

documented on two examinations at least 60 days apart; or

3. Microcephaly with head circumference that is less than the third percentile for age, documented on two examinations at least 60 days apart; or

4. Brain atrophy, documented by appropriate medically acceptable imaging.  
OR

I. Immune suppression and growth failure (see 114.00F7) documented by 1 and 2, or by 1 and 3:

1. CD4 measurement:

a. For children from birth to attainment of age 5, CD4 percentage of less than 20 percent; or

b. For children from age 5 to attainment of age 18, absolute CD4 count of less than 200 cells/mm<sup>3</sup> or CD4 percentage of less than 14 percent; and

2. For children from birth to attainment of age 2, three weight-for-length measurements that are:

a. Within a consecutive 12-month period; and

b. At least 60 days apart; and

c. Less than the third percentile on the appropriate weight-for-length table under 105.08B1; or

3. For children from age 2 to attainment of age 18, three BMI-for-age measurements that are:

a. Within a consecutive 12-month period; and

b. At least 60 days apart; and

c. Less than the third percentile on the appropriate BMI-for-age table under 105.08B2.

[FR Doc. 2016-28843 Filed 12-1-16; 8:45 am]

**BILLING CODE 4191-02-P**

## SOCIAL SECURITY ADMINISTRATION

### 20 CFR Part 404

[Docket No. SSA-2007-0101]

RIN 0960-AF69

#### Revised Medical Criteria for Evaluating Mental Disorders; Correction

**AGENCY:** Social Security Administration.

**ACTION:** Final rules; correction.

**SUMMARY:** We published a document in the *Federal Register* revising our rules on September 26, 2016. That document inadvertently included incorrect amendatory instructions to appendix 1 to subpart P of 20 CFR part 404, removing section 114.00I and redesignating section 114.00J as section 114.00I. This document corrects the final regulation by removing that amendatory instruction.

**DATES:** These rules are effective January 17, 2017.

**FOR FURTHER INFORMATION CONTACT:** Cheryl A. Williams, Office of Medical Policy, Social Security Administration, 6401 Security Boulevard, Baltimore,

Maryland 21235-6401, (410) 965-1020. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-1213, or TTY 1-800-325-0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

**SUPPLEMENTARY INFORMATION:** We published a final rule in the *Federal Register* of September 26, 2016 (81 FR 66137) titled, Revised Medical Criteria for Evaluating Mental Disorders. The final rule, among other things, amended 20 CFR part 404. We inadvertently included an amendatory instruction to appendix 1 to subpart P of 20 CFR part 404, removing section 114.00I and redesignating section 114.00J as section 114.00I. This document amends and corrects the final regulation.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; and 96.006, Supplemental Security Income).

In FR Doc. 2016-22908 appearing on page 66138 in the *Federal Register* of Monday, September 26, 2016, the following corrections are made:

#### Appendix 1 to Subpart P of Part 404 [Corrected]

■ 1. On page 66161, in the first column, in appendix 1 to subpart P of part 404, correct amendatory instruction 3 by removing instruction 3.c.iii, and redesignating instructions 3.c.iv. through 3.c.xvi. as instructions 3.c.iii. through 3.c.xv. respectively.

**Carolyn W. Colvin,**

*Acting Commissioner of Social Security.*

[FR Doc. 2016-28845 Filed 12-1-16; 8:45 am]

**BILLING CODE 4191-02-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### 23 CFR Parts 630 and 635

[FHWA Docket No. FHWA-2015-0009]

RIN 2125-AF61

#### Construction Manager/General Contractor Contracting

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

**ACTION:** Final rule.

**SUMMARY:** Section 1303 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) authorizes the use of the Construction Manager/General Contractor (CM/GC) contracting method.

This final rule implements the new provisions in the statute, including requirements for FHWA approvals relating to the CM/GC method of contracting for projects receiving Federal-aid Highway Program funding.

**DATES:** This final rule is effective January 3, 2017.

**FOR FURTHER INFORMATION CONTACT:** Mr. Gerald Yakowenko, Contract Administration Team Leader, Office of Program Administration, (202) 366-1562, or Ms. Janet Myers, Office of the Chief Counsel, (202) 366-2019, Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

#### SUPPLEMENTARY INFORMATION:

##### Electronic Access and Filing

This document, the notice of proposed rulemaking (NPRM), 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, 365 days each year. Please follow the instructions. 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 Publishing Office's Web page at: <http://www.gpo.gov/fdsys>.

