills Toll Road .....	Transportation Corridors Agency, CA .....	799.7	41
I-15 Reconstruction .....	Utah DOT .....	1,318	54
I-17 Reconstruction .....	Arizona DOT .....	79.7	33
E-470 Segments I and II .....	E-470 Public Highway Authority .....	323.6	90
Southern Connector .....	South Carolina DOT .....	106.4	87
Conway Bypass .....	South Carolina DOT .....	386.0	89

Thus, from the data available to the FHWA, it appears that the subcontracting opportunities for small entities will be similar under both design-build and design-bid-build contracts.

To offset potential adverse impacts on small entities, the proposed rule would eliminate the FHWA's existing requirement for the prime contractor to perform 30 percent of all contract work, less specialty items (see § 635.116). This should provide greater flexibility for STDs in administering design-build contracts. For design-builders, it will remove potential barriers regarding the choice of subcontractors, and most important, it will provide greater subcontracting opportunities for firms of all sizes. For these reasons and because this proposed rule is directed to the States and directly affects the STDs, which are not considered small entities for the purposes of the Regulatory Flexibility Act, the FHWA is able to preliminarily certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

#### **Unfunded Mandates Reform Act of 1995**

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, March 22, 1995, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. (2 U.S.C. 1531 *et seq.*) This rulemaking proposes to allow STDs to use a contracting method which has only been used in the Federal-aid highway program on an experimental basis to date. There is no requirement for a State to use the design-build contracting technique. It is strictly an optional contracting method. Therefore, this proposed rule is not considered an unfunded mandate.

#### **Executive Order 13132 (Federalism)**

This proposed action has been analyzed in accordance with the principles and criteria contained in

Executive Order 13132, dated August 4, 1999, and the FHWA has determined that this action would not have sufficient federalism implications to warrant the preparation of a Federal assessment. Nothing in this document directly preempts any State law or regulation or affects the States' ability to discharge traditional State governmental functions. Section 1307 of the TEA-21 directs the FHWA to develop regulations which will: (1) Identify Secretary's approval criteria for design-build contracts, and (2) establish procedures for obtaining FHWA's approval for design-build contracts. Throughout the proposed regulation there is an effort to give the STDs flexibility in deciding where to appropriately use design-build contracting while keeping administrative burdens to a minimum.

#### **Executive Order 13175 (Tribal Consultation)**

The FHWA has analyzed this proposal under Executive Order 13175, dated November 6, 2000, and believes that the proposed rule will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal law. The proposed rule does not address issues which are related to tribal operations. Therefore, a tribal summary impact statement is not required.

#### **Executive Order 12372 (Intergovernmental Review)**

Catalog of Federal Domestic Assistance Program Number 20.205, Highway planning and construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

#### **Executive Order 12988 (Civil Justice Reform)**

This proposed action would meet applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize

litigation, eliminate ambiguity, and reduce burden.

#### **Executive Order 13045 (Protection of Children)**

We have analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed rule is not economically significant and does not concern an environmental risk to health or safety that may disproportionately affect children.

#### **Executive Order 12630 (Taking of Private Property)**

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

#### **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The FHWA has reviewed this proposal and determined that it does not contain collection of information requirements for the purposes of the PRA.

Since 1990 the FHWA has been allowing the STDs to evaluate design-build contracting on an experimental basis through Special Experimental Project No. 14 (SEP-14). To receive the FHWA's approval, STDs were requested to prepare experimental project work plans and evaluation reports for all design-build projects.

Under the proposed rule, the STDs will no longer be required to develop workplans or evaluation reports for "qualified projects." However, because of the "qualified project" definition in section 1307 of TEA-21, the FHWA will continue to approve "non-qualified" design-build projects under SEP-14. Therefore, a SEP-14 workplan and evaluation will continue to be necessary for these projects. The evaluation reports will document the lessons

learned through design-build contracting and this information will be shared with others in the highway industry. The collection of SEP-14 information does not entail the reporting of information in response to identical questions. The SEP-14 design-build evaluation reports do not involve answering specific questions; they address issues relating to competitive acquisition. Each is a one of a kind document which relates to the lessons learned on a particular project.

We invite comments on this analysis.

**National Environmental Policy Act**

The agency has analyzed this proposed action for the purposes of the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), and has preliminarily determined that this proposed action would not have any effect on the quality of the environment. Design-build projects must comply with NEPA requirements and the proposed rule includes guidance concerning compliance with NEPA in relation to the release of the Request for Proposals document.

**Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this proposed action with the Unified Agenda.

**List of Subjects**

23 CFR Part 627

Government procurement, Grant programs-transportation, Highways and roads.

