

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Boeing: Docket No. FAA-2008-1070; Directorate Identifier 2008-NM-087-AD.

Comments Due Date

(a) We must receive comments by November 24, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Boeing Model 737-100, -200, -200C, -300, -400, and -500 series airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from reports of broken retract actuator beams of the main landing gear (MLG) and the subsequent failure of the MLG to fully retract. We are issuing this AD to detect and correct broken retract actuator beams of the MLG, which could result in damage to the beam arm, hydraulic tubing, and flight control cables. Damage to the flight control cables could result in loss of control of the airplane.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Inspection and Related Investigative and Corrective Actions/Overhaul

(f) Except as provided by paragraphs (g) and (h) of this AD: At the applicable times specified in paragraph 1.E. of Boeing Service Bulletin 737-32A1355, Revision 2, dated March 5, 2008; inspect for damage of the retract actuator beam of the MLG and overhaul the retract actuator beam, as applicable, by doing all the applicable actions specified in the Accomplishment Instructions of the service bulletin. Do all applicable related investigative and corrective actions before further flight. Repeat the applicable inspection or overhaul thereafter at the applicable time specified in paragraph 1.E. of the service bulletin.

Exceptions to Service Information

(g) Where Boeing Service Bulletin 737-32A1355, Revision 2, dated March 5, 2008, specifies a compliance time after “* * * the date on this service bulletin,” this AD

requires compliance within the specified compliance time after the effective date of this AD.

(h) Boeing Service Bulletin 737-32A1355, Revision 2, dated March 5, 2008, specifies that the actions are for airplanes with new MLG retract actuator beams that have not been overhauled having P/N 65-46108-15 and subsequent dash numbers, and new or overhauled MLG retract actuator beams having P/N 65-46108-14 and previous dash numbers; however, this AD is not limited to new or overhauled beams. This AD requires that the actions required by paragraph (f) of this AD be done on airplanes with any MLG retract actuator beam having those P/Ns.

Alternative Methods of Compliance (AMOCs)

(i)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 917-6440; fax (425) 917-6590; has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved the repair must meet the certification basis of the airplane and the approval must specifically refer to this AD.

Issued in Renton, Washington, on September 26, 2008.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8-23828 Filed 10-7-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Highway Administration****23 CFR Parts 620, 635, 636, and 710**

[FHWA Docket No. FHWA-2008-0136]

RIN 2125-AF29

Fair Market Value and Design-Build Amendments

AGENCY: Federal Highway Administration (FHWA), DOT.

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

SUMMARY: This NPRM proposes to amend FHWA regulations, to require State departments of transportation (DOT) and other public authorities to negotiate for and obtain fair market value as part of any concession agreement involving a facility acquired or constructed with Federal-aid highway funds. Additionally, this NPRM proposes to amend FHWA regulations to permit public agencies to compete against private entities for the right to obtain a concession agreement involving such facilities. Also, this notice proposes to amend the design-build regulations to permit contracting agencies to incorporate unsuccessful offerors' ideas into a design-build contract upon the acceptance of a stipend.

DATES: Comments must be received on or before November 7, 2008. Late-filed comments will be considered to the extent practicable.

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, or submit electronically at <http://dms.dot.gov/submit> or fax comments to (202) 493-2251.

Alternatively, comments may be submitted to the Federal eRulemaking portal at <http://www.regulations.gov>. 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 postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477-78) or you may visit <http://dms.dot.gov>.

FOR FURTHER INFORMATION CONTACT: Mr. Marcus J. Lemon, Chief Counsel, Mr. Michael Harkins, Office of Chief Counsel, or Mr. Steve Rochlis, Office of Chief Counsel, (202) 366-0740, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001. Office hours are from 7:45

a.m. to 4:15 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://dms.dot.gov/submit>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: <http://www.archives.gov> and the Government Printing Office's Web page at: <http://www.access.gpo.gov/nara>.

Background

In this NPRM, the FHWA is proposing to make changes to existing regulations for two reasons: (1) To clarify that fair market value must be negotiated for and received under a concession agreement in accordance with 23 U.S.C. 156, and (2) to amend the design-build regulations to allow contracting agencies to incorporate unsuccessful proposers' ideas into a contract upon payment of a stipend.