##### Executive Summary

This regulatory action fulfills the statutory requirement in section 1303(b) of MAP-21 requiring the Secretary to promulgate a regulation to implement the CM/GC method of contracting. The CM/GC contracting method allows a contracting agency to use a single procurement to secure pre-construction and construction services. In the pre-construction services phase, a contracting agency procures the services of a construction contractor early in the design phase of a project in order to obtain the contractor's input on constructability issues that may be affected by the project design. If the contracting agency and the construction contractor reach agreement on price reasonableness, they enter into a contract for the construction of the project.

The CM/GC method has proven to be an effective method of project delivery through its limited deployment in the FHWA's Special Experimental Project Number 14 (SEP-14) Program. Utilizing the contractor's unique construction expertise in the design phase can recommend for the contracting agency's consideration innovative methods and

industry best practices to accelerate project delivery and offer reduced costs and reduced schedule risks.

### Background

Section 1303 of MAP-21 amended 23 U.S.C. 112(b) by adding paragraph (4) to authorize the use of the CM/GC method of contracting. While the term CM/GC is not used in Section 1303 of MAP-21 to describe the contracting method, the statute allows contracting agencies to award a two-phase contract to a “construction manager or general contractor” for the provision of construction-related services during both the preconstruction and construction phases of a project. State statutes authorizing this method of contracting use different titles including: CM/GC, Construction Manager at-Risk, and General Contractor/Construction Manager. The FHWA has elected to use the term “construction manager/general contractor,” or “CM/GC,” in reference to two-phase contracts that provide for constructability input in the preconstruction phase followed by the construction phase of a project.

The CM/GC contracting method allows a contracting agency to receive a contractor’s constructability recommendations during the design process. A number of States including Utah, Colorado, and Arizona, have used the CM/GC project delivery method on Federal-aid highway projects under FHWA’s SEP-14 program with varying degrees of success. These projects have shown that early contractor involvement through the CM/GC method has the potential to improve the quality, performance, and cost of the project while ensuring that construction issues are addressed and resolved early in the project development process.

The CM/GC contractor’s constructability input during the design process is used to supplement, but not replace or duplicate, the engineering or design services provided by the contracting agency or its consultant. A CM/GC contractor does not provide engineering services. More information about the CM/GC project delivery method can be found on the FHWA’s Every Day Counts Web page at <http://www.fhwa.dot.gov/everydaycounts/edctwo/2012/cmgc.cfm>.

### Notice of Proposed Rulemaking (NPRM)

On June 29, 2015, FHWA published an NPRM in the **Federal Register** at 80 FR 36939 soliciting public comments on its proposal to adopt new regulations. Comments were submitted by nine State

Transportation Agencies (STAs),<sup>1</sup> six industry associations, and one private individual.

### Analysis of NPRM Comments and FHWA Response

The following summarizes the comments submitted to the docket on the NPRM, notes where and why FHWA has made changes to the final rule, and explains why certain recommendations or suggestions have not been incorporated into the final rule.

Generally speaking, most commenters agreed that the proposed rule implements the statutory requirements. The majority of the comments related to requests for clarification or interpretation of various provisions in the proposed regulatory text. The FHWA has carefully reviewed and analyzed all comments and, where appropriate, made revisions to the rule.

### General

The NYSDOT generally supported the proposed regulations and expressed an appreciation for the flexibility allowed by FHWA in various requirements, such as the method of selecting different project delivery methods, developing early work packages, establishing self-perform requirements, and other requirements related to the CM/GC contract method. The FHWA appreciates these comments and finds no substantive response is needed.

The American Association of State Highway and Transportation Officials (AASHTO) indicated the NPRM is consistent with State environmental requirements and protects the integrity of the National Environmental Policy Act (NEPA) decisionmaking process by including specific safeguards to ensure the NEPA decisionmaking process is not biased by the existence of a CM/GC contract and that all reasonable alternatives will be fairly considered when a project involves an Environmental Impact Statement (EIS) or Environmental Assessment (EA). The FHWA appreciates these comments and finds no substantive response is needed.