23 CFR Part 635

Grant programs-transportation, Highways and roads, Reporting and recordkeeping requirements.

23 CFR Part 636

Design-build, Grant programs-transportation, Highways and roads.

23 CFR Part 637

Construction inspection and approval; Highways and roads.

23 CFR 710

Grant programs-transportation, Highway and roads, Real property acquisition, Rights-of-way, Reporting and recordkeeping requirements.

Issued on: October 12, 2001.

**Mary E. Peters,**  
*Administrator.*

For reasons set forth in the preamble, the FHWA proposes to amend Chapter I of title 23, Code of Federal Regulations, by adding part 636 and by revising parts 627, 635, 637 and 710 as set forth below:

**PART 627—VALUE ENGINEERING**

1. Revise the authority citation for part 627 to read as follows:

**Authority:** 23 U.S.C. 106(d), 106(f), 112(b), 302, 307, and 315; 49 CFR 18.

2. In part 627 revise all references to "State highway agencies" to read "State transportation departments"; and revise the acronyms "SHA" and "SHAs" to read "STD" and "STDs", respectively.

3. In § 627.5, add paragraph (e) to read as follows:

**§ 627.5 General principles and procedures.**

\* \* \* \* \*

(e) In the case of a Federal-aid design-build project meeting the project criteria in 23 CFR 627.1(a), the STDs shall fulfill the value engineering requirements by:

(1) Performing their own value engineering analysis of the concepts in the Request for Proposals document prior to the initiation of the design-build procurement process; or

(2) Requiring a value engineering analysis at other key points in the project development process. Value engineering reviews are generally not recommended as part of the design-build proposal process. At the STD's discretion, value engineering change proposal clauses may be used in design-build contracts.

**PART 635—CONSTRUCTION AND MAINTENANCE**

4. Revise the authority citation for part 635 to read as follows:

**Authority:** 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.*; sec. 1041 (a), Pub. L. 102-240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.48(b).

5. In part 635 revise all references to "State highway agencies" to read "State transportation departments"; and revise the acronyms "SHA" and "SHAs" to read "STD" and "STDs", respectively.

6. Amend § 635.102 by placing all definitions in alphabetical order, removing the definition of "certification acceptance," and by adding the definition of "design-build project" to read as follows:

**§ 635.102 Definitions.**

\* \* \* \* \*

*Design-build project* means a project which utilizes a single contract to provide for design and construction.

\* \* \* \* \*

7. Amend § 635.104 by adding paragraph (c) to read as follows:

**§ 635.104 Method of construction.**

\* \* \* \* \*

(c) In the case of a design-build project, the requirements of part 636 and the appropriate provisions pertaining to design-build contracting in this part will apply.

8. Revise § 635.107 to read as follows:

**§ 635.107 Participation by disadvantaged business enterprises.**

(a) The STD shall schedule contract lettings in a balanced program providing contracts of such size and character as to assure an opportunity for all sizes of contracting organizations to compete. In accordance with Title VI of the Civil Rights Act of 1964, subsequent Federal-aid Highway Acts, and 49 CFR part 26, the STD shall ensure equal opportunity for disadvantaged business enterprises (DBEs) participating in the highway construction program.

(b) In the case of a design-build project funded with title 23 funds, the requirements of 49 CFR part 26 and the following provisions apply.

(1) The STDs may establish specific DBE goals in the request for proposal document, however, offerors do not have to furnish the information required by 49 CFR 26.53(b)(2) prior to the award of contract. The STDs may determine when this information must be submitted.

(2) If a DBE contract goal is established, the STD must require offerors to make a commitment to meet the goal or provide good faith efforts, as described in 49 CFR 26.53.

(3) During the proposal evaluation process, the STD will make a fair and reasonable judgment whether a proposer, that did not meet the goal, made adequate good faith efforts as described in 49 CFR 26.53.

(4) During the proposal evaluation process, DBE commitments above the contractual requirements must not be used as a proposal evaluation factor in determining the successful offeror.

(5) The STD must maintain oversight of the design-builder's DBE commitments during the project to ensure that contract requirements are met.

9. Amend § 635.109 by adding paragraph (c) to read as follows:

**§ 635.109 Standardized changed condition clauses.**

\* \* \* \* \*

(c) In the case of a design-build project, only the requirements of section (a)(2) of this section are applicable. However, STDs may consider using "differing site condition clauses" and "significant changes in the character of work clauses" which are appropriate for the risk and responsibilities that are shared with the design-builder.