Fair Market Value

In recent years, some State and local governments have successfully entered into concession agreements to provide for the long-term development, construction, operation and maintenance of a public highway. Under these agreements, a third-party concessionaire pays the government a large sum of money in return for the right to operate and collect revenues from the facility. Examples include the Chicago Skyway and the Indiana Toll Road. For the Chicago Skyway, the Skyway Concession Company, a joint venture between Cintra Concesiones de Infraestructuras de Transporte SA of Madrid, Spain (Cintra), and Macquarie Infrastructure Group of Australia (Macquarie) paid Chicago a \$1.83 billion up-front payment for the right to operate the Skyway. For the Indiana Toll Road, the ITR Concession Company, also made up of Cintra and Macquarie, paid the State of Indiana \$3.8 billion for the right to operate the Indiana Toll Road. Other forms of concession agreements involve the financing of specific infrastructure improvements to the facility in conjunction with the right to operate and collect tolls. An example includes the Capital Beltway HOT Lanes Project under which Fluor-Transurban will finance the majority of the total estimated \$1.9 billion project costs to widen and construct new lanes on the Capital Beltway in Virginia in return for

the right to operate and collect tolls on the facility for 75 years.

Concession agreements are very important tools that State and local agencies may use to enhance their transportation program. By entering into a concession agreement, not only can the State accelerate an expensive and needed infrastructure improvement, but the State can, under certain statutory provisions, allocate its budgetary resources to other highway projects and use the proceeds from the concession payment to supplement its overall transportation program. Given these benefits, many States are beginning to view concession agreements as a vital and indispensable part of their transportation programs, given that traditional methods of taxing and spending have largely proven to be ineffective in addressing congestion, performance, reconstruction, and development issues.

Current FHWA regulations do not contemplate the use of concession agreements. While 23 U.S.C. 156 requires State and local agencies to charge fair market value for the sale, lease, or use of any real property acquired with funding made available under title 23, U.S.C., it excludes sales, leases, or uses for utility use and occupancy or for a title 23 eligible project at 23 CFR 710.403(d)(5). In the context of concession agreements, the FHWA is concerned that this broad exception for transportation projects could be construed to exempt concession agreements from the fair market value requirement. Moreover, FHWA regulations at 23 CFR 620.203(j) specifically provide that State DOTs need not charge a public agency for a relinquishment of a Federal-aid facility.

In order to avoid a situation where a State or local agency enters into a transaction at less than fair market value, the FHWA proposes to amend its regulations. The FHWA does not believe that the transportation project exception in 23 U.S.C. 156 is intended to encompass proceeds received under a concession agreement. The plain language of the exception is "for a transportation project eligible for assistance made available under [title 23]." While a concession agreement may provide for the construction of a title 23 eligible project, the legal and administrative costs of the State to enter into a concession agreement itself is not a Federal-aid eligible cost. The concession terms under these agreements spell out the right to operate and collect revenues from the facility over an extended period of time, which also are not title 23 eligible.

The Federal Government has a substantial interest in assuring that fair market value is received since 23 U.S.C. requires the Federal share of the proceeds from these transactions to be reinvested into the surface transportation system. The Federal Government's interest in States attaining fair market value to be reinvested in the surface transportation system furthers interstate commerce, strengthens national defense and security, and improves the overall performance of the national Federal-aid highway system. Moreover, given that the substantial majority of these facilities were constructed with public tax dollars, the overall public interest is better served when the public is able to realize maximum return on its tax investment in the form of additional surface transportation improvements.

Most concession agreements to date have been procured pursuant to a competitive process. Whenever the concession agreement is procured competitively, there is a high degree of probability that fair market value will be received. As such, these regulations create a presumption that fair market value is received whenever a highway agency procures a concession agreement through a competitive process. An exception may be made for situations where the highway agency can demonstrate that the process used resulted in fair market value.