The Professional Engineers in California Government (PECG) expressed concerns that the CM/GC contracting method will result in non-competitive awards of construction contracts. The group stated the CM/GC contracting method may lead to situations where there is an inherent conflict of interest in having the contractor provide input during the design phase (e.g., a contractor’s

recommendation to use a specific material because it believes that there is more profitability with that material over another). The PECG believed that CM/GC contracting may result in situations where there is little cost competition because some contracting agencies may be subject to undue pressure to agree to proposed prices to avoid the risk of delaying important highway projects. In response, FHWA has no evidence of situations where a contracting agency was misled by a contractor’s recommendation for materials or construction methods. Ultimately, the contracting agency is responsible for the design and material selection issues. Given this responsibility, it is unlikely that there would be an inherent conflict of interest in the design or material selection process. The FHWA acknowledges that some contracting agencies may experience schedule pressures, but all public agencies are responsible for cost, schedule, and quality issues in the development of their projects. The FHWA did not make any revisions to the proposed regulatory text as a result of this comment.

### Section-by-Section Analysis

#### Part 630—Preconstruction Procedures

#### Section 630.106—Authorization To Proceed

The Minnesota DOT indicated that the proposed provisions in this section would allow certain preconstruction services associated with preliminary design to be authorized but would not provide sufficient flexibility for other limited actions, such as the acquisition of long-lead-time materials, prior to completing NEPA, even at the STA’s own risk. The Minnesota DOT stated that materials acquired solely with State funds would not be incorporated into the project until NEPA is complete and would follow FHWA’s procurement requirements. The Minnesota DOT recommended that such at-risk work should be eligible for Federal participation once the NEPA evaluation process is completed, and FHWA authorizes construction.

In response, contracting agencies should be aware that 23 U.S.C. 112(b)(4) does not allow construction activities (even at-risk activities) before the conclusion of the NEPA process (and only allows for contracting agency final design activities on an at-risk basis). Title 23 U.S.C. 112(b)(4)(C)(ii) expressly prohibits a contracting agency from awarding the construction services phase of a contract, and from proceeding or permitting any consultant or contractor to proceed with

<sup>1</sup> In this rule FHWA uses the term STA to refer to State Transportation Departments (STD). STA and STD have the same meaning and are used interchangeably in 23 CFR part 635.

construction until completion of the environmental review process. The FHWA considers the acquisition of materials, even on an at-risk basis, to be a “construction” activity. Even when performed on an at-risk basis, the early acquisition of materials is an indication that the contracting agency has made a commitment of resources—possibly prejudicing the selection of alternatives before making a final NEPA decision.

The NYSDOT stated that the regulation should provide for an exception to the limitation on final design activities for design elements that are necessary to complete the NEPA process (e.g., to secure environmental approval, an element of the project common to all alternatives may need to be completely designed). The FHWA appreciates this comment but believes that the definition of preliminary design (as contained in 23 CFR 636.103 and referenced in 23 CFR 635.502) is sufficiently broad to include such necessary design work so long as it does not materially affect the objective consideration of alternatives in the NEPA review process. In addition, 23 U.S.C. 139(f)(4)(D) provides authority for a higher level of design for the preferred alternative, subject to conditions in that provision.

In developing the provisions for at-risk activities in the rule, FHWA considered the MAP–21 revisions to 23 U.S.C. 112(b) that added two provisions relating to final design. Section 112(b)(4)(C)(ii) prohibits a contracting agency from proceeding, or permitting any consultant or contractor to proceed, with final design until completion of the NEPA process. Additionally, MAP–21 included language, codified at 23 U.S.C. 112(b)(4)(C)(iv)(I), providing that a contracting agency may proceed at its own expense with design activities at any level of detail for a project before completion of the NEPA process for the project without affecting subsequent approvals required for the project.<sup>2</sup> As noted in the NPRM, FHWA considered these provisions together to determine whether it could give meaning to both. This is consistent with applicable conventions of statutory interpretation. The FHWA determined both provisions could be applied if they are interpreted to prohibit FHWA approval or authorization of financial support for final design work before the conclusion of NEPA, but to allow final design work

by a contracting agency solely at its own risk.

Other NEPA requirements and policies, including 40 CFR 1506.1(a)-(b) and FHWA Order 6640.1A—*FHWA Policy on Permissible Project Related Activities During the NEPA Process*, limit agencies from taking actions that might limit the choice of reasonable alternatives in the NEPA review process. The FHWA has a responsibility to ensure compliance with all aspects of the NEPA review process in any federally assisted project, and thus it is important that States not take any actions that might be perceived as limiting the choice of reasonable alternatives—even if those actions are 100 percent State-funded actions taken at the State’s financial risk. It is important for FHWA and its partners to be consistent with this issue on both a project-level and national-program basis.