10. Amend § 635.110 by adding paragraph (f) to read as follows:

**§ 635.110 Licensing and qualification of contractors.**

\* \* \* \* \*

(f) In the case of a design-build project, the STDs may use their own bonding, insurance, licensing, qualification or prequalification procedure for any phase of design-build procurement.

(1) The STDs may not impose statutory or administrative requirements which provide an in-State or local geographical preference in the solicitation, licensing, qualification, pre-qualification, short listing or selection process. The geographic location of a firm's office may not be a selection criteria. However, the STDs may require the successful design-builder to establish a local office after the award of contract.

(2) If required by State statute, local statute, or administrative policy, the STDs may require prequalification for construction contractors. The STDs may require offerors to demonstrate the ability of their engineering staff to become licensed in that State as a condition of responsiveness; however, licensing procedures may not serve as a barrier for the consideration of otherwise responsive proposals. The STDs may require compliance with State licensing practices as a condition of contract award.

11. Amend § 635.112 by revising the section heading and by adding paragraph (i) to read as follows:

**§ 635.112 Advertising for bids and proposals.**

\* \* \* \* \*

(i) In the case of a design-build project, the requirements of this section are modified by the following:

(1) The FHWA Division Administrator's approval of the Request for Proposals document will constitute the FHWA's project authorization and the FHWA's approval of the STD's request to release the document. This approval will carry the same significance as plan, specification and estimate approval on a design-bid-build Federal-aid project.

(2) The STD may decide the appropriate solicitation schedule for all

design-build requests. This includes all project advertising, the release of the Request for Qualifications document, the release of the Request for Proposals document and all deadlines for the receipt of qualification statements and proposals. Typical advertising periods range from six to ten weeks and can be longer for large, complicated projects.

(3) The STD shall obtain the approval of the Division Administrator prior to issuing addenda which result in major changes to the Request for Proposals document. Minor addenda need not receive prior approval but may be identified by the STD at the time of or prior to requesting the FHWA's concurrence in award. The STD shall provide assurance that all offerors have received all issued addenda.

12. Amend § 635.113 by adding paragraph (c) to read as follows:

**§ 635.113 Bid opening and bid tabulations.**

\* \* \* \* \*

(c) In the case of a design-build project, the requirements of this section are modified by the following:

(1) All proposals received shall be opened and reviewed in accordance with the terms of the solicitation. The STD shall use its own procedures for the following:

(i) The process of handling proposals and information;

(ii) The review and evaluation of proposals;

(iii) The submission, modification, revision and withdrawal of proposals; and

(iv) The announcement of the successful offeror.

(2) The STD shall submit a tabulation of proposal costs to the FHWA Division Administrator. The tabulation of price proposal information may include detailed pricing information when available or lump sum price information if itemized costs are not used.

13. Amend § 635.114 by adding paragraph (k) to read as follows:

**§ 635.114 Award of contract and concurrence in award.**

\* \* \* \* \*

(k) In the case of a design-build project, the requirements of this section are modified by the following sentence: Design-build contracts shall be awarded on the basis of the criteria specified in the Request for Proposals document. See Part 636, Design-build Contracting, for details.

14. Amend § 635.116 by adding paragraph (d) to read as follows:

**§ 635.116 Subcontracting and contractor responsibilities.**

\* \* \* \* \*

(d) In the case of a design-build project, the requirements of this section are modified by the following:

(1) The provisions of paragraph (a) of this section are not applicable to design-build contracts;

(2) At their discretion, the STDs may establish a minimum percentage of work which must be done by the design-builder;

(3) No procedure, requirement or preference shall be imposed which prescribes minimum subcontracting requirements or goals (other than those necessary to meet the Disadvantaged Business Enterprise program requirements of 49 CFR part 26).

15. Amend § 635.122 by adding paragraph (c) to read as follows:

**§ 635.122 Participation in progress payments.**

\* \* \* \* \*

(c) In the case of a design-build project, the STD shall define its procedures for making progress payments on lump sum contracts in the Request for Proposal document.

16. Amend § 635.309 by adding paragraph (p) to read as follows:

**§ 635.309 Authorization.**

\* \* \* \* \*

(p) In the case of a design-build project, the requirements of this section are supplemented with the following:

(1) The FHWA's project authorization (authorization to advertise or release the Request for Proposals document) 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 nonattainment 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).

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

(v) A statement is received from the STD that either all right-of-way, 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 design-builder's construction schedule.

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

(A) A statement concerning scope and current status of the required services, and

(B) A statement which requires compliance with the Uniform Relocation and Real Property Acquisition Policies Act of 1970, as amended, and 23 CFR part 710.

