305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Ellen Anderson, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 240–402–1309.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** on December 20, 2011 (76 FR 78866), FDA announced that a food additive petition (FAP 1A4784) had been filed by Nexira, c/o Keller and Heckman LLP, 1001 G St. NW., Suite 500 West, Washington, DC 20001. The petition proposes to amend the food additive regulations in § 172.780 *Acacia (gum arabic)* (21 CFR 172.780) to provide for the expanded safe use of acacia gum (gum arabic) in food.

Under 21 CFR 171.1(c)(H), either a claim of categorical exclusion under 21 CFR 25.30 or § 25.32 (21 CFR 25.32) or an environmental assessment under 21 CFR 25.40 is required to be submitted in a food additive petition. A claim of categorical exclusion under § 25.32(k) was submitted with the petition, which applies to substances added directly to food that are intended to remain in food through ingestion by consumers and that are not intended to replace macronutrients in food. The Agency reviewed the claim of categorical exclusion submitted by the petitioner and stated in the original filing notice its determination that, under § 25.32(k), the proposed action was of a type that does not individually or cumulatively have a significant effect on the human environment, and therefore, neither an environmental assessment nor an environmental impact statement is required.

However, upon further review of the petition, the Agency has decided that the food additive may act to replace macronutrients in food and, therefore, the categorical exclusion in § 25.32(k) is not applicable for the proposed action. The Agency informed the petitioner of this decision, who subsequently submitted an environmental assessment.

The potential environmental impact of this petition is being reviewed. To encourage public participation consistent with regulations issued under the National Environmental Policy Act (40 CFR 1501.4(b)), the Agency is placing the environmental assessment submitted with the petition that is the subject of this notice on public display at the Division of Dockets Management (see **DATES** and **ADDRESSES**) for public review and comment.

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday. FDA will also place on public display any amendments to, or comments on, the petitioner's environmental assessment without further announcement in the **Federal Register**. If, based on its review, the Agency finds that an environmental impact statement is not required, and this petition results in a regulation, the notice of availability of the Agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the **Federal Register** in accordance with 21 CFR 25.51(b).

Dated: August 28, 2012.

Dennis M. Keefe,

Director, Office of Food Additive Safety, Center for Food Safety and Applied Nutrition.

[FR Doc. 2012–21639 Filed 8–31–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 172

[FHWA Docket No. FHWA–2012–0043]

RIN 2125–AF44

Procurement, Management, and Administration of Engineering and Design Related Services

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

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

SUMMARY: The FHWA proposes to update the regulations governing the procurement, management, and administration of engineering and design related services directly related to a highway construction project and reimbursed with Federal-aid highway program (FAHP) funding. The intent is to make the regulations consistent with prior changes in legislation and other applicable regulations. These revisions also address certain findings and recommendations for the oversight of consultant services contained in national review and audit reports.

DATES: Comments must be received on or before November 5, 2012. Late 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 W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, or submit electronically at *http://www.regulations.gov* or fax comments to (202) 493–2251. 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. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Page 19477–78), or you may visit *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Jon Obenberger, Preconstruction Team Leader, FHWA Office of Program Administration, (202) 366–2221, or via email at *jon.obenberger@dot.gov*, or Mr. Steven Rochlis, Attorney Advisor, FHWA Office of the Chief Counsel, (202) 366–1395, or via email at *steve.rochlis@dot.gov.* Office hours for the FHWA are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document and all comments received may be viewed online through the Federal eRulemaking portal at: *http://www.regulations.gov.* The Web site is available 24 hours each day, 366 days this year. Please follow the instructions. 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 accessing the Office of the Federal Register's home page at: *http://www.archives.gov/federal-register/*, or the Government Printing Office's Web page at: *http://www.gpo.gov/fdsys.*

Background

The FHWA proposes to modify existing regulations for the administration of engineering and design related service contracts to ensure consistency and compliance with prior changes in authorizing

legislation codified in 23 U.S.C. 112(b)(2) and changes in other applicable Federal regulations. Proposed revisions will also address certain findings contained in a 2008 U.S. Government Accountability Office (GAO) review report (*http://www.gao.gov/products/GAO-08-198*) regarding increased reliance on consulting firms by State transportation agencies (STAs) and a 2009 DOT Office of Inspector General (OIG) audit report (*http://www.oig.dot.gov/library-item/4710*) regarding oversight of engineering consulting firms' indirect costs claimed on Federal-aid grants. This rulemaking does not otherwise impose any new burdens on States, local public agencies, or other grantees and subgrantees.

The primary authority for the procurement, management, and administration of engineering and design related services directly related to a highway construction project and reimbursed with FAHP funding is codified in 23 U.S.C. 112(b)(2). On November 30, 2005, the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006 (Pub. L. 109–115, 119 Stat. 2396, HR 3058), commonly referred to as the ''2006 Appropriations Act,'' was signed into law. Section 174 of this Act amended 23 U.S.C. 112(b)(2) by removing the provisions that permitted States to use ''alternative'' or ''equivalent'' State qualifications-based selection procedures and other procedures for acceptance and application of consultant indirect cost rates that were enacted into State law prior to June 9, 1998.

Effective on the date of enactment of the ''2006 Appropriations Act,'' States and local public agencies could no longer use alternative or equivalent procedures. States and local public agencies are required to procure engineering and design related services in accordance with the qualifications-based selection procedures prescribed in the Brooks Act (40 U.S.C. 1101 et seq.) and to accept and apply consultant indirect cost rates established by a cognizant Federal or State agency in accordance with the Federal Acquisition Regulation (FAR) cost principles (48 CFR part 31). To comply with the amendments to 23 U.S.C. 112(b)(2), this proposed rulemaking will remove all references to alternative or equivalent procedures.

In addition, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council published a final rule in the **Federal Register** of August 30, 2010 (75 FR 53129), and effective on October 1, 2010, raising the Federal simplified acquisition threshold established in 48 CFR 2.101 of the FAR from $100,000 to $150,000 to account for inflation using the Consumer Price Index as required in statute. The FHWA proposes to revise the small purchase procedures section to reflect this increase in the Federal threshold.

The proposed revisions will also address certain findings and recommendations contained in the aforementioned GAO review and OIG audit reports, clarify existing requirements to enhance consistency and compliance with Federal laws and regulations, and address evolutions in industry practices regarding the procurement, management, and administration of consultant services.

Specific proposed revisions are described in the section-by-section analysis below.

Section-by-Section Discussion of the Proposals

The FHWA proposes to revise 23 CFR part 172—Administration of Engineering and Design Related Service Contracts as follows:

Title—Administration of Engineering and Design Related Services Contracts

The title of this part would be changed to Procurement, Management, and Administration of Engineering and Design Related Services to reflect the range of requirements and Federal interests associated with the procurement, management, and administration of engineering and design related services addressed within this part.

Section 172.1—Purpose and Applicability

Section 172.1 would be amended to clarify the applicability of the requirements of this part for the procurement, management, and administration of engineering and design related services and the requirements of the common grant rule (49 CFR part 18) for procurement of these and other consultant services reimbursed with FAHP funding.

Section 172.3—Definitions

Section 172.3 would be amended to clarify the definitions of ''audit'' and ''cognizant agency'' to provide consistency with the FAR cost principles (48 CFR part 31) and with industry guidance established in the American Association of State Highway and Transportation Officials (AASHTO) Uniform Audit and Accounting Guide, 2010 Edition (*http://audit.transportation.org/Documents/2010_Uniform_Audit_and_Accounting_Guide.pdf*). The definition of ''competitive negotiation'' would be amended to remove references to State alternative or equivalent procedures prohibited by sec. 174 of the ''2006 Appropriations Act.'' The definitions of ''contracting agencies'' and ''one-year applicable accounting period'' would be amended to provide consistency with other terminology of this part. The definition of ''engineering and design related services'' would be amended to also include professional services of an architectural or engineering nature as defined by State law, consistent with the Brooks Act and common grant rule requirements. Definitions would be added for the terms ''contract,'' ''contract modification,'' ''Federal cost principles,'' ''fixed fee,'' ''scope of work,'' and ''State transportation agency (STA)'' to clarify the meaning of each within the context of the regulation. A definition would also be added for ''management role'' to clarify the types of services and roles performed by consultants that require FHWA or direct grantee approval.