Based on the comments from the Minnesota DOT, NYSDOT, and other commenters, FHWA believes further clarification of allowable at-risk construction activities on CM/GC projects is appropriate. As a result of these comments, we have provided appropriate revisions to the definition of ‘early work package’ in sections 635.502 and 635.505(b), to clarify what constitutes an early work package and the timing limitations applicable to early work packages. See the discussion in this preamble for each of these sections.

The National Association of Surety Bond Producers (NASBP), the Surety & Fidelity Association of America (SFAA), and the American Subcontractors Association, Inc. (ASA) submitted combined comments. In part, their comments suggested that FHWA revise the appropriate sections of 23 CFR part 630 to clarify the applicability of part 630 to projects that are pursued as public private partnerships (PPP) and receive Federal credit or loan assistance. These associations expressed an interest in ensuring that all Federal assistance is reported for transparency and accountability for long-term PPP agreements. No revisions were made to the proposed regulatory text as these comments are outside of the scope of this rulemaking, and existing USDOT program regulations (49 CFR part 80) and guidance address accountability for Federal credit-based funding in PPP projects.

## Part 635—Construction and Maintenance

### Subpart A—Contract Procedures Section 635.110—Licensing and Qualifications of Contractors

The NASBP, SFAA, and ASA recommended that FHWA require contracting agencies to follow the bonding requirements in 49 CFR 18.36—“Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments” (currently 2 CFR 200.325 in 2 CFR part 200—“Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards”). They also suggested that FHWA set appropriate minimum requirements for bonding and other procurement requirements for PPP projects. In response, we note FHWA’s contracting regulations do not specify the process or provide requirements for furnishing performance bonds on Federal-aid projects. In general, the contracting agencies may use their own procedures and requirements for bonding, insurance, prequalification, qualification, or licensing of contractors on Federal-aid projects as long as those procedures do not restrict competition (23 CFR 635.110(b)). The revision to this section simply clarifies that this general requirement applies to CM/GC contracting. In general, the provisions of 2 CFR part 200 apply to all Federal assistance programs, except where an authorizing statute provides otherwise. For contracting under the Federal-aid highway program, 23 U.S.C. 112 provides the authority, and the regulations in 23 CFR part 635 implement specific requirements, for construction contracting, including performance bonding requirements. Therefore, the provisions of 23 CFR 635.110 are applicable to all Title 23 funded construction projects, and FHWA did not make any revisions to this section.

The AASHTO provided a recommendation to clarify this section to ensure that both CM/GC and design-build projects are subject to the contracting agency’s own bonding, insurance, licensing, qualification, or prequalification procedures. The NPRM proposed to revise the first sentence of subsection (f) to make such clarification. The FHWA reviewed the proposed language and made minor clarifying edits to make it clear the provision applies to both design-build and CM/GC projects. The FHWA concluded the provision is otherwise clear as proposed and therefore made no further revision to the proposed language.

<sup>2</sup> Section 1440 of the Fixing America’s Surface Transportation (FAST) Act (Pub. L. 114–94) (December 4, 2015) allows at-risk preliminary engineering activities under certain conditions. That general provision does not supersede section 112’s specific provisions on at-risk final design in connection with CM/GC projects.

### Section 635.112—Advertising for Bids and Proposals

The Idaho Transportation Department (ITD) suggested that FHWA's approval of projects included on the Statewide Transportation Improvement Program (STIP) also serve as FHWA's approval of the project for advertising for bids and proposals. The ITD suggested that separate FHWA review and approvals would inevitably delay projects. In response, FHWA notes that the cost information typically available at the time the STIP is developed is preliminary in nature and does not provide sufficient information regarding the project scope and estimated cost for construction authorization purposes. Therefore, FHWA made no revisions to the proposed language.

### Section 635.113—Bid Opening and Bid Tabulations

The ITD suggested adding language to the rule that would require the use of low bid procedures if the contracting agency and the CM/GC contractor do not reach an agreed price for construction of the project. In response, FHWA does not want to limit contracting agencies to the use of competitive sealed bidding in circumstances where an agreed price is not reached with the CM/GC contractor. It is possible that another competitive delivery method (such as design-build) could be appropriate for unique projects. Given the need for flexibility in this area, FHWA made no revisions in response to this comment.