Additionally, these amended regulations would permit public agencies to submit proposals for concession agreements against private entities in an open competition. We are aware of instances where public agencies are willing to enter into a concession agreement with a State DOT. Examples include agreements between the Texas Department of Transportation (TxDOT) and the North Texas Turnpike Authority (NTTA) involving State Highway (SH) 121 and SH 161 in Texas. Rather than being strictly governmental in nature, these are commercial transactions with consideration being exchanged between the parties with arm's length negotiations being conducted. The agreements include binding legal commitments to provide the concession payments, meet certain conditional and operational performance requirements, and comply with other legally enforceable requirements.

In the case of SH 121, TxDOT originally sought private bids and, through a competitive process, selected a private developer's bid of \$2.8 billion. However, prior to accepting the bid, the Texas Legislature enacted a law mandating that local toll agencies, such

as NTTA, be given a right of first refusal. After conducting a market valuation analysis, as required by Texas State law, TxDOT awarded 50-year concession to NTTA for \$3.3 billion. In the case of SH 161, TxDOT awarded a 50-year concession to NTTA for \$1.1 billion after conducting the required market valuation analysis.

In these situations, TxDOT may have benefitted from conducting a competition. In fact, with respect to SH 121, the Texas legislature originally directed that TxDOT open the bidding process to NTTA. Although the timing of the Texas legislature's mandate was too late in the procurement process that had already been initiated for the project, FHWA regulations for Federal-aid construction contracts prohibited even the option of a competition involving both public and private entities. By opening up the competitive process to public agencies, the changes in this proposed rule would provide States an opportunity to expand the range of potential bidders for concession agreements. However, the States still retain the option to award these agreements exclusively to public agencies in accordance with their own policy objectives provided the States can demonstrate to the FHWA that fair market value for the concession has been obtained.

In addition to complying with 23 U.S.C. 156, these regulations also ensure that these transactions comply with the revenue use restrictions under the Federal tolling provisions. The Federal tolling provisions include the general toll program at 23 U.S.C. 129; high occupancy toll (HOT) lanes at 23 U.S.C. 166; the value pricing pilot program (VPPP) at section 1012(b) of the Intermodal Surface Transportation Efficiency Act (ISTEA), as amended by section 1216(a) of the Transportation Equity Act for the 21st Century (TEA-21) and section 1604(a) of the Safe, Accountable, Flexible, Efficient, Transportation Efficiency Act: A Legacy for Users (SAFETEA-LU); the Interstate System reconstruction and rehabilitation pilot program (ISRRPP) at section 1216(b) of TEA-21; the express lanes demonstration program at section 1604(b) of SAFETEA-LU; and the Interstate System construction toll pilot program (ISCTPP) at section 1604(c) of SAFETEA-LU. Each of these programs require toll revenue to be used first (1) for debt service, (2) to provide a reasonable return on investment to any private party financing a project, and (3) for the costs that are necessary for the proper operation and maintenance of

the facility.¹ With the exception of the ISRRPP and ISCTPP, toll revenues in excess may be applied to other projects eligible for assistance under title 23, United States Code.

The FHWA considers concession payments, which are substantively lease acquisition payments, to be included in the costs incurred by the concessionaire to operate the facility and operational costs for purposes of the toll revenue use restrictions under the Federal toll programs. However, the amount of the concession payment must be based on the market value of acquiring an interest in the facility. The concession amount may not be based exclusively on factors unrelated to the market value of the facility, such as State transportation program funding needs or shortfalls in other areas such as transit or bridges. This change would bring consistency with other pilot programs such as the ISRRPP, which require a similar showing of an arm's length transaction. Otherwise, the concession payment is not a valid operating cost and simply becomes a means to create excess toll revenue.

Design-Build

The FHWA also proposes to amend 23 CFR Part 636 to permit contracting agencies to incorporate unsuccessful offerors' technical concepts into a contract or future solicitation upon the acceptance of a stipend by the unsuccessful offeror whose ideas the contracting agency intends to use. FHWA regulations currently permit contracting agencies to use unsuccessful offerors' ideas upon acceptance of a stipend for other solicitations. However, current regulations do not permit contracting agencies to do so in the negotiations conducted with the winning offeror after source selection, but rather only allow such a transaction before contract execution. Although prohibited by current regulations, the FHWA has permitted States to use unsuccessful offeror's ideas for other's solicitations upon acceptance of a stipend after source selection through Special Experimental Project 14 (SEP-14). This practice has generally been well received and afforded more flexibility to contracting agencies in tailoring their projects to best suit the public interest. Therefore, we are proposing to amend 23 CFR Part 636 accordingly to allow maximum design flexibility and ingenuity.