Section 172.5—Methods of Procurement

This section would be redesignated as sec. 172.7 and revised. The title would be changed to Procurement Methods and Procedures, to reflect the proposed content which would address not only methods of procurement, but also the procurement requirements associated with these methods.

The title of paragraph (a) would be changed from procurement to procurement methods, and would be revised to specify the three currently allowable procurement methods: Competitive negotiation (qualifications-based selection), small purchases, and noncompetitive. The provisions of subparagraph (a)(1) would be amended to remove references to State alternative or equivalent procedures prohibited by sec. 174 of the ''2006 Appropriations Act.'' Additional provisions would be added to clarify the requirements and expectations for solicitation; request for proposal; evaluation factors; evaluation, ranking, and selection; and negotiation to ensure consistency and compliance with the provisions of the Brooks Act as required by 23 U.S.C. 112(b)(2)(A).

Subparagraph (a)(2) would be amended to clarify the requirements for use of small purchase procedures and reflect the increase in the Federal simplified acquisition threshold from $100,000 to $150,000 (as specified in the final rule published in the **Federal Register** of August 30, 2010 (75 FR 53129)). Additional revisions would

define the negotiation requirements for small purchase procedures and clarify the limitations on participation of FAHP funding in contract costs exceeding the established small purchase threshold.

The provisions of subparagraph (a)(3) would be amended to define contract negotiation requirements for noncompetitive procurement procedures and to remove references to State alternative or equivalent procedures prohibited by sec. 174 of the ''2006 Appropriations Act.''

Subparagraph (a)(4) would be removed, as State alternative or equivalent procedures are now prohibited.

Paragraph (b) would be redesignated as sec. 172.7(b)(2) and revised to clarify the methods contracting agencies may use to achieve Disadvantaged Business Enterprise (DBE) participation on engineering and design related services contracts in accordance with the requirements of 49 CFR part 26 and the agency's DBE program approved by FHWA.

Paragraph (b) of the redesignated sec. 172.7 would be amended to reference and clarify the applicability of various title 23 and 49 procurement related requirements, including the common grant rule procurement provisions, verification of suspension and debarment actions, and prevention of conflicts of interest. A requirement to develop a written code of conduct governing the performance of contracting agency employees and consultants is proposed to be included within contracting agency written policies, procedures, and contract documents to ensure consistency with the conflict of interest requirements specified in 23 CFR 1.33 and the common grant rule.

Information in paragraph (c) of the existing sec. 172.5 would be transferred to paragraph (b) of a new sec. 172.9 titled Contracts and Administration. The proposed sec. 172.9(b) would clarify the permitted and prohibited methods of payment and requirements associated with the use of lump sum and cost reimbursement contract payment methods, consistent with FAR requirements and industry guidance established in the AASHTO Guide for Consultant Contracting, 2008 Edition.

Section 172.7—Audits

This section would be redesignated as sec. 172.11 and revised. The title of this section would be changed to Allowable Costs and Oversight, and would address requirements for the allowability of contract cost and for providing assurance of compliance with the Federal cost principles.

Paragraph (a) of the proposed sec. 172.11 would clarify consultant requirements for accounting for costs, maintaining adequate records, and applying the FAR cost principles to determine the allowability of costs.

Paragraph (b) of the proposed sec. 172.11 would clarify the requirements for the allowability, acceptance, and application of elements of contract cost in accordance with the common grant rule, FAR cost principles, and requirements of 23 U.S.C. 112(b)(2). Subparagraph (b)(1) of the proposed sec. 172.11 would clarify requirements regarding cognizance, acceptance, and application of consultant indirect cost rates consistent with applicable Federal requirements and industry guidance established in the AASHTO Uniform Audit and Accounting Guide, 2010 Edition. Indirect cost rate requirements are proposed to include subconsultant rates since the Federal cost principles also apply to subconsultant costs, the qualifications of subconsultants are considered under a qualifications-based selection, and subconsultants may perform a significant portion of the contracted services. Subparagraph (b)(1)(iii) would clarify the requirement for STAs or other direct grantees to perform an evaluation of a consultant's or subconsultant's indirect cost rate prior to acceptance and application of the rate to a contract when the rate has not been established by a cognizant agency. This subparagraph would permit STAs and other direct grantees to follow a risk-based oversight process for the evaluation performed to provide assurance of indirect cost rate compliance with the FAR cost principles, as described in proposed subparagraph (c)(2).

Information from paragraphs (b) and (c) of the existing sec. 172.7 would be transferred to subparagraph (b)(1) of the proposed sec. 172.11 and revised to remove references to other State procedures prohibited by sec. 174 of the ''2006 Appropriations Act.'' Subparagraph (b)(2) of the proposed sec. 172.11 would clarify requirements for establishment of consultant direct salary or wage rates on contracts to ensure compliance with qualifications-based selection procurement requirements and the reasonableness provisions of the FAR cost principles. Subparagraph (b)(3) of the proposed sec. 172.11 would clarify requirements for the determination of fixed fees or profit in accordance with qualifications-based selection procurement requirements and industry practices. Subparagraph (b)(4) of the proposed sec. 172.11 would clarify the requirements for determining the allowability of other direct contract costs in accordance with the Federal cost principles.

Paragraph (c) of the proposed sec. 172.11 would clarify the responsibilities for contracting agencies to provide assurance of consultant cost compliance with the FAR cost principles. Subparagraph (c)(2) would permit STAs and other direct grantees written procedures to incorporate a risk-based oversight process for providing assurance of consultant cost compliance with the Federal cost principles on contracts administered by the grantee or its subgrantees. This oversight process would consist of risk assessment, mitigation, and evaluation procedures in support of the STA or other direct grantee effectively allocating resources to provide reasonable assurance of consultant compliance with the FAR cost principles.

Information in paragraph (a) of the existing sec. 172.7, performance of audits, would be transferred to subparagraph (c)(2) of sec. 172.11 and revised to remove references to other State procedures prohibited by sec. 174 of the ''2006 Appropriations Act.'' Audits performed in accordance with generally accepted government audit standards to test compliance with the FAR cost principles would be listed as an evaluation procedure under an established risk-based oversight process.

Subparagraph (c)(3) of the proposed sec. 172.11 would require consultants to certify to the contracting agency that costs included within proposals to establish indirect cost rates are allowable in accordance with the FAR cost principles prior to contracting agency acceptance of the indirect cost rates for application to contracts. Implementation of this cost certification requirement was a recommendation in the aforementioned 2009 OIG Audit Report, and is based on FHWA Order 4470.1A, FHWA Policy for Contractor Certification of Costs in Accordance with FAR to Establish Indirect Cost Rates on Engineering and Design related Services Contracts (*http://www.fhwa.dot.gov/legsregs/directives/orders/44701a.htm*).

Subparagraph (c)(4) of the proposed sec. 172.11 would require contracting agencies to pursue administrative, contractual, or legal remedies as may be appropriate when consultants knowingly charge unallowable costs to a FAHP funded contract.

Paragraph (d) of the existing sec. 172.7 would be redesignated as sec. 172.11(d) and revised to ensure consistency of terminology within the regulation.

Section 172.9—Approvals

Information in this section would be transferred to a new sec. 172.5, Program Management and Oversight, a redesignated sec. 172.7, Procurement Methods and Procedures, and a new sec. 172.9, Contracts and Administration, and revised for clarification to ensure consistency with applicable Federal laws and regulations.

Paragraph (a) of the existing sec. 172.9 would be redesignated as sec. 172.5(c) and revised to clarify the requirements for contracting agency written procedures to ensure compliance with existing Federal statutes and regulations. A new paragraph (a) of sec. 172.5 would clarify STA or other direct grantee responsibilities for management of consultant services programs and oversight of subgrantees. A new paragraph (b) of sec. 172.5 would clarify program level responsibilities of subgrantees. A new paragraph (d) of sec. 172.5 would clarify a contracting agency's ability to adopt direct Federal Government or other contracting procedures and requirements which are not in conflict with laws and regulations applicable to the FAHP. Paragraph (e) of sec. 172.5 proposes a 12-month period from the effective date of a final rule for contracting agencies to issue or update current written procedures for review and approval by the appropriate oversight agency.