(2) During a conformity lapse, a design-build project (including right-of-way acquisition activities) may continue if the FHWA authorized the design-build contract prior to the lapse and the project met transportation conformity requirements (40 CFR parts 51 and 93); whether the right-of-way authorization comes before the design-build authorization, or is part of such an authorization.

(3) Changes to the design-build project concept and scope may require a modification of the transportation plan and transportation improvement program. The project sponsor must comply with the metropolitan and statewide transportation planning requirements in 23 CFR part 450 and provide appropriate approval notification to the design-builder for such changes.

17. Amend § 635.411 by adding paragraph (f) to read as follows:

**§ 635.411 Material or product selection.**

\* \* \* \* \*

(f) In the case of a design-build project, the requirements of this section are supplemented with the following:

Federal funds shall not participate, directly or indirectly, in payment for any premium or royalty on any patented or proprietary material, specification, or process specifically set forth in the Request for Proposals document unless the conditions of paragraph (a) of this section are applicable.

18. Add Part 636 to read as follows:

**PART 636—DESIGN-BUILD CONTRACTING**

**Subpart A—General**

Sec.

- 636.101 What does this part do?
- 636.102 Does this part apply to me?
- 636.103 What are the definitions of terms used in this part?
- 636.104 Does this part apply to all Federal-aid design-build projects?
- 636.105 Is the FHWA requiring the use of design-build?
- 636.106 What type of projects may be used with design-build contracting?
- 636.107 Does the definition of a qualified project limit the use of design-build contracting?
- 636.108 How does the definition of a qualified project apply to ITS projects?
- 636.109 How does the NEPA review process relate to the design-build procurement process?
- 636.110 What procedures may be used for solicitations and receipt of proposals?
- 636.111 Can oral presentations be used during the procurement process?

- 636.112 May stipends be used?
- 636.113 Is the stipend amount eligible for Federal participation?
- 636.114 What factors should be considered in risk allocation?
- 636.115 May I meet with industry to gather information concerning the appropriate risk allocation strategies?
- 636.116 What organizational conflict of interest requirements apply to design-build projects?
- 636.117 What conflict of interest standards apply to individuals who serve as selection team members for the owner?
- 636.118 Is team switching allowed after contract award?
- 636.119 How does this part apply to a project developed under a public-private partnership?

**Subpart B—Selection Procedures, Award Criteria**

- 636.201 What selection procedures and award criteria may be used?
- 636.202 When are two-phase design-build selection procedures appropriate?
- 636.203 What are the elements of two-phase selection procedures for competitive proposals?
- 636.204 What items may be included in a phase-one solicitation?
- 636.205 Can past performance be used as an evaluation criteria?
- 636.206 How do I evaluate offerors who do not have a record of relevant past performance?
- 636.207 Is there a limit on short listed firms?
- 636.208 May I use my existing prequalification procedures with design-build contracts?
- 636.209 What items must be included in a phase-two solicitation?
- 636.210 What requirements apply to projects which use the modified design-build procedure?
- 636.211 When and how should tradeoffs be used?
- 636.212 To what extent must tradeoff decisions be documented?

**Subpart C—Proposal Evaluation Factors**

- 636.301 How should proposal evaluation factors be selected?
- 636.302 Are there any limitations on the selection and use of proposal evaluation factors?
- 636.303 May pre-qualification standards be used as proposal evaluation criteria in the RFP?
- 636.304 What process may be used to rate and score proposals?
- 636.305 Can price information be provided to analysts who are reviewing technical proposals?

**Subpart D—Exchanges**

- 636.401 What types of information exchange may take place during the procurement process?
- 636.402 What information may be exchanged with a clarification?
- 636.403 Can a competitive range be used to limit competition?
- 636.404 After developing a short list, can I still establish a competitive range?

- 636.405 Are communications allowed prior to establishing the competitive range?
- 636.406 Am I limited in holding communications with certain firms?
- 636.407 Can communications be used to cure proposal deficiencies?
- 636.408 Can offerors revise their proposals during communications?

**Subpart E—Discussions, Proposal Revisions and Source Selection**

- 636.501 What issues may be addressed in discussions?
- 636.502 Why should I use discussions?
- 636.503 Must I notify offerors of my intent to use/not use discussions?
- 636.504 If the solicitation indicated my intent was to award contract without discussions, but circumstances change, may I still hold discussions?
- 636.505 Must a contracting agency establish a competitive range if it intends to have discussions with offerors?
- 636.506 What issues must be covered in discussions?
- 636.507 What subjects are prohibited in discussions, communications and clarifications with offerors?
- 636.508 Can price or cost be an issue in discussions?
- 636.509 Can offerors revise their proposals as a result of discussions?
- 636.510 Can the competitive range be further defined once discussions have begun?
- 636.511 Can there be more than one round of discussions?
- 636.512 What is the basis for the source selection decision?