¹ The VPPP requires toll revenue to be used first for the project's operating costs. This has been interpreted to include the facility's debt service, reasonable return on investment to a private party, and costs necessary for the proper operation and maintenance. 73 FR 53478 (2008).

Section-by-Section Analysis

Section 620.203(b)

This subsection would be amended to clarify that a concession agreement awarded to a public entity is not to be considered a relinquishment. As such, whenever a concession agreement is awarded to a public entity, the State would be required to negotiate for and charge fair market value.

Section 635.112(e)

This subsection would be amended to permit public agencies to compete against private entities for concession agreements. As proposed, the public entity could either submit a bid for itself or join a team with other public or private entities to submit a bid.

Section 636.113

This section would be amended by adding a new subsection to require contracting agencies to clearly state in their RFPs of their intention to incorporate an unsuccessful offeror's ideas into the final contract with the selected design-builder upon acceptance of a stipend.

Section 636.513

This section would be amended to permit contracting agencies to conduct negotiations to incorporate an unsuccessful offeror's ideas into the contract with the selected design-builder.

Section 710.405(d)(5)

This section would be amended to clarify that concession agreements do not meet the transportation project exemption under 23 U.S.C. 156(a).

Section 710.701

This section would establish that the purpose of Subpart G is to prescribe the standards to ensure fair market value is received under concession agreements involving Federally funded highways.

Section 710.703

This section would establish the definitions that are applicable to 23 CFR Part 710 Subpart G. *Fair market value*, for purposes of this Subpart, is defined to be the price at which a highway agency is ready and willing to enter into a concession or a contractual agreement to lease a Federally funded highway on the open market and in an arm's length transaction. The acquisition price of the facility should reflect the value that it is worth on the open market for a reasonable period of time to any willing, knowledgeable and able buyers. The value should include not only the market value of the land, but also the

facility's capital earning potential taking into account both any toll revenues that are expected to be collected and any additional ancillary income, such as parking fees, commercial revenue, and advertising. Also, in order to be considered fair market value, the transaction in which the agreement is negotiated and the price is established would be required to be an arm's length transaction. In order to be considered an arm's length transaction, the parties, including the public entities, would have to be able to act independently from each other and free from any conflicts of interest.

Also, consistent with 23 U.S.C. 156, a *Federally funded highway* would be defined as any highway acquired with Federal assistance made available under title 23, United States Code. This definition would clarify that the phrase "acquired with Federal assistance" applies not only to Federal assistance in the actual purchase of real property, but also to any capital expenditure or improvements including any fixtures located on any real property. Thus, a highway would be subject to these regulations if any title 23, United States Code, funds participated in the costs associated with the facility, as by way of example, costs incurred in design, construction or reconstruction of the facility.

Section 710.705

This section would provide that subpart G applies to all concession agreements involving Federally funded highways.

Section 710.707

This section would establish that fair market value must be received for any concession agreement involving a Federally funded highway.

Section 710.709

This section would set forth general requirements concerning how fair market value is to be determined. First, this section would provide that fair market value may be determined either on a best value basis or on the basis of the highest bid received. Whichever method the highway agency elects to use would have to be specified in the relevant solicitation documents. Second, this section would provide that the terms of the concession agreement must be legally binding and enforceable. This includes agreements between two public entities. Third, this section would establish a rule that any concession agreement procured through a fair and open competition is presumed to be fair market value. Fourth, if a highway agency does not wish procure

the agreement through a competitive process, then the highway agency would have to demonstrate to the FHWA that the process used resulted in fair market value being received. Finally, this section would clarify that Parts 172, 635, and 636, as applicable, must be followed whenever any Federal funds are to be used for a project under the concession agreement.