Information in subparagraph (a)(5) of the existing sec. 172.9 would be expanded under a new paragraph (d) of a proposed sec. 172.9 titled Contracts and Administration. This new paragraph (d) would clarify requirements for consultant monitoring and oversight which include providing a qualified, full-time, public employee of the contracting agency in responsible charge of each contract to ensure compliance with the requirements of 23 U.S.C. 302(a) and evaluating a consultant's performance on a contract.

Paragraph (a) of the proposed sec. 172.9, Contracts and Administration, would define the various contract types and clarify the requirements associated with the use of on-call or indefinite delivery/indefinite quantity contracts in a manner that is consistent with Federal laws and regulations.

Paragraph (c) of the proposed sec. 172.9 would clarify the provisions required to be incorporated into engineering and design related services contracts when FAHP funding is used to ensure consistency and compliance with applicable Federal laws and regulations.

Paragraph (e) of the proposed sec. 172.9 would clarify the requirements associated with contract modifications to ensure modifications are warranted, properly scoped, and in compliance with applicable Federal procurement requirements.

Paragraph (b) of the existing sec. 172.9 would be redesignated as paragraph (f) of the proposed sec. 172.9. Paragraph (c) of the existing sec. 172.9 would be removed since the oversight and approval responsibility of contracts for major projects, as specified in 23 U.S.C. 106(h), should be defined within the stewardship and oversight agreements that are established between individual STAs and respective FHWA division offices.

Paragraph (d) of the existing sec. 172.9 would be redesignated as sec. 172.7(b)(5) and revised to clarify contracting agency responsibilities associated with participation of FAHP funding for consultants performing services in a management role. These revisions would ensure compliance with applicable Federal requirements regarding oversight, procurement, conflicts of interest, and cost allowability.

For ease of reference, the following distribution table is provided:

Old section	New section
172.1	172.1 Revised.
172.3	172.3 Revised.
Audit	Revised.
Cognizant agency	Revised.
Competitive negotiation.	Revised.
Contract	Added.
Contracting agencies	Revised.
Contract modification	Added.
Engineering and design related services.	Revised.
Federal cost principles.	Added.
Fixed fee	Added.
Management role	Added.
One-year applicable accounting period.	Revised.
Scope of work	Added.
State transportation agency.	Added.
172.5(a)	172.7(a) Revised.
172.5(a)(1)	172.7(a)(1) Revised.
172.5(a)(2)	172.7(a)(2) Revised.
172.5(a)(3)	172.7(a)(3) Revised.
172.5(a)(4)	Removed.
None	172.7(b) Added.
172.5(b)	172.7(b)(2) Revised.
None	172.9(a) Added.
172.5(c)	172.9(b)
None	172.9(c), (d), and (e) Added.
None	172.11(a), (b), and (c) Added.
172.7(a)	172.11(c)(2) Revised.
172.7(b)	172.11(b)(1) Revised.
172.7(c)	172.11(b)(1) Revised.
172.7(d)	172.11(d) Revised.
None	172.5(a) and (b) Added.
172.9(a)	172.5(c) Revised.
172.9(a)(5)	172.5(c)(11), (12), and 172.9(d) Revised.
None	172.5(d) and (e) Added.
172.9(b)	172.9(f) Revised.
172.9(c)	Removed.
172.9(d)	172.7(b)(5) Revised.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The FHWA has determined that this action does not constitute a significant regulatory action within the meaning of Executive Order 12866 or within the meaning of DOT regulatory policies and procedures. The proposed amendments clarify and revise requirements for the procurement, management, and administration of engineering and design related services using FAHP funding and directly related to a construction project. Additionally, this action complies with the principles of Executive Order 13563. The proposed changes to part 172 will provide additional clarification, guidance, and flexibility to stakeholders implementing these regulations. After evaluating the costs and benefits of these proposed amendments, the FHWA anticipates that the economic impact of this rulemaking would be minimal. These changes are not anticipated to adversely affect, in any material way, any sector of the economy. In addition, these changes will not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. It is anticipated that the economic impact of this rulemaking will be minimal; therefore, a full regulatory evaluation is not necessary.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 60l-612), the FHWA has evaluated the effects of this proposed rule on small entities, such as local governments and businesses. Based on the evaluation, the FHWA anticipates that this action would not have a significant economic impact on a substantial number of small entities. The proposed amendments clarify and revise requirements for the procurement, management, and administration of engineering and design related services using FAHP

funding and directly related to a construction project. After evaluating the cost of these proposed amendments, as required by changes in authorizing legislation, other applicable regulations, and industry practices, the FHWA believes the projected impact upon small entities which utilize FAHP funding for consultant engineering and design related services would be negligible. Therefore, I certify that the proposed action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This NPRM 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). The actions proposed in this NPRM would not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $143.1 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, FHWA will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and Tribal governments and the private sector. Additionally, the definition of ''Federal Mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The FAHP permits this type of flexibility.

Executive Order 13132 (Federalism Assessment)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and it has been determined that this proposed action does not have a substantial direct effect or sufficient federalism implications on States that would limit the policymaking discretion of the States. Nothing in this proposed rule directly preempts any State law or regulation or affects the States' ability to discharge traditional State governmental functions.

Paperwork Reduction Act

Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. This proposed action does not contain a collection of information requirement for the purpose of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.).

National Environmental Policy Act

The FHWA has analyzed this proposed action for the purpose of the National Environmental Policy Act (42 U.S.C. 4321 et seq.) and has determined that this action would not have any effect on the quality of the human and natural environment because this rule would merely establish the requirements for the procurement, management, and administration of engineering and design related services using FAHP funding and directly related to a construction project.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this proposed action under Executive Order 13175, dated November 6, 2000, and believes that this proposed action would not have substantial direct effects on one or more Indian Tribes, would not impose substantial direct compliance costs on Indian Tribal governments, and would not preempt Tribal law. This proposed rulemaking merely establishes the requirements for the procurement, management, and administration of engineering and design related services using FAHP funding and directly related to a construction project. As such, this proposed rule would not impose any direct compliance requirements on Indian Tribal governments nor would it have any economic or other impacts on the viability of Indian Tribes. Therefore, a Tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this proposed action under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. We have determined that this proposed action would not be a significant energy action under that order because any action contemplated would not be likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, the FHWA certifies that a Statement of Energy Effects under Executive Order 13211 is not required.

Executive Order 12630 (Taking of Private Property)

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

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)

The FHWA has analyzed this proposed action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, and certifies that this proposed action would not cause an environmental risk to health or safety that may disproportionately affect children.

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 number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 172

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

Issued on: August 24, 2012.

Victor M. Mendez,

Administrator.

In consideration of the foregoing, the FHWA proposes to amend part 172 of title 23, Code of Federal Regulations, as follows:

TITLE 23—HIGHWAYS

1. Revise Part 172 to read as follows:

PART 172–PROCUREMENT, MANAGEMENT, AND ADMINISTRATION OF ENGINEERING AND DESIGN RELATED SERVICES

Sec.
172.1 Purpose and applicability.
172.3 Definitions.
172.5 Program management and oversight.
172.7 Procurement methods and procedures.
172.9 Contracts and administration.
172.11 Allowable costs and oversight.

Authority: 23 U.S.C. 106, 112, 114(a), 302, 315, and 402; 40 U.S.C. 1101 *et seq.;* 48 CFR part 31; 49 CFR 1.48(b) and part 18.

§ 172.1 Purpose and applicability.

This part prescribes the requirements for the procurement, management, and administration of engineering and design related services under 23 U.S.C. 112 and as supplemented by the common grant rule (as specified in 49 CFR part 18). The requirements of the common grant rule shall apply except where inconsistent with the requirements of this part and other laws and regulations applicable to the Federal-aid highway program (FAHP). The requirements herein apply to federally funded contracts for engineering and design related services for highway construction projects subject to the provisions of 23 U.S.C. 112(a) and are issued to ensure that a qualified consultant is obtained through an equitable qualifications-based selection procurement process, that prescribed work is properly accomplished in a timely manner, and at fair and reasonable cost.

State transportation agencies (STAs) (or other direct grantees) shall ensure that subgrantees comply with the requirements of this part and the common grant rule.

Federally funded contracts for services not defined as engineering and design related, or for services not in furtherance of a highway construction project or activity subject to the provisions of 23 U.S.C. 112(a), are not subject to the requirements of this part and shall be procured and administered under the requirements of the common grant rule and procedures applicable to such activities.

§ 172.3 Definitions.