**Subpart F—Notifications and Debriefings**

- 636.601 When must notification be provided to unsuccessful offerors?
- 636.602 What issues must be provided in the written notification of contract award to unsuccessful offerors?
- 636.603 How may I notify the successful offeror?
- 636.604 Can offerors request preaward or postaward debriefings?
- 636.605 What issues must be discussed at preaward debriefings?
- 636.606 What issues must not be discussed at preaward debriefings?
- 636.607 What issues must be discussed at postaward debriefings?
- 636.608 What issues must not be discussed at postaward debriefings?

**Authority:** Sec. 1307 of Pub. L. 105-178, 112 Stat. 107, at 229 (1998); 23 U.S.C. 101, 109, 112, 113, 114, 115, 119, 128, and 315; 49 CFR 1.48(b).

**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; cost is then divided by qualitative score to yield an "adjusted bid" or "cost 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 cost and qualitative components and award is based upon a combination of cost 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.

*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.

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

*Contracting agency* means the agency which represents the owner for the design-build project.

*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.

*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 a single contract which provides for design and construction services.

*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 offeror to revise its proposal.

*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 proposals and management plan are evaluated and scored, 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 (generally 30 to 35 percent complete). 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.

*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.

*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.

*Qualified project* means any design-build project with a total estimated cost greater than \$50,000,000.00 or an intelligent transportation system project greater than \$5,000,000. (23 U.S.C. 112 (b)(3)(C)).

*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 firms can be identified.

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

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

*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 the most highly qualified unsuccessful offerors.

*Technical proposals* means that portion of a design-build proposal which contains design factors, layout, aesthetics and specifications for materials.

*Tradeoff* means a method of source selection which allows you to select the source which represents the best value. This process permits an exchange between cost and non-cost factors and allows you to accept 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 cost 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 preestablished for qualitative and cost components, and award is based upon high total points earned by the offerors.

**§ 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 on the National Highway System (NHS) and non-NHS projects which are located within the highway right-of-way. Projects which are not located within the highway right-of-way, and not linked to a Federal-aid highway project (i.e., the project would not exist without the Federal-aid highway) may utilize State 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 What type of projects may be used with design-build contracting?**

You may use the design-build contracting technique for any qualified or non-qualified project which you deem to be appropriate on the basis of project delivery time, cost, construction schedule and/or quality.

**§ 636.107 Does the definition of a qualified project limit the use of design-build contracting?**

(a) No, the use of the term "qualified project" does not limit the use of design-build contracting. It merely determines the FHWA's procedures for approval. The FHWA Division Administrator may approve the design-build method for "qualified projects" which meet the requirements of this part.

(b) The FHWA Division Administrator may also approve other design-build projects (which do not meet the "qualified projects" definition) by using Special Experimental Projects No. 14 (SEP-14), "Innovative Contracting Practices,"<sup>1</sup> provided the project meets

the requirements of this part. Projects which do not meet the requirements of this part must be submitted to the FHWA Headquarter's for concept approval.

**§ 636.108 How does the definition of a qualified project apply to ITS projects?**

For the purpose of this rule, a Federal-aid ITS design-build project meets the criteria of a "qualified project" if:

(a) A majority of the scope of services provides ITS services (at least 50 percent of the scope of work is related to ITS services); and

(b) The estimated contract value exceeds \$5 million.

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

In terms of the design-build procurement process:

(a) The RFQ solicitation may be released prior to the conclusion of the NEPA review process as long as the RFQ solicitation informs proposers of the general status of the NEPA process.

(b) The RFP should not be released prior to the conclusion of the NEPA process. The NEPA review process is concluded with either a Categorical Exclusion classification, an approved Finding of No Significant Impact, or an approved Record of Decision as defined in 23 CFR 771.113(a).

(c) The RFP must address how environmental commitments and mitigation measures identified during the NEPA process will be implemented.

**§ 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:

(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 the most highly ranked 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) If provided 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.

**§ 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.

(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,

<sup>1</sup> Information concerning Special Experimental Project No. 14 (SEP-14), "Innovative Contracting Practices," is available on FHWA's home page: <http://www.fhwa.dot.gov>. Additional information

may be obtained from the FHWA Division Administrator in each State.