### Section 635.122—Participation in Progress Payments

The Michigan DOT asked for clarification whether the solicitation document (early in the project development process) needs to specify the method for making construction phase payments. The Michigan DOT recommended that the final rule provide more flexibility to allow contracting agencies to determine the payment method later in the process as long as the method is clearly defined in the construction contract. The Michigan DOT stated that the payment mechanism is one area where risks can be mitigated and transferred effectively. The FHWA agrees with this comment and modified the provision to require the State Transportation Department (STD) to define its procedures for making construction phase progress payments in either the CM/GC solicitation document or the construction services contract documents.

### Part 635—Construction and Maintenance

#### Subpart C—Physical Construction Authorization

##### Section 635.309—Authorization

The Colorado DOT commented on the preamble discussion for this section and asked if the contracting agency could negotiate the agreed price for construction with the CM/GC contractor before the NEPA review of the project is complete. In response, FHWA notes section 635.505(b) prohibits the contracting agency from awarding the construction services phase of a CM/GC contract before NEPA is complete. The regulation, however, does not prohibit the parties from undertaking the evaluation and negotiation processes that precede such award.

The Maryland State Highway Administration (SHA) asked for clarification whether the term "Request for Proposals document" in the proposed language for section 635.309(p)(1)(vi) was in reference to the initial solicitation document or a Request for Proposals for an agreed price for construction services. In response to this comment, FHWA clarifies the provision establishes requirements for design-build Request for Proposals and CM/GC initial solicitation documents. The FHWA edited the references in the provision to better reflect this intended meaning.

### Part 635—Construction and Maintenance

#### Subpart E—Construction Manager/General Contractor (CM/GC) Contracting

##### Section 635.502—Definitions

##### Construction Services

The AASHTO expressed a concern that, should the contracting agency desire to include a percent fee when compensating the contractor, it may not be included in the definition and, therefore, not allowed under the rule. The AASHTO suggested adding language to the definition that says the term includes all costs to supervise and administer physical construction work, including fees paid to the CM/GC contractor for project administration. The FHWA acknowledges that, in some instances, payment of a fee to a CM/GC contractor may be an eligible cost. However, after considering the comment, we concluded the eligibility of fees should be addressed on a contract-specific basis. In response to the comment, FHWA added language to the final rule definition that clarifies the term "construction services" includes all costs to perform, supervise, and

administer physical construction work for the project.

The Connecticut DOT suggested adding the phrase "[f]or which this portion will be determined by the STA through consideration of the complexity and additional factors associated with each individual project" after the phrase "project or portion of the project." The FHWA concluded, however, that it was not clear the addition would clarify the definition and therefore did not accept this proposed revision. The Delaware DOT suggested that the definition of "construction services" should be modified to account for the possibility that the construction manager does not perform the construction work because an agreed price cannot be negotiated. This possibility is addressed through the provisions in section 635.504(b)(6), and therefore, FHWA did not make this proposed revision to the definition.

Additionally, due to concerns raised by the Minnesota and Connecticut DOTs regarding the statutory requirement for FHWA approval of a price estimate for the entire project before authorizing construction activities (23 U.S.C. 112(b)(4)(C)(iii)(I)), FHWA reviewed the definition of "construction services" for clarity. The FHWA determined the last sentence in the proposed definition, concerning procurement and authorization procedures, could cause confusion and could be read as conflicting with requirements in section 635.506(d)(2) of the final rule. For these reasons, FHWA is removing the last sentence in the NPRM definition of "construction services."

##### Early Work Package

The Colorado DOT expressed a concern that the preamble language does not allow contracting agencies to perform long-lead time procurements for materials, equipment, and items at risk. The Minnesota DOT expressed a similar concern and suggested that contracting agencies be allowed to acquire long-lead time materials at their own risk, but not be allowed to install the material prior to the completion of the NEPA process.

For the reasons noted in the discussion for section 630.106, FHWA revised the definition of an early work package to include examples of early construction work, which may not be performed prior to the conclusion of NEPA, even on an at-risk basis (e.g., site preparation, structure demolition, hazardous material abatement/treatment/removal, early material acquisition/fabrication contracts, or any action that may materially affect the objective consideration of alternatives in the NEPA review process). Based on the

concerns expressed by the Minnesota DOT and Colorado DOT, FHWA also added language in the definition of “preconstruction service” and in section 635.505(b) to clarify allowable preconstruction activities and emphasize that early construction packages are not allowed until NEPA is complete. In further response to comments questioning the clarity of the definition and the timing of early work package authorizations, FHWA added language to clarify two provisions in the definition that relate to pricing. First, FHWA clarified the type of risks (construction risks) that must be understood before the contracting agency and the CM/GC contractor can agree on a price. The FHWA also inserted into the definition an explicit reference to section 635.506(d)(2), to make it clear that FHWA approval of the price estimate for construction of the entire project must occur before it can authorize any early work package. In addition to the responses above, FHWA believes it is important to emphasize early work packages are for minor elements or stages of project construction that can be accomplished during the period after NEPA is complete and before design of the project is sufficient to permit the parties to reach an agreed price for construction of the project. Early work packages are not to be used to piecemeal construction of the project. Early work packages are intended to support the objective of the CM/GC contracting process, which is to expedite competitive procurement and improve project delivery through use of the two-stage contracting process.