As used in this part:

Audit means a formal examination, in accordance with professional standards, of a consultant's accounting systems, incurred cost records, and other cost presentations to test the reasonableness, allowability, and allocability of costs in accordance with the Federal cost principles (as specified in 48 CFR part 31).

Cognizant agency means any agency described below that has performed an audit in accordance with generally accepted government auditing standards to test compliance with the requirements of the Federal cost principles (as specified in 48 CFR part 31) and issued an audit report of the consultant's indirect cost rate, or any described agency that has conducted a review of an audit report and related workpapers prepared by a certified public accountant and issued a letter of concurrence with the audited indirect cost rate(s). A cognizant agency may be any of the following:

(1) Federal agency;

(2) State transportation agency of the State where the consultant's accounting and financial records are located; or

(3) State transportation agency to whom cognizance for the particular indirect cost rate(s) of a consulting firm has been delegated or transferred in writing by the State transportation agency identified in subparagraph (2) of this definition.

Competitive negotiation means qualifications-based selection procurement procedures complying with 40 U.S.C. 1101–1104, commonly referred to as the Brooks Act.

Consultant means the individual or firm providing engineering and design related services as a party to a contract.

Contract means a procurement contract or agreement between a contracting agency and consultant under a FAHP grant or subgrant and includes any procurement subcontract under a contract.

Contracting agencies means State transportation agency or a procuring agency of the State acting in conjunction with and at the direction of the State transportation agency, other direct grantees, and all subgrantees that are responsible for the procurement, management, and administration of engineering and design related services.

Contract modification means an agreement modifying the terms or conditions of an original or existing contract.

Engineering and design related services means:

(1) Program management, construction management, feasibility studies, preliminary engineering, design engineering, surveying, mapping, or architectural related services with respect to a highway construction project subject to 23 U.S.C. 112(a) (as defined in 23 U.S.C. 112(b)(2)(A)); and

(2) Professional services of an architectural or engineering nature, as defined by State law, which are required to or may logically or justifiably be performed or approved by a person licensed, registered, or certified to provide the services (as defined in 40 U.S.C. 1102(2)).

Federal cost principles means the cost principles contained in 48 CFR part 31 of the Federal Acquisition Regulations for determination of allowable costs of commercial, for-profit entities (as specified in 49 CFR 18.22(b)).

Fixed fee means a dollar amount established to cover the consultant's profit and business expenses not allocable to overhead.

Management role means acting on the contracting agency's behalf, subject to review and oversight by agency officials, to perform management services such as a program or project administration role typically performed by the contracting agency and necessary to fulfill the duties imposed by title 23 U.S.C., other Federal and State laws, and applicable regulations.

One-year applicable accounting period means the annual accounting period for which financial statements are regularly prepared by the consultant.

Scope of work means all services, work activities, and actions required of the consultant by the obligations of the contract.

State transportation agency (STA) means that department or agency maintained in conformity with 23 U.S.C. 302 and charged under State law with the responsibility for highway construction (as defined in 23 U.S.C. 101); and that is authorized by the laws of the State to make final decisions in all matters relating to, and to enter into, all contracts and agreements for projects and activities to fulfill the duties imposed by title 23 United States Code, title 23 Code of Federal Regulations, and other applicable Federal laws and regulations.

§ 172.5 Program management and oversight.

(a) *STA responsibilities.* STAs (or other direct grantees) shall develop and sustain organizational capacity and provide the resources necessary for the procurement, management, and administration of engineering and design related consultant services, reimbursed in whole or in part with FAHP funding (as specified in 23 U.S.C. 302(a)). Responsibilities shall include the following:

(1) Preparing and maintaining written policies and procedures for the procurement, management, and administration of engineering and design related consultant services in accordance with paragraph (c) of this section;

(2) Establishing a procedure for estimating staffing, resources, and costs of needed consultant services and associated agency oversight in support of project authorization requests submitted to FHWA for approval (as specified in 23 CFR 630.106);

(3) Procuring, managing, and administering engineering and design related consultant services in accordance with applicable Federal and State laws, regulations, and approved policies and procedures (as specified in 23 CFR 1.9(a)); and

(4) Administering subgrants in accordance with State laws and procedures (as specified in 49 CFR 18.37) and the requirements of 23 U.S.C.

106(g)(4)). This shall include providing oversight of the procurement, management, and administration of engineering and design related consultant services by subgrantees to assure compliance with applicable Federal and State laws and regulations. Nothing in this part shall be taken as relieving the STA of its responsibility under laws and regulations applicable to the FAHP for the work performed under any consultant agreement or contract entered into by a subgrantee.

(b) *Subgrantee responsibilities.* Subgrantees shall develop and sustain organizational capacity and provide the resources necessary for the procurement, management, and administration of engineering and design related consultant services, reimbursed in whole or in part with FAHP funding (as specified in 23 U.S.C. 106(g)(4)(A)). Responsibilities shall include the following:

(1) Adopting written policies and procedures prescribed by the awarding STA (or other direct grantee) for the procurement, management, and administration of engineering and design related consultant services in accordance with applicable Federal and State laws and regulations; or when not prescribed, shall include:

(i) Preparing and maintaining its own written policies and procedures in accordance with paragraph (c) of this section; or

(ii) Submitting documentation associated with each procurement and subsequent contract to the awarding STA (or other direct grantee) for review to assess compliance with applicable Federal and State laws, regulations, and the requirements of this part;

(2) Procuring, managing, and administering engineering and design related consultant services in accordance with applicable Federal and State laws, regulations, and approved policies and procedures (as specified in 23 CFR 1.9(a)).

(c) *Written policies and procedures.* The contracting agency shall prepare and maintain written policies and procedures for the procurement, management, and administration of engineering and design related consultant services. The STA (or other direct grantee) written policies and procedures and all revisions shall be approved by the FHWA. Written policies and procedures prepared by subgrantees shall be approved by the awarding STA (or other direct grantee). Any deviations from approved policies and procedures shall require review by FHWA, or the direct grantee as appropriate, to assess compliance with applicable requirements. These policies and procedures shall, as appropriate for each method of procurement a contracting agency proposes to use, address the following items to assure compliance with Federal and State laws, regulations, and the requirements of this part:

(1) Preparing a scope of work and evaluation factors for the ranking/selection of a consultant;

(2) Soliciting proposals from prospective consultants;

(3) Preventing, identifying, and mitigating conflicts of interest for employees of both the contracting agency and consultants (as specified in 23 CFR 1.33 and the requirements of this part).

(4) Verifying suspension and debarment actions and eligibility of consultants (as specified in 49 CFR 18.35 and 2 CFR part 180);

(5) Evaluating proposals and the ranking/selection of a consultant;

(6) Preparing an independent agency estimate for use in negotiation with the selected consultant;

(7) Selecting appropriate contract type, payment method(s), and terms and incorporating required contract provisions, assurances, and certifications in accordance with § 172.9;

(8) Negotiating a contract with the selected consultant;

(9) Establishing elements of contract costs, accepting indirect cost rate(s) for application to contracts, and assuring consultant compliance with the Federal cost principles in accordance with § 172.11;

(10) Assuring consultant costs billed are allowable in accordance with the Federal cost principles and consistent with the contract terms as well as the acceptability and progress of the consultant's work;

(11) Monitoring the consultant's work and compliance with the terms, conditions, and specifications of the contract;

(12) Preparing a consultant's performance evaluation when services are completed and using such performance data in future evaluation and ranking of consultant to provide similar services;

(13) Closing-out a contract;

(14) Retaining adequate programmatic and contract records (as specified in 49 CFR 18.42 and the requirements of this part);

(15) Determining the extent to which the consultant, which is responsible for the professional quality, technical accuracy, and coordination of services, may be reasonably liable for costs resulting from errors and omissions in the work furnished under its contract;

(16) Assessing administrative, contractual, or legal remedies in instances where consultants violate or breach contract terms and conditions, and providing for such sanctions and penalties as may be appropriate; and

(17) Resolving disputes in the procurement, management, and administration of engineering and design related consultant services.

(d) A contracting agency may formally adopt, by statute or within approved written policies and procedures as specified in paragraph (c) of this section, any direct Federal Government or other contracting regulation, standard, or procedure provided its application does not conflict with the provisions of 23 U.S.C. 112, the requirements of this part, and other laws and regulations applicable to the FAHP.