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 the public 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 shall 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 proposing on that project. However, a State may determine there is not an organizational conflict of interest for a sub-consultant where:

(i) The sub-consultant or registered design professional provides only preliminary design services, or

(ii) The sub-consultant has had no involvement with this design-build procurement process, or

(iii) Where all information generated by the sub-consultant is provided 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 the apparent successful offeror to provide information concerning potential organizational conflicts of interest prior to the award of contract. 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 subcontractor 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 the rule, the State standards prevail.

**§ 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 requests 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) When an owner utilizes traditional Federal-aid funds for work done under a public-private partnership agreement (or a portion of the work under a public-private agreement), the provisions of 23 U.S.C. 112 apply to the contracts funded with Federal-aid funds. In such instances, the procurement of

engineering service contracts, construction contracts and design-build contracts must follow the appropriate Federal-aid requirements (Brooks Architect-Engineers Act, 40 U.S.C. 541 *et seq*; competitive bidding procedures for construction contracts, 23 U.S.C. 112; and the design-build requirements of this part). If an owner is only requesting traditional Federal-aid funding for one particular contract under a franchise agreement, then Federal-aid procurement procedures will only apply to the work under that particular Federal-aid contract and not to the selection of the public-private entity.

(b) For projects developed under public-private partnership agreements where the only FHWA funding is in the form of a loan, a loan guarantee, a line of credit, or some other form of loan assistance, the requirements of this part do not apply. In such cases, the public-private entity may select consultants, construction contractors or design-builders in whatever manner it sees fit provided:

- (1) The procurement process for the selection of the public-private entity is a competitive process; and
- (2) The selection process follows State laws and procedures.

(c) Except as noted above, the State must ensure such public-private partnership projects comply with all other 23 U. S. Code provisions, regardless of the form of the FHWA funding (traditional Federal-aid funding or loan assistance). This includes compliance with all FHWA policies such as environmental and right-of-way requirements and compliance with construction contracting requirements, such as Buy America, Davis-Bacon minimum wage rate requirements, etc., for federally funded construction or design-build contracts under the franchise agreement.

**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 Cost, Adjusted low-bid (cost per quality point), meets criteria/low bid, weighted criteria process, fixed price/best design, best value, tradeoff.
(b) Single Phase (RFP) .....	Project not meeting the criteria in § 636.202 ...	All of the award criteria in item (a) above.
(c) Modified Design-Build (may be one or two phases).	Projects with relatively simple scope. <sup>2</sup> .....	Lowest price technically acceptable.

<sup>2</sup> The modified design-build contracting technique, as defined above, should be reserved for projects which are relatively simple in scope (such as pavement resurfacing, simple pavement rehabilitation, or other projects) where the design-builder's role is primarily limited to completing the design and constructing the project.

**§ 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.

- (a) Are three or more offers anticipated?
- (b) Will offerors be expected to perform substantial design work before developing price or cost proposals?
- (c) Will offerors incur a substantial expense in preparing proposals?
- (d) Have you identified and analyzed other contributing factors, including:
  - (1) The extent to which you have defined the project requirements?
  - (2) The time constraints for delivery of the project?

- (3) The capability and experience of potential contractors?
- (4) Your capability to manage the two-phase selection process?
- (5) 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 cost 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:
- (a) The scope of work;

- (b) The phase-one evaluation factors and their relative weights, including:
  - (1) Technical approach (but not detailed design or technical information);
  - (2) Technical qualifications, such as—
    - (i) Specialized experience and technical competence;
    - (ii) Capability to perform (including key personnel); and
    - (iii) Past performance of the members of the offeror's team (including the architect-engineer and construction members);
  - (3) Other appropriate factors (excluding cost or price related factors, which are not permitted in phase-one);
- (c) Phase-two evaluation factors;
- (d) 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?**

(a) 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?**

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.

**§ 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 projects which are relatively simple in scope.

(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 a tradeoff process 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 process, 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 shall also state, at a minimum, whether all evaluation factors other than cost or price, when combined, are—

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

(ii) Approximately equal to cost or price. As a minimum, cost or price must have a weight of at least 50 percent in the award criteria.

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

When tradeoffs are performed, the source selection records shall 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 cost or price in every source selection. As a minimum, cost or price must have a weight of at least 50 percent in the award criteria. (Cost is assumed to have a weight of at least 50 percent under the "adjusted low-bid" and the "fixed price/best design" award criteria.)

(2) You must evaluate the quality of the product or service through consideration of one or more non-cost 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 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.

**§ 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, and

(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 during the procurement process?**

Certain types of information exchange may be desirable at different points in the procurement process. 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 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.	Any offeror 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.