Request for Comment

The FHWA invites and requests comments on the proposed regulations contained in this NPRM. All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, the FHWA will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and USDOT Regulatory Policies and Procedures

The FHWA has determined preliminarily that this action would not be a significant regulatory action within the meaning of Executive Order 12866 and would not be significant within the meaning of U.S. Department of Transportation regulatory policies and procedures. It is anticipated that the economic impact of this rulemaking would be minimal. These proposed changes would not adversely affect, in a material way, any sector of the economy. 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. Consequently, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612) the FHWA has evaluated the effects of this proposed action on small entities and has determined that the proposed action would not have a significant economic impact on a substantial number of small entities. This proposed action does not affect any

funding distributed under any of the program administered by the FHWA. It ensures that State and local governments comply with both 23 U.S.C. 156 to receive fair market value and the Federal tolling provision listed above regarding operating expenses whenever a concession agreement is executed involving a Federally funded highway. For these reasons, the FHWA certifies that this action would 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, 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 \$128.1 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the FHWA will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, tribal governments and the private sector.

Executive Order 13132 (Federalism Assessment)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA has determined preliminarily that this proposed action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this proposed action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 13211 (Energy Effects)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, dated May 18, 2001. We have determined that it is not a significant energy action under that order since it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects 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. Accordingly, the FHWA solicits comments on this issue.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501), 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 determined that this proposal does not contain collection of information requirements for the purposes of the PRA.

Executive Order 12988 (Civil Justice Reform)

This action meets 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 rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this proposed action would not cause any environmental risk to health or safety that might disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this proposed rule under Executive Order 12630, Governmental Actions and Interface with Constitutionally Protected Property Rights. The FHWA does not anticipate that this proposed action would affect a taking of private property or otherwise have taking implications under Executive Order 12630.

National Environmental Policy Act

The agency has analyzed this proposed action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) and has determined that this proposed action would not have any effect on the quality of the environment.

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 action with the Unified Agenda.

List of Subjects

23 CFR Part 620

Grant programs—transportation, Highways and roads, Rights-of-way.

23 CFR Part 635

Construction and maintenance, 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 710

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

Issued on: October 1, 2008.

Thomas J. Madison, Jr.,
Federal Highway Administrator.

In consideration of the foregoing, the FHWA amends chapter I of title 23, Code of Federal Regulations, as set forth below:

PART 620—ENGINEERING

1. The authority citation for part 620 continues to read as follows:

Authority: 23 U.S.C. 315 and 318; 49 CFR 1.48, 23 CFR 1.32.

2. Revise § 620.203(b) to read as follows:

§ 620.203 Procedures.

* * * * *

(b) Other than a conveyance made as part of a concession agreement as defined in § 710.703 of this chapter, for purposes of this section, *relinquishment* is defined as the conveyance of a portion of a highway right-of-way or facility by a State highway agency (SHA) to another Government agency for highway use.

* * * * *

PART 635—CONSTRUCTION AND MAINTENANCE

3. The authority citation for part 635 continues to read as follows:

Authority: Sec. 1503 of Pub. L. 109–59, 119 Stat. 1144; 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).

4. Revise § 635.112(e) to read as follows:

§ 635.112 Advertising for bids and proposals.

* * * * *

(e) Except in the case of a concession agreement, as defined in § 710.703 of this chapter, no public agency shall be permitted to bid in competition or to enter into subcontracts with private contractors.

* * * * *

PART 636—DESIGN-BUILD CONTRACTING

5. The authority citation for part 636 continues to read as follows:

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

6. Amend § 636.113 by adding a new paragraph (c) to read as follows:

§ 636.113 Bid opening and bid tabulations.

* * * * *

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

7. Amend § 636.513 by designating the existing text as paragraph (a) and adding a new paragraph (b) to read as follows:

§ 636.513 Are limited negotiations allowed prior to contract execution?

* * * * *

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

PART 710—RIGHT-OF-WAY AND REAL ESTATE

8. The authority citation for part 710 continues to read as follows:

Authority: Sec. 1307, Pub. L. 105–178, 112 Stat. 107; 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.

9. Amend 710.403(d)(5) to read as follows:

§ 710.403 Management.

(d) * * *

(5) Use for transportation projects eligible for assistance under title 23 of the United States Code, except for

concession agreements as defined in § 710.703.

* * * * *

10. Add new Subpart G to Part 710 to read as follows:

Subpart G—Concession Agreements

Sec.