(e) Notwithstanding the foregoing, a contracting agency shall have a reasonable period of time, not to exceed 12 months from the effective date of this rule unless an extension is granted for unique or extenuating circumstances, to issue or update current written policies and procedures for review and approval in accordance with paragraph (c) of this section and consistent with the requirements of this part.

§ 172.7 Procurement methods and procedures.

(a) *Procurement methods.* The procurement of engineering and design related services funded by FAHP funds and directly related to a highway construction project subject to the provisions of 23 U.S.C. 112(a) shall be conducted in accordance with one of three methods: Competitive negotiation (qualifications-based selection) procurement, small purchase procurement for small dollar value contracts, and noncompetitive procurement where specific conditions exist allowing solicitation and negotiation to take place with a single consultant.

(1) *Competitive negotiation (qualifications-based selection).* Except as provided in (2) and (3) below, contracting agencies shall use the competitive negotiation method for the procurement of engineering and design related services when FAHP funds are involved in the contract (as specified in 23 U.S.C. 112(b)(2)(A)). The solicitation, evaluation, ranking, selection, and negotiation shall comply with the qualifications-based selection procurement procedures for architectural and engineering services codified under 40 U.S.C. 1101–1104, commonly referred to as the Brooks Act. In accordance with the requirements of the Brooks Act, the following

procedures shall apply to the competitive negotiation procurement method:

(i) *Solicitation.* The solicitation process shall be by public announcement, public advertisement, or any other public forum or method that assures qualified in-State and out-of-State consultants are given a fair opportunity to be considered for award of the contract. Procurement procedures may involve a single step process with issuance of a request for proposal (RFP) to all interested consultants or a multiphase process with issuance of a request for statements or letters of interest or qualifications (RFQ) whereby responding consultants are ranked based on qualifications and request for proposals are then provided to three or more of the most highly qualified consultants. Minimum qualifications of consultants to perform services under general work categories or areas of expertise may also be assessed through a prequalification process whereby statements of qualifications are submitted on an annual basis. Regardless of any process utilized for prequalification of consultants or for an initial assessment of a consultant's qualifications under an RFQ, a RFP specific to the project, task, or service is required for evaluation of a consultant's specific technical approach and qualifications.

(ii) *Request for proposal (RFP).* The RFP shall provide all information and requirements necessary for interested consultants to provide a response to the RFP and compete for the solicited services. The RFP shall:

(A) Provide a clear, accurate, and detailed description of the scope of work, technical requirements, and qualifications of consultants necessary for the services to be rendered. The scope of work should detail the purpose and description of the project, services to be performed, deliverables to be provided, estimated schedule for performance of the work, and applicable standards, specifications, and policies;

(B) Identify the requirements for any discussions that may be conducted with three (3) or more of the most highly qualified consultants following submission and evaluation of proposals;

(C) Identify evaluation factors including their relative weight of importance in accordance with subparagraph (a)(1)(iii) of this section;

(D) Specify the contract type and method(s) of payment to be utilized in accordance with § 172.9;

(E) Identify any special provisions or contract requirements associated with the solicited services;

(F) Require that submission of any requested cost proposals or elements of cost be in a concealed format and separate from technical/qualifications proposals as these shall not be considered in the evaluation, ranking, and selection phase; and

(G) Provide a schedule of key dates for the procurement process and establish a submittal deadline for responses to the RFP which provides sufficient time for interested consultants to receive notice, prepare, and submit a proposal, which except in unusual circumstances shall be not less than 14 days from the date of issuance of the RFP.

(iii) *Evaluation factors.* (A) Criteria used for evaluation, ranking, and selection of consultants to perform engineering and design related services must assess the demonstrated competence and qualifications for the type of professional services solicited. These qualifications-based factors may include, but are not limited to, technical approach (e.g., project understanding, innovative concepts or alternatives, quality control procedures), work experience, specialized expertise, professional licensure, staff capabilities, workload capacity, and past performance.

(B) Price shall not be used as a factor in the evaluation, ranking, and selection phase. All price or cost related items which include, but are not limited to, cost proposals, direct salaries/wage rates, indirect cost rates, and other direct costs are prohibited from being used as evaluation criteria.

(C) In-State or local preference shall not be used as a factor in the evaluation, ranking, and selection phase. State licensing laws are not preempted by this provision and professional licensure within a jurisdiction may be established as a requirement which attests to the minimum qualifications and competence of a consultant to perform the solicited services.

(D) The following nonqualifications-based evaluation criteria are permitted under the specified conditions and provided the combined total of these criteria do not exceed a nominal value of ten percent of the total evaluation criteria to maintain the integrity of a qualifications-based selection:

(1) A local presence may be used as a nominal evaluation factor where appropriate. This criteria shall not be based on political or jurisdictional boundaries and may be applied on a project-by-project basis for contracts where a need has been established for a consultant to provide a local presence, a local presence will add value to the quality and efficiency of the project, and application of this criteria leaves an appropriate number of qualified consultants, given the nature and size of the project. If a consultant outside of the locality area indicates as part of a proposal that it will satisfy the criteria in some manner, such as establishing a local project office, that commitment shall be considered to have satisfied the local presence criteria.

(2) The participation of qualified and certified Disadvantaged Business Enterprise (DBE) subconsultants may be used as a nominal evaluation criteria where appropriate in accordance with 49 CFR part 26 and a contracting agency's FHWA-approved DBE program.

(iv) *Evaluation, ranking, and selection.* (A) Consultant proposals shall be evaluated by the contracting agency based on the criteria established and published within the public solicitation.

(B) While the contract will be with the prime consultant, proposal evaluations shall consider the qualifications of the prime consultant and any subconsultants identified within the proposal with respect to the scope of work and established criteria.

(C) Following submission and evaluation of proposals, the contracting agency shall conduct interviews or other types of discussions determined appropriate for the project with at least three of the most highly qualified consultants to clarify the technical approach, qualifications, and capabilities provided in response to the RFP. Discussion requirements shall be specified within the RFP and should be based on the size and complexity of the project as defined in contracting agency written policies and procedures (as specified in § 172.5(c)). Discussions may be written, by telephone, video conference, or by oral presentation/interview. Discussions following proposal submission are not required provided proposals contain sufficient information for evaluation of technical approach and qualifications to perform the specific project, task, or service with respect to established criteria.

(D) From the proposal evaluation and any subsequent discussions which have been conducted, the contracting agency shall rank, in order of preference, at least three consultants determined most highly qualified to perform the solicited services based on the established and published criteria.

(E) Notification must be provided to responding consultants of the final ranking of the three most highly qualified consultants.

(F) The contracting agency shall retain acceptable documentation of the solicitation, proposal, evaluation, and selection of the consultant in

accordance with the provisions of 49 CFR 18.42.

(v) *Negotiation.* (A) *Independent estimate.* Prior to receipt or review of the most highly qualified consultant's cost proposal, the contracting agency shall prepare a detailed independent estimate with an appropriate breakdown of the work or labor hours, types or classifications of labor required, other direct costs, and consultant's fixed fee for the defined scope of work. The independent estimate shall serve as the basis for negotiation and ensuring the consultant services are obtained at a fair and reasonable cost.

(B) Elements of contract costs (e.g., indirect cost rates, direct salary or wage rates, fixed fee, and other direct costs) shall be established separately in accordance with § 172.11.

(C) If concealed cost proposals were submitted in conjunction with technical/qualifications proposals, only the cost proposal of the consultant with which negotiations are initiated may be considered. Concealed cost proposals of consultants with which negotiations are not initiated should be returned to the respective consultant due to the confidential nature of this data (as specified in 23 U.S.C. 112(b)(2)(E)).

(D) The contracting agency shall retain documentation of negotiation activities and resources used in the analysis of costs to establish elements of the contract in accordance with the provisions of 49 CFR 18.42. This documentation shall include the consultant cost certification and documentation supporting the acceptance of the indirect cost rate to be applied to the contract (as specified in § 172.11(c)).

(2) *Small purchases.* The small purchase method involves procurement of engineering and design related services where an adequate number of qualified sources are reviewed and the total contract costs do not exceed an established simplified acquisition threshold. Contracting agencies may use the State's small purchase procedures which reflect applicable State laws and regulations for the procurement of engineering and design related services provided the total contract costs do not exceed the Federal simplified acquisition threshold (as specified in 48 CFR 2.101). When a lower threshold for use of small purchase procedures is established in State law, regulation, or policy, the lower threshold shall apply to the use of FAHP funds. The following additional requirements shall apply to the small purchase procurement method:

(i) The scope of work, project phases, and contract requirements shall not be broken down into smaller components merely to permit the use of small purchase procedures.