#### Preconstruction Services

The Michigan DOT requested clarification as to whether the proposed definition of preconstruction services prohibits a design firm from being on the CM/GC contractor’s preconstruction team if the design firm is not providing the contracting agency with design/engineering services. In response to this request, the regulation does not prohibit a CM/GC contractor from hiring a design or engineering firm for consultation during preconstruction services. This consulting firm may assist the CM/GC contractor by providing incidental engineering related services typically performed by general construction contractors, such as the preparation of site plans or falsework plans. In order to avoid conflict of interest issues, the design-engineering firm hired by the CM/GC contractor may not be the same as, or affiliated with, the design-engineering firm under contract to the contracting agency for engineering services. The FHWA does not believe it

is necessary to revise the regulatory language to address this comment.

The Minnesota DOT expressed concern that the proposed definition for “preconstruction services” appeared to disallow site work for testing and other field studies before NEPA completion. The Minnesota DOT suggested that FHWA modify the definition of “preconstruction services” to include site work for testing for the contracting agency’s design team and other field studies to inform the environmental process. In response, FHWA agrees with this suggestion and revises the final sentence of the definition to expressly include on-site material sampling and data collection to assist the contracting agency’s design team in its preliminary design work. The definition still excludes design and engineering-related services as defined in 23 CFR 172.3.

The Minnesota DOT also suggested that FHWA broaden the definition to allow the CM/GC contractor to perform engineering typically performed by the contractor (e.g., falsework plans, shop drawings) during the preconstruction phase of the project. A private individual raised similar concerns, indicating that incidental engineering related services were not within the definition of “construction” or the definition of “engineering” in 23 CFR 172.3. The private individual requested more specificity on the types of incidental engineering work that could be offered at the preconstruction services (for example, falsework studies, shop plans, formwork studies). The FHWA agrees that it may be appropriate for the CM/GC contractor to develop certain preliminary plans typically prepared by a construction contractor (such as falsework plans) to assist the contracting agency’s design team during its preconstruction activities. Shop drawings or fabrication plans, however, are considered to be an element of final design, not preliminary design, and FHWA is precluded from approving or authorizing financial support for final design activities until the NEPA process is complete. In addition, shop drawings are typically developed by a fabricator or material supplier who is under contract with a construction contractor. Even on an at-risk basis, contracting for the acquisition or fabrication of materials is not allowed before the conclusion of the NEPA process. This is necessary to prevent the perception of bias and a commitment of resources to a particular NEPA alternative. The FHWA made modifications to the definition of “preconstruction services” to provide clarity on what preconstruction services are eligible and which of these services can or cannot be

provided before the completion of the NEPA process.

The Minnesota DOT asked why the proposed rule was silent on the use of subcontractors for preconstruction services. The FHWA does not believe it is necessary to address subcontractors, as the regulation applies directly to Federal-aid recipients (contracting agencies) and indirectly to CM/GC firms. The CM/GC firm may have contractual relationships with subcontractors, lower-tier subcontractors, material suppliers, etc. in accordance with applicable Federal and State requirements. Therefore, no revisions are made to the regulatory language to address this comment.

The NYSDOT asked if guidance should be provided regarding design liability issues identified in *Coghlin Electrical Contractors, Inc. v. Gilbane Bldg. Co. et al.*, 472 Mass. 549 (2015). The FHWA believes that providing guidance regarding the applicability of this case, or other liability cases, is beyond the scope of this rule.

The Greater Contractors Association of New York (GCA) supported the distinction in the definition between design services and constructability reviews. The GCA believed that the definition makes it clear that the CM/GC contractor is providing input on constructability, scheduling, risk identification, and cost-related issues only. The FHWA agrees with this comment and does not believe that the regulatory text requires further revisions.