**§ 636.402 What information may be exchanged with a clarification?**

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.

**§ 636.403 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 the provisions of Subpart F, Notifications and Debriefings.

**§ 636.404 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.

**§ 636.405 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.

**§ 636.406 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.

**§ 636.407 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.

**§ 636.408 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 intention 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 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 offeror's 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 violation 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. Thus, regardless of the length

or number of discussions, there will be only one request for a revised proposal (i.e., only one best and final offer).

**§ 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.

**Subpart F—Notifications and Debriefings**

**§ 636.601 When must notification be provided to unsuccessful offerors?**

You must provide written notification to unsuccessful offerors, as follows:

(a) *Preaward notification.* When you exclude an offeror from the competitive range or otherwise eliminate an offeror from competition prior to the award of contract, you must provide a written notification to the offeror. The notification shall state the basis for the determination and that a proposal revision will not be considered.

(b) *Postaward notification.* You must provide written notification of contract award within three working days to:

- (1) Each offeror whose proposal was in the competitive range, but did not receive award; and
- (2) Offerors who did not receive a preaward notification.

**§ 636.602 What issues must be provided in the written notification of contract award to unsuccessful offerors?**

(a) The written notification must include:

- (1) The number of offerors solicited;
- (2) The number of proposals received;
- (3) The name and address of each offeror receiving an award;
- (4) The items, quantities, and unit prices of awarded contracts, except where it is impractical to furnish unit prices, the total contract price may be furnished; and
- (5) In general terms, the reason(s) the offeror's proposal was not accepted, unless the price information readily reveals the reason.

(b) The notification must not reveal an offeror's cost breakdown, profit, overhead rates, trade secrets,

manufacturing processes and techniques, or other confidential business information to any other offeror.

**§ 636.603 How may I notify the successful offeror?**

You may notify the successful offeror in accordance with your own procedures.

**§ 636.604 Can offerors request preaward or postaward debriefings?**

(a) Yes, any offeror may request a debriefing. You may provide oral or written debriefings.

(b) Offerors who have been excluded from the competitive range or otherwise excluded from the competition before award may request a debriefing before award by submitting a written request within three days after receipt of a notice of exclusion from further consideration. You should provide the debriefing as soon as practicable.

However, at your discretion, you may delay the debriefing until after contract award.

(c) If the offeror does not submit a timely request, the offeror need not be given either a preaward or a postaward debriefing. Offerors are entitled to no more than one debriefing for each proposal.

(d) An official summary of the preaward or postaward debriefing shall be included in the contract file.

**§ 636.605 What issues must be discussed at preaward debriefings?**

At a minimum, preaward debriefings shall include:

(a) The agency's evaluation of significant elements in the offeror's proposal;

(b) A summary of the rationale for eliminating the offeror from the competition; and

(c) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed in the process of eliminating the offeror from the competition.

**§ 636.606 What issues must not be discussed at preaward debriefings?**

You must not disclose:

- (a) The number of offerors;
- (b) The identity of other offerors;
- (c) The content of other offerors' proposals;
- (d) The ranking of other offerors;
- (e) The evaluation of other offerors; or
- (f) Any of the information prohibited in § 636.608.

**§ 636.607 What issues must be discussed at postaward debriefings?**

At a minimum, the debriefing information shall include the following:

(a) Your agency's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;

(b) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;

(c) The overall ranking of all offerors, when any ranking was developed by your agency during the source selection;

(d) A summary of the rationale for award; and

(e) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

**§ 636.608 What issues must not be discussed at postaward debriefings?**

(a) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors.

(b) The debriefing shall not reveal any information prohibited from disclosure under the Freedom of Information Act (5 U.S.C. 552) including the following:

- (1) Trade secrets;
- (2) Privileged or confidential manufacturing processes and techniques;
- (3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and
- (4) The names of individuals providing reference information about an offeror's past performance.

**PART 637—CONSTRUCTION INSPECTION AND APPROVAL**

19. The authority citation for part 637 is revised to read as follows:

**Authority:** Sec. 1307, Pub. L. 105-178, 112 Stat. 107, at 229 (1998); 23 U.S.C. 109, 114, and 315; 49 CFR 1.48(b).

**PART 637—[AMENDED]**

20. In part 637 revise all references to "State highway agency's" to read "State transportation department's"; revise the acronyms "SHA" and "SHAs" to read "STD" and "STDs", respectively; and revise the references to "non-SHA" to read "non-STD".