(ii) A minimum of three consultants are required to satisfy the adequate number of qualified sources reviewed.

(iii) Contract costs may be negotiated in accordance with State small purchase procedures; however, the allowability of costs shall be determined in accordance with the Federal cost principles.

(iv) The full amount of any contract modification or amendment that would cause the total contract amount to exceed the established simplified acquisition threshold would be ineligible for Federal-aid funding. The FHWA may withdraw all Federal-aid from a contract if it is modified or amended above the applicable established simplified acquisition threshold.

(3) *Noncompetitive.* The noncompetitive method involves procurement of engineering and design related services when it is not feasible to award the contract using competitive negotiation or small purchase procurement methods. The following requirements shall apply to the noncompetitive procurement method:

(i) Contracting agencies may use their own noncompetitive procedures which reflect applicable State and local laws and regulations and conform to applicable Federal requirements.

(ii) Contracting agencies shall establish a process to determine when noncompetitive procedures will be used and shall submit justification to, and receive approval from, the FHWA before using this form of contracting.

(iii) Circumstances under which a contract may be awarded by noncompetitive procedures are limited to the following:

(A) The service is available only from a single source;

(B) There is an emergency which will not permit the time necessary to conduct competitive negotiations; or

(C) After solicitation of a number of sources, competition is determined to be inadequate.

(iv) Contract costs may be negotiated in accordance with contracting agency noncompetitive procedures; however, the allowability of costs shall be determined in accordance with the Federal cost principles.

(b) *Additional procurement requirements.* (1) *Common grant rule.* (i) STAs (or other direct grantees) and their subgrantees must comply with procurement requirements established in State and local laws, regulations, policies, and procedures which are not addressed by or in conflict with applicable Federal laws and regulations (as specified in 49 CFR 18.36).

(ii) When State and local procurement laws, regulations, policies, or procedures are in conflict with applicable Federal laws and regulations, contracting agencies must comply with Federal requirements to be eligible for Federal-aid reimbursement of the associated costs of the services incurred following FHWA authorization (as specified in 49 CFR 18.4).

(2) *Disadvantaged Business Enterprise (DBE) program.* (i) Contracting agencies shall give consideration to DBE consultants in the procurement of engineering and design related service contracts subject to 23 U.S.C. 112(b)(2) in accordance with 49 CFR part 26. When DBE program participation goals cannot be met through race-neutral measures, additional DBE participation on engineering and design related services contracts may be achieved in accordance with a contracting agency's FHWA approved DBE program through either:

(A) Use of an evaluation criterion in the qualifications-based selection of consultants (as specified in § 172.7(a)(1)(iii)(D)); or

(B) Establishment of a contract participation goal.

(ii) The use of quotas or exclusive set-asides for DBE consultants is prohibited (as specified in 49 CFR 26.43).

(3) *Suspension and debarment.* Contracting agencies must verify suspension and debarment actions and eligibility status of consultants and subconsultants prior to entering into an agreement or contract in accordance with 49 CFR 18.35 and 2 CFR part 180.

(4) *Conflicts of interest.* (i) Contracting agencies shall maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of engineering and design related services contracts under this part and governing the conduct and roles of consultants in the performance of services under such contracts to prevent, identify, and mitigate conflicts of interest in accordance with 23 CFR 1.33 and the provisions of this subparagraph.

(ii) No employee, officer, or agent of the contracting agency shall participate in selection, or in the award or administration of a contract supported by Federal-aid funds if a conflict of interest, real or apparent, would be involved. Such a conflict arises when:

(A) The employee, officer, or agent;

(B) Any member of his or her immediate family;

(C) His or her partner; or

(D) An organization which employs or is about to employ, any of the above, has

a financial or other interest in the consultant selected for award.

(iii) The contracting agency's officers, employees, or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from consultants, potential consultants, or parties to subagreements. Contracting agencies may establish dollar thresholds where the financial interest is not substantial or the gift is an unsolicited item of nominal value.

(iv) Contracting agencies may provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(v) To the extent permitted by State or local law or regulations, such standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the contracting agency's officers, employees, or agents, or by consultants or their agents.

(5) *Consultant services in management roles.* (i) When FAHP funds participate in the contract, the contracting agency shall receive approval from the FHWA, or the direct grantee as appropriate, before utilizing a consultant to act in a management role for the contracting agency, unless an alternate approval procedure has been approved. Use of consultants in management roles does not relieve the contracting agency of responsibilities associated with the use of FAHP funds (as specified in 23 U.S.C. 302(a) and 23 U.S.C. 106(g)(4)) and should be limited to large projects or circumstances where unusual cost or time constraints exist, unique technical or managerial expertise is required, and/or an increase in contracting agency staff is not a viable option.

(ii) Management roles may include, but are not limited to, providing oversight of an element of a highway program, function, or service on behalf of the contracting agency or may involve managing or providing oversight of a project, series of projects, and/or the work of other consultants and contractors on behalf of the contracting agency. Contracting agency written policies and procedures (as specified in § 172.5(c)) may further define allowable management roles and services a consultant may provide, specific approval responsibilities, and associated controls necessary to ensure compliance with Federal requirements.

(iii) Use of consultants in management roles requires appropriate conflicts of interest standards as specified in subparagraph (b)(4) of this section and adequate contracting agency staffing to administer and monitor the management consultant contract (as specified in § 172.9(d)). A consultant serving in a management role shall be precluded from providing services on projects, activities, or contracts under its oversight.

(iv) FAHP funds shall not participate in the costs of a consultant serving in a management role where the consultant was not procured in accordance with Federal and State requirements (as specified in 23 CFR 1.9(a)).

(v) Where benefiting more than a single Federal-aid project, allocability of consultant contract costs for services related to a management role shall be distributed consistent with the cost principles applicable to the contracting agency (as specified in 49 CFR 18.22(b)).

§ 172.9 Contracts and administration.

(a) *Contract types.* The types of contracts which shall be used are: (1) *Project-specific.* A contract between the contracting agency and consultant for the performance of services and defined scope of work related to a specific project or projects.

(2) *Multiphase.* A project-specific contract where the defined scope of work is divided into phases which may be negotiated and authorized individually as the project progresses.

(3) *On-call or indefinite delivery/indefinite quantity (IDIQ).* A contract for the performance of services for a number of projects, under task or work orders issued on an as-needed or on-call basis, for an established contract period. The procurement of services to be performed under on-call or IDIQ contracts must follow either competitive negotiation or small purchase procurement procedures (as specified in § 172.7). The solicitation and contract provisions must address the following requirements:

(i) Specify a reasonable maximum length of contract period, including the number and period of any allowable contract extensions, which shall not exceed 5 years;

(ii) Specify a maximum total contract dollar amount which may be awarded under a contract;

(iii) Include a statement of work, requirements, specifications, or other description to define the general scope, complexity, and professional nature of the services; and

(iv) If multiple consultants are to be selected and multiple on-call or IDIQ contracts awarded through a single solicitation for specific services:

(A) Identify the number of consultants that may be selected or contracts that may be awarded from the solicitation; and

(B) Specify the procedures the contracting agency will use in competing and awarding task or work orders among the selected, qualified consultants. Task or work orders shall not be competed and awarded among the selected, qualified consultants on the basis of costs under on-call or IDIQ contracts for services procured with competitive negotiation procedures. Under competitive negotiation procurement, each specific task or work order shall be awarded to the selected, qualified consultants:

(1) Through an additional qualifications-based selection procedure; or

(2) On a regional basis whereby the State is divided into regions and consultants are selected to provide on-call or IDIQ services for an assigned region(s) identified within the solicitation.

(b) *Payment methods.* (1) The method of payment to the consultant shall be set forth in the original solicitation, contract, and in any contract modification thereto. The methods of payment shall be: Lump sum, cost plus fixed fee, cost per unit of work, or specific rates of compensation. A single contract may contain different payment methods as appropriate for compensation of different elements of work.

(2) The cost plus a percentage of cost and percentage of construction cost methods of payment shall not be used.