- 710.701 Purpose.
- 710.703 Definitions.
- 710.705 Applicability.
- 710.707 Fair market value.
- 710.709 Determination of fair market value.

Authority: 23 U.S.C. 129,156, 166, 315; Pub. L. 102–240, section 1012(b); Pub. L. 105–178, section 1216(b); Pub. L. 109–59, section 1604.

§ 710.701 Purpose.

The purpose of this subpart is to prescribe the standards that ensure fair market value is received by a highway agency under concession agreements involving Federally funded highways.

§ 710.703 Definitions.

As used in this subpart:

(a) *Best value* means the proposal offering the most overall public benefits as determined through an evaluation of the amount of the concession payment and other appropriate considerations. Such other appropriate considerations may include, but are not limited to, qualifications and experience of the concessionaire, expected quality of services to be provided, the history or track record of the concessionaire in providing the services, timelines for the delivery of services, performance standards, complexity of the services to be rendered, and revenue sharing.

(b) *Concession agreement* means an agreement between a highway agency and a concessionaire under which the concessionaire is given the right to operate and collect revenues or fees for the use of a Federally funded highway in return for compensation to be paid to the highway agency. A concession agreement may include, but not be limited to, obligations concerning the development, design, construction, maintenance, operation, level of service, and/or capital improvements to a facility over the term of the agreement.

(c) *Concessionaire* means any private or public entity that enters into a concession agreement with a highway agency.

(d) *Fair market value, for purposes of this Subpart*, means the price at which a highway agency is ready and willing to enter into a concession agreement for a Federally funded highway on the open market for a reasonable period of time and in an arm's length transaction to any willing, knowledgeable, and able buyer.

(e) *Federally funded highway* means any highway (including highways, bridges, and tunnels) acquired with Federal assistance made available under title 23, United States Code. A highway shall be deemed to be acquired with Federal assistance if Federal assistance participated in either the purchase of any real property, or in any capital expenditures in any fixtures located on real property, within the right-of-way, including the highway and any structures located upon the property.

(f) *Highway agency* means any State transportation department or other public authority with jurisdiction over a Federally funded highway.

§ 710.705 Applicability.

This subpart applies to all concession agreements involving Federally funded highways.

§ 710.707 Fair market value.

A highway agency shall receive fair market value for any concession agreement involving a Federally funded highway.

§ 710.709 Determination of fair market value.

(a) Fair market value may be determined either on a best value basis or upon the basis of highest bid received, as may be specified by the highway agency in the request for proposals or other relevant solicitation.

(b) In order to be considered fair market value, the terms of the concession agreement must be both legally binding and enforceable.

(c) Any concession agreement awarded pursuant to a competitive process shall be presumed to be fair market value. Any such competitive process shall afford all interested proposers an equal opportunity to submit a proposal for the concession agreement and shall comply with applicable State and local law.

(d) If a concession agreement is not awarded pursuant to a competitive process, the highway agency must demonstrate to the FHWA that the process used resulted in fair market value being received.

(e) Nothing in this subpart is intended to waive the requirements of Part 172, Part 635, and Part 636 of this chapter whenever any Federal-aid (including TIFIA assistance) is to be used for a project under the concession agreement.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2008–0538; FRL–8726–8]

Approval and Promulgation of Implementation Plans; State of Missouri

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to grant conditional approval of Missouri's attainment demonstration State Implementation Plan (SIP) for the lead National Ambient Air Quality Standard (NAAQS) nonattainment area of Herculaneum, Missouri. The state asserts that it will adopt and submit specific enforceable measures to EPA by date certain, which will be no later than one year following any EPA approval of the plan, in order to meet the conditions described in this proposal. EPA proposes conditional approval because Missouri's SIP submission provides substantial progress toward improving air quality, and Missouri has committed to submitting a SIP revision to meet all applicable requirements of the Clean Air Act.

DATES: Comments must be received on or before November 7, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R07–OAR–2008–0538, by one of the following methods:

1. <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

2. *E-mail:* yoshimura.gwen@epa.gov.

3. *Mail, Hand Delivery or Courier:* Gwen Yoshimura, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101.

Instructions: Direct your comments to Docket ID No. EPA–R07–OAR–2008–0538. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which