#### Section 635.504—CM/GC Requirements Section 635.504(b)(1)

The Maryland SHA expressed concern that the NRPM did not discuss allowable procurement practices (e.g., discussions, procedures for request for proposals, competitive ranges). It requested clarification that State procedures be allowable where FHWA’s regulation is silent on an issue. The FHWA agrees with this comment and revises the regulatory text to allow for the use of applicable State or local procedures as long as these procedures do not restrict competition or conflict with Federal law or regulations. In considering this comment, FHWA also recognized the rule should be clearer that the use of State and local procedures is permissive, not mandatory. For this reason, FHWA replaced “shall” with “may” in the provision.

The ARTBA commented that it was pleased to see numerous references in the NPRM regarding the importance of open competition. At the same time, it

was dismayed by the USDOT's promotion of local labor hiring preference provisions in the Federal-aid highway program and other USDOT assistance programs. It believed that such provisions are in conflict with the principles of open competition. This particular comment is outside of the scope of this rulemaking, and FHWA did not make changes in response to the comment. Local hiring preference is the subject of a separate rulemaking, "Geographic-Based Hiring Preferences in Administering Federal Awards" [Docket DOT-OST-2015-0013; RIN 2105-AE38], 80 FR 12092 (Mar. 6, 2016).

#### Section 635.504(b)(2)

The AGC referenced the procurement requirements in this section of the NPRM and recommended that FHWA include a discussion of what is the expectation in the construction services portion of a contracting agency's solicitation. The AGC suggested that contracting agencies should clarify whether the CM/GC contractor's responsibilities are limited to providing constructability and material reviews, or whether the CM/GC contractor is expected to perform design services. The AGC referenced recent cases that showed a trend of liability and responsibility being assigned to CM/GC contractors related to the preconstruction phase of the contract for what have been considered professional services provided. The FHWA does not believe that the regulatory language requires clarifications. The definition of "preconstruction services" in section 635.502 specifically excludes design and engineering-related services as defined in 23 CFR part 172.

#### Section 635.504(b)(3)

The ARTBA expressed several concerns regarding objectivity and transparency of the selection process for alternative contracting methods. The ARTBA agreed that the NPRM language is consistent with the provision in MAP-21 that gives flexibility to the contracting agency in determining factors for the selection of the CM/GC contractor, but wished to underscore the importance of certain procurement requirements (such as interviews) to ensure integrity and enlist the participation of the industry in CM/GC projects. The ARTBA highlighted the importance of clarity and disclosure in all procurement documents. The FHWA agrees with ARTBA's general comments that clarity and transparency are important in the procurement process. Section 635.504(b)(3)(ii) requires solicitation documents to list the

evaluation factors and significant subfactors and their relative importance in evaluating proposals. This provision does not require contracting agencies to use any particular method of identifying relative importance. There are a number of ways to do so, such as by the assignment of specific weights or percentages to the factors, or by listing the evaluation criteria in descending order of importance. This decision about how to do the procurement rests with the contracting agency under 23 U.S.C. 112(b)(4)(B). Under section 635.504(b)(3)(ii), the contracting agency must disclose the evaluation criteria it will use, and the relative importance of the criteria, in the solicitation documents.

In connection with section 635.504(b)(3)(iv), Michigan DOT recommended that FHWA provide some flexibility in allowing the contracting agency to decide whether interviews would be necessary after the receipt of responses to the solicitation but before establishing a final rank. The Michigan DOT indicated that the contracting agency should have the flexibility to determine whether interviews are needed, based upon the strength of written responses to the solicitation document. The Michigan DOT indicated that in some cases, interviews might not be necessary if there were a significant separation between one team and all others. Similarly, the ITD commented that interviews should be conducted at the discretion of the State when the topped ranked firms are close in score, and the evaluation team should determine appropriate additional criteria to be evaluated in the interview. In response, FHWA believes Michigan DOT and ITD have raised valid points for those circumstances where it may not be necessary to interview firms before establishing the final rank. In the final rule, if interviews are used, the contracting agency must offer the opportunity for an interview to all short listed firms (or firms that submitted responsive proposals, if a short list is not used) as required by section 635.504(b)(4). In response to the comments, we have added a parenthetical to section 635.504(b)(3)(iv) so that the provision explicitly recognizes contracting agencies may reserve the right to make a final determination whether interviews are needed based on responses to the solicitation. The FHWA disagrees with ITD, however, about flexibility for the proposal evaluation team to establish additional criteria applicable to the interview process. The FHWA does not believe adding criteria not disclosed in

the solicitation documents is conducive to open and transparent competition. For that reason, no change is made to the rule in response to this comment. Under section 635.504(b)(3)(ii), contracting agencies must identify in the solicitation documents their intent to use, or not use, interviews and the relative importance of the interviews as part of the evaluation criteria. The contracting agency must disclose in the solicitation documents any criteria specific to the interview phase, including its relative importance with respect to all evaluation factors.