(3) The lump sum payment method shall only be used when the contracting agency has established the extent, scope, complexity, character, and duration of the work to be required to a degree that fair and reasonable compensation, including a fixed fee, can be determined at the time of negotiation.

(4) When the method of payment is other than lump sum, the contract shall specify a maximum amount payable which shall not be exceeded unless adjusted by a contract modification.

(5) The specific rates of compensation payment method provides for reimbursement on the basis of direct labor hours at specified fixed hourly rates (including direct labor costs, indirect costs, and fee or profit) plus any other direct expenses or costs, subject to an agreement maximum amount. This payment method shall only be used when it is not possible at the time of procurement to estimate the extent or duration of the work or to estimate costs with any reasonable degree of accuracy and should be limited to contracts or components of contracts for specialized or support type services where the consultant is not in direct control of the number of hours worked, such as construction engineering and inspection. Use of this payment method

requires contracting agency management and monitoring of the consultant's level of effort and classification of employees used to perform the contracted services.

(6) Contracting agencies may withhold retainage from payments in accordance with prompt pay requirements (as specified in 49 CFR 26.29). When retainage is used, the terms and conditions of the contract must clearly define agency requirements, including periodic reduction in retention and the conditions for release of retention.

(c) *Contract provisions.* Contracts must include the following provisions:

(1) Administrative, contractual, or legal remedies in instances where consultants violate or breach contract terms and conditions, and provide for such sanctions and penalties as may be appropriate (all contracts and subcontracts);

(2) Termination for cause and for convenience by the contracting agency including the manner by which it will be effected and the basis for settlement (all contracts and subcontracts in excess of $10,000);

(3) Notice of contracting agency requirements and regulations pertaining to reporting (all contracts and subcontracts);

(4) Contracting agency requirements and regulations pertaining to copyrights and rights in data (all contracts and subcontracts);

(5) Access by grantee, the subgrantee, the FHWA, the U.S. Department of Transportation's Inspector General, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the consultant which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions (all contracts and subcontracts);

(6) Retention of all required records for not less than 3 years after the contracting agency makes final payment and all other pending matters are closed (all contracts and subcontracts);

(7) Lobbying certification and disclosure (as specified in 49 CFR part 20) (all contracts and subcontracts exceeding $100,000);

(8) Standard DOT Title VI Assurances (DOT Order 1050.2) (all contracts and subcontracts);

(9) Disadvantaged Business Enterprise (DBE) assurance (as specified in 49 CFR 26.13(b)) (all contracts and subcontracts);

(10) Prompt pay requirements (as specified in 49 CFR 26.29) (all contracts and subcontracts);

(11) Determination of allowable costs in accordance with the Federal cost principles (all contracts and subcontracts);

(12) Contracting agency requirements pertaining to consultant errors and omissions (all contracts and subcontracts); and

(13) Contracting agency requirements pertaining to conflicts of interest (as specified in 23 CFR 1.33 and the requirements of this part) (all contracts and subcontracts).

(d) *Contract administration and monitoring.* (1) *Responsible charge.* A full-time, public employee of the contracting agency qualified to ensure that the work delivered under contract is complete, accurate, and consistent with the terms, conditions, and specifications of the contract shall be in responsible charge of each contract or project. While an independent consultant may be procured to serve in a program or project management role (as specified in § 172.7(b)(5)) or to provide technical assistance in review and acceptance of engineering and design related services performed and products developed by other consultants, a full-time, public employee must be designated by the contracting agency as being in responsible charge. A public employee may serve in responsible charge of multiple projects and contracting agencies may use multiple public employees to fulfill monitoring responsibilities. The public employee's responsibilities shall include:

(i) Administering inherently governmental activities including, but not limited to, contract negotiation, contract payment, and evaluation of compliance, performance, and quality of services provided by consultant;

(ii) Being familiar with the contract requirements, scope of services to be performed, and products to be produced by the consultant;

(iii) Being familiar with the qualifications and responsibilities of the consultant's staff and evaluating any requested changes in key personnel;

(iv) Scheduling and attending progress and project review meetings, commensurate with the magnitude, complexity, and type of work, to ensure the work is progressing in accordance with established scope of work and schedule milestones;

(v) Assuring consultant costs billed are allowable in accordance with the Federal cost principles and consistent with the contract terms as well as the acceptability and progress of the consultant's work;

(vi) Evaluating and participating in decisions for contract modifications; and

(vii) Documenting contract monitoring activities and maintaining adequate contract records (as specified in 49 CFR 18.42).

(2) *Performance evaluation.* The contracting agency shall prepare a final evaluation report of the consultant's performance on a contract. The report should include, but not be limited to, an evaluation of the timely completion of work, adherence to contract scope and budget, and quality of the work. The consultant shall be provided a copy of the report and shall be provided an opportunity to provide written comments to be attached to the report. Additional interim performance evaluations should be considered based on the scope, complexity, and size of the contract as a means to provide feedback, foster communication, and achieve desired changes or improvements. Completed performance evaluations should be archived for consideration as an element of past performance in the future evaluation of the consultant to provide similar services.

(e) *Contract modification.* (1) Contract modifications are required for any amendments to the terms of the existing contract that change the cost of the contract; significantly change the character, scope, complexity, or duration of the work; or significantly change the conditions under which the work is required to be performed.

(2) A contract modification shall clearly define and document the changes made to the contract, establish the method of payment for any adjustments in contract costs, and be in compliance with the terms and conditions of the contract and original procurement.

(3) Contract modifications shall be negotiated following the same procedures as the negotiation of the original contract.

(4) Only the type of services and work included within the scope of services of the original solicitation from which a qualifications-based selection was made may be added to a contract. Services outside of the scope of work established in the original request for proposal must be procured under a new solicitation, performed by contracting agency staff, or performed under a different contract established for the services desired.

(5) Overruns in the costs of the work shall not automatically warrant an increase in the fixed fee portion of a cost plus fixed fee reimbursed contract. Permitted changes to the scope of work or duration may warrant consideration

for adjustment of the fixed fee portion of cost plus fixed fee or lump sum reimbursed contracts.

(f) *Contracts.* Contracts and contract settlements involving engineering and design related services for projects that have not been assumed by the State under 23 U.S.C. 106(c), that do not fall under the small purchase procedures (as specified in § 172.7(a)(2)), shall be subject to the prior approval by FHWA, unless an alternate approval procedure has been approved by FHWA.

§ 172.11 Allowable costs and oversight.

(a) *Allowable costs.* (1) Costs or prices based on estimated costs for contracts shall be eligible for Federal-aid reimbursement only to the extent that costs incurred or cost estimates included in negotiated prices are allowable in accordance with the Federal cost principles.

(2) Consultants shall be responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with Federal cost principles.

(b) *Elements of contract costs.* The following requirements shall apply to the establishment of the specified elements of contract costs:

(1) *Indirect cost rates.* (i) Indirect cost rates shall be updated on an annual basis in accordance with the consultant's annual accounting period and in compliance with the Federal cost principles.

(ii) Contracting agencies shall accept a consultant's or subconsultant's indirect cost rate(s) established for a 1-year applicable accounting period by a cognizant agency that has:

(A) Performed an audit in accordance with generally accepted government auditing standards to test compliance with the requirements of the Federal cost principles and issued an audit report of the consultant's indirect cost rate(s); or

(B) Conducted a review of an audit report and related workpapers prepared by a certified public accountant and issued a letter of concurrence with the related audited indirect cost rate(s).

(iii) When the indirect cost rate has not been established by a cognizant agency in accordance with subparagraph (1)(ii) herein, a STA (or other direct grantee) shall perform an evaluation of a consultant's or subconsultant's indirect cost rate prior to acceptance and application of the rate to contracts administered by the grantee or its subgrantees. The evaluation performed by STAs (or other direct grantees) to establish or accept an indirect cost rate(s) shall provide assurance of compliance with the Federal cost principles and may consist of the following:

(A) Performing an audit in accordance with generally accepted government auditing standards and issuing an audit report;

(B) Reviewing and accepting an audit report and related workpapers prepared by a certified public accountant or another STA;

(C) Establishing a provisional indirect cost rate for the specific contract and adjusting contract costs based upon an audited final rate; or

(D) Conducting other evaluations in accordance with a risk-based oversight process as specified in subparagraph (c)(2) of this section and within the agency's approved written policies and procedures (as specified in § 172.5(c)).