21. Amend § 637.207 by adding paragraph (a)(1)(iv) and paragraph (b) to read as follows:

**§ 637.207 Quality assurance program.**

(a) \* \* \*

(1) \* \* \*

(iv) In the case of a design-build project on the National Highway System, warranties may be used where appropriate. Warranties which are limited in scope or duration may be supplemented by quality control and verification sampling and testing. Warranty provisions shall generally be for a specific product or feature.

\* \* \* \* \*

(b) In the case of a design-build project funded under title 23, U.S. Code, the STD's quality assurance program should consider the specific contractual needs of the design-build project. All provisions of § 637.207(a) are applicable to design-build projects. In addition, the quality assurance program may include the following:

(1) Reliance on a combination of contractual provisions and acceptance methods;

(2) Reliance on quality control sampling and testing as part of the acceptance decision, provided that adequate verification of the design-builder's quality control sampling and testing is performed to ensure that the design-builder is providing the quality of materials and construction required by the contract documents.

(3) Contractual provisions which require the operation of the completed facility for a specific time period.

**PART 710—RIGHT-OF-WAY AND REAL ESTATE**

22. The authority citation for part 710 is revised to read as follows:

**Authority:** Sec. 1307, Pub. L. 105-178, 112 Stat. 107, at 229 (1998); 23 U.S.C. 101(a), 107, 108, 111, 114, 133, 142(f), 156, 204, 210, 308, 315, 317, and 323; 42 U.S.C. 2000d *et seq.*, 4633, 4651-4655; 49 CFR 1.48(b) and (cc), 18.31, and parts 21 and 24; 23 CFR 1.32.

23. Amend part 710 by adding § 710.313 to subpart C to read as follows:

**§ 710.313 Design-build projects.**

(a) In the case of a design-build project, right-of-way must be acquired and cleared in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of

1970, as amended, and STD right-of-way procedures. The procedures in § 710.311 regarding responsibility for the review and approval of right-of-way availability statements and certifications also apply to design-build projects.

(b) The decision to advance a right-of-way segment to the construction stage shall not impair the safety or in anyway be coercive in the context of 49 CFR 24.102(h) with respect to unacquired or occupied properties on the same or adjacent segments of project right-of-way.

(c) Certain right-of-way acquisition and clearance services may be incorporated into the design-build contract if allowed under State law. The contract may include language that provides that construction will not commence until all property is acquired and relocations have been completed. In situations where large, multi-year construction projects are undertaken, the construction could be phased or segmented to allow right-of-way activities to be completed in phases, thereby allowing certification for each section.

(d) If the STD elects to include right-of-way services in the design-build contract, the following provisions must be addressed in the request for proposals document:

(1)(i) The design-builder must submit written acquisition and relocation procedures to the STD for approval prior to commencing right-of-way activities. These procedures should contain a prioritized appraisal, acquisition, and relocation strategy as well as check points for STD approval, such as approval of just compensation, replacement housing payment calculations, replacement housing payment and moving cost claims, appraisals, administrative and stipulated settlements that exceed determined thresholds based on a risk management analysis, etc.

(ii) The written relocation plan must provide reasonable time frames for the orderly relocation of residents and businesses on the project. It should be understood that these time frames will be based on best estimates of the time it will take to acquire the right-of-way and relocate families in accordance with certain legal requirements and time

frames which may not be violated. Accordingly, the time frames estimated for right-of-way acquisition will not be compressed in the event other necessary actions preceding right-of-way acquisition miss their assigned due dates.

(2)(i) The design-builder must establish a project tracking system and quality control system. This system must show the appraisal, acquisition and relocation status of all parcels.

(ii) The quality control system may be administered by an independent consultant with the necessary expertise in appraisal, acquisition and relocation policies and procedures, who can make periodic reviews and reports to the design-builder and the STD.

(3) The STD may consider the establishment of a hold off zone around all occupied properties to ensure compliance with right-of-way procedures prior to starting construction activities in affected areas. The limits of this zone should be established by the STD prior to the design-builder entering on the property. There should be no construction related activity within the hold off zone until the property is vacated. The design-builder must have written notification of vacancy from the right-of-way quality control consultant or STD prior to entering the hold off zone.

(4) Adequate access shall be provided to all occupied properties to insure emergency and personal vehicle access.

(5) Utility service must be available to all occupied properties at all times prior to and until relocation is completed.

(6) Open burning should not occur within 305 meters (1,000 feet) of an occupied dwelling.

(7) The STD will provide a right-of-way project manager who will serve as the first point of contact for all right-of-way issues.

(e) If the STD elects to perform all right-of-way services relating to the design-build contract, the provisions in § 710.311 will apply. The STD will notify potential offerors of the status of all right-of-way issues in the request for proposal document.

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