(iv) A lower indirect cost rate may be accepted for use on a contract if submitted voluntarily by a consultant; however, the consultant's offer of a lower indirect cost rate shall not be a condition or qualification to be considered for the work or contract award.

(v) Once accepted in accordance with subparagraphs (1)(ii)–(iv) herein, contracting agencies shall apply such indirect cost rate(s) for the purposes of contract estimation, negotiation, administration, reporting, and contract payment and the indirect cost rate(s) shall not be limited by administrative or de facto ceilings of any kind.

(vi) A consultant's accepted indirect cost rate for its 1-year applicable accounting period shall be applied to contracts; however, once an indirect cost rate is established for a contract, it may be extended beyond the 1-year applicable period, through the duration of the specific contract, provided all concerned parties agree. Agreement to the extension of the 1-year applicable period shall not be a condition or qualification to be considered for the work or contract award.

(vii) *Disputed rates.* If an indirect cost rate established by a cognizant agency in subparagraph (1)(ii) herein is in dispute, the contracting agency does not have to accept the rate. A contracting agency may perform its own audit or other evaluation of the consultant's indirect cost rate for application to the specific contract, until or unless the dispute is resolved. A contracting agency may alternatively negotiate a provisional indirect cost rate for the specific contract and adjust contract costs based upon an audited final rate. Only the consultant and the parties involved in performing the indirect cost audit may dispute the established indirect cost rate. If an error is discovered in the established indirect cost rate, the rate may be disputed by any prospective contracting agency.

(2) *Direct salary or wage rates.* (i) Compensation for each employee or classification of employee must be reasonable for the work performed in accordance with the Federal cost principles.

(ii) To provide for fair and reasonable compensation, considering the classification, experience, and responsibility of employees necessary to provide the desired engineering and design related services, contracting agencies may establish consultant direct salary or wage rate limitations or ''benchmarks'' based upon an objective assessment of the reasonableness of proposed rates performed in accordance with the reasonableness provisions of the Federal cost principles.

(iii) When an assessment of reasonableness in accordance with the Federal cost principles has not been performed, contracting agencies shall use and apply the consultant's actual direct salary or wage rates for estimation, negotiation, administration, and payment of contracts and contract modifications.

(3) *Fixed fee.* (i) The determination of the amount of fixed fee shall consider the scope, complexity, contract duration, degree of risk borne by the consultant, amount of subcontracting, and professional nature of the services as well as the size and type of contract.

(ii) The establishment of fixed fee shall be project or task order specific.

(iii) Fixed fees in excess of 15 percent of the total direct labor and indirect costs of the contract may be justified only when exceptional circumstances exist.

(4) *Other direct costs.* The Federal cost principles shall be used in determining the reasonableness, allowability, and allocability of other direct contract costs.

(c) *Oversight.* (1) *Agency controls.* Contracting agencies shall provide reasonable assurance that consultant costs on contracts reimbursed in whole or in part with FAHP funding are allowable in accordance with the Federal cost principles and consistent with the contract terms considering the contract type and payment method(s). Contracting agency written policies, procedures, contract documents, and other controls (as specified in § 172.5(c) and § 172.9) shall address the establishment, acceptance, and administration of contract costs to assure compliance with the Federal cost

principles and requirements of this section.

(2) *Risk-based analysis.* The STAs (or other direct grantees) may employ a risk-based oversight process to provide reasonable assurance of consultant compliance with Federal cost principles on FAHP funded contracts administered by the grantee or its subgrantees. If employed, this risk-based oversight process shall be incorporated into STA (or other direct grantee) written policies and procedures (as specified in § 172.5(c)). In addition to ensuring allowability of direct contract costs, the risk-based oversight process shall address the evaluation and acceptance of consultant and subconsultant indirect cost rates for application to contracts. A risk-based oversight process shall consist of the following:

(i) *Risk assessments.* Conducting and documenting an annual assessment of risks of noncompliance with the Federal cost principles per consultant doing business with the agency, considering the following factors:

(A) Consultant's contract volume within the State;

(B) Number of States in which the consultant operates;

(C) Experience of consultant with FAHP contracts;

(D) History and professional reputation of consultant;

(E) Audit history of consultant;

(F) Type and complexity of consultant accounting system;

(G) Size (number of employees and/or annual revenues) of consultant;

(H) Relevant experience of certified public accountant performing audit of consultant;

(I) Assessment of consultant's internal controls;

(J) Changes in consultant organizational structure; and

(K) Other factors as appropriate.

(ii) *Risk mitigation and evaluation procedures.* Allocating resources, as considered necessary based on the results of the annual risk assessment, to provide reasonable assurance of compliance with the Federal cost principles through application of the following types of risk mitigation and evaluation procedures appropriate to the consultant and circumstances:

(A) Audits performed in accordance with generally accepted government audit standards to test compliance with the requirements of the Federal cost principles;

(B) Certified public accountant or other STA workpaper reviews;

(C) Desk reviews;

(D) Other analytical procedures;

(E) Consultant cost certifications in accordance with subparagraph (c)(3) herein; and

(F) Training on the Federal cost principles.

(iii) *Documentation.* Maintaining adequate documentation of the risk-based analysis procedures performed to support the allowability and acceptance of consultant costs on FAHP funded contracts.

(3) *Consultant cost certification.* (i) Indirect cost rate proposals for the consultant's 1-year applicable accounting period shall not be accepted and no agreement shall be made by a contracting agency to establish final indirect cost rates, unless the costs have been certified by an official of the consultant as being allowable in accordance with the Federal cost principles. The certification requirement shall apply to all indirect cost rate proposals submitted by prime and subconsultants for acceptance by a STA (or other direct grantee).

(ii) Consultant official shall be an individual executive or financial officer of the consultant's organization at a level no lower than a Vice President or Chief Financial Officer, or equivalent, who has the authority to represent the financial information utilized to establish the indirect cost rate proposal submitted for acceptance.

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

Certificate of Final Indirect Costs

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

1. All costs included in this proposal (identify proposal and date) to establish final indirect cost rates for (identify period covered by rate) are allowable in accordance with the cost principles of the Federal Acquisition Regulation (FAR) of title 48, Code of Federal Regulations (CFR), part 31; and

2. This proposal does not include any costs which are expressly unallowable under applicable cost principles of the FAR of 48 CFR part 31.

Firm: _____

Signature: _____

Name of Certifying Official: _____

Title: _____

Date of Execution: _____

(4) *Sanctions and penalties.* Contracting agency written policies, procedures, and contract documents (as specified in § 172.5(c) and § 172.9(c)) shall address the range of administrative, contractual, or legal remedies that may be assessed in accordance with Federal and State laws and regulations where consultants violate or breach contract terms and conditions. Where consultants knowingly charge unallowable costs to a FAHP funded contract:

(i) Contracting agencies shall pursue administrative, contractual, or legal remedies and provide for such sanctions and penalties as may be appropriate; and

(ii) Consultants are subject to suspension and debarment actions (as specified in 2 CFR part 180), potential cause of action under the False Claims Act (as specified in 32 U.S.C. 3729–3733), and prosecution for making a false statement (as specified in 18 U.S.C. 1020).

(d) *Prenotification; confidentiality of data.* The FHWA, grantees, and subgrantees of FAHP funds may share audit information in complying with the grantee's or subgrantee's acceptance of a consultant's indirect cost rates pursuant to 23 U.S.C. 112 and this part provided that the consultant is given notice of each use and transfer. Audit information shall not be provided to other consultants or any other government agency not sharing the cost data, or to any firm or government agency for purposes other than complying with the grantee's or subgrantee's acceptance of a consultant's indirect cost rates pursuant to 23 U.S.C. 112 and this part without the written permission of the affected consultants. If prohibited by law, such cost and rate data shall not be disclosed under any circumstance; however, should a release be required by law or court order, such release shall make note of the confidential nature of the data.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1610

RIN 3046–AA90

Availability of Records

AGENCY: Equal Employment Opportunity Commission

ACTION: Notice of proposed rulemaking.

SUMMARY: The Equal Employment Opportunity Commission (''EEOC'' or ''Commission'') proposes to revise its Freedom of Information Act (FOIA) regulations in order to implement the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act) and the Electronic FOIA Act of 1996 (E–FOIA Act); to reflect the reassignment of FOIA responsibilities in the Commission's field offices from the Regional Attorneys