The AGC suggested that FHWA encourage the use of interviews in the selection process and clarify what value (percent of selection ranking) will be given to the interview. The FHWA agrees that interviews are important element of the selection process, and if used, it is important for proposers to understand the value that contracting agencies will assign to the interview. Section 635.504(b)(3)(ii) requires inclusion in the solicitation documents of the relative importance of evaluation factors, and this requirement would apply to the use of interviews. For this reason, FHWA did not revise the rule in response to this comment.

The AGC also suggested that FHWA add a new section recommending the use of a short list process where only a limited number of firms are selected to proceed through the procurement process and that FHWA require the solicitation to identify the number of firms to be included on the short list. After considering the comment, FHWA concluded the use of shortlisting is a topic that normally would be included in contracting agencies' CM/GC procurement procedures. This procurement process detail is best left to the discretion of the contracting agency, consistent with 23 U.S.C. 112 (b)(4)(B). Those procedures are subject to FHWA approval under section 635.504(c), and will be publicly available. For these reasons, no changes are made to the NPRM language in response to these AGC comments.

The NYSDOT indicated that the NPRM was silent regarding best practices in the administration of CM/GC projects. As an example, it cited the practice of ensuring interaction and coordination between the contracting agency's design or engineering consultant (if out-sourced) and the CM/GC contractor. The NYSDOT suggested that FHWA consider the need for issuing guidance related to other best practices such as risk management plans. The FHWA agrees that coordination and interaction between the contracting agency's designer (if out-

sourced) and the CM/GC contractor is desirable, but this is a matter of administrative practice best addressed by the contracting agency. The issuance of guidance on best practices related to the administration of CM/GC projects is outside of the scope of this rulemaking, and FHWA made no changes to the rule in response to these comments.

#### Section 635.504(b)(5)

The ITD suggested that approvals by the FHWA Division Administrator be limited to approving changes to the approved State solicitation template documents. The FHWA's role in the CM/GC project approval and authorization process is described in section 635.506, and this comment is addressed in the discussion of that section. Therefore, FHWA did not make changes to this section.

#### Section 635.504(b)(6)

The Minnesota DOT suggested allowing additional flexibility in situations where the contracting agency and CM/GC contractor are unable to reach agreement on price and schedule for construction services (including early work packages). In particular, the commenter suggested the rule expressly allow flexibility in such cases for the contracting agency to use design-build contracting for the project or individual work packages. The proposed rule suggested that the traditional competitive bidding process be used in these situations. In response, FHWA recognizes that there may be circumstances where it would be appropriate to have the option of using either competitive bidding (23 CFR 635.112) or another approved method, such as design-build contracting under 23 CFR part 636, for both early work packages and the main portion of project construction (*i.e.*, project construction exclusive of any early work packages). The FHWA revised the first sentence of the paragraph by adding "or another approved method" at the end of the sentence. The FHWA also deleted the proposed language in the paragraph that would have prohibited the contracting agency, once it advertises for bids or proposals for the project or a portion of the project (early work packages), from using the CM/GC agreed price procedures. Under the final rule, when the contracting agency and the CM/GC contractor fail to agree on a price for an early work package, the contracting agency may perform that work itself under force account provisions, or may undertake a new procurement for that early work package, without affecting its ability to use CM/GC agreed price procedures for

other early work packages and for construction services for the main portion of the project.

The AASHTO noted that the proposed provisions of this section (requiring a transition to competitive bidding if the contracting agency and CM/GC contractor are unwilling or unable to enter into a contract for construction services) create a potential conflict with the CM/GC laws of at least one State. Apparently, this unidentified State's statute allows the contracting agency to enter into negotiations with the next highest scored firm(s) until agreement is reached or the process is terminated. The AASHTO provided a recommended revision which would allow such a State to enter into negotiations with the highest ranked firm from the original solicitation for CM/GC services. From FHWA's perspective, the level of design would typically be 60 percent to 90 percent complete when final negotiations for construction services for the main portion of the project take place with the CM/GC contractor. If the contracting agency and the CM/GC contractor are not able to reach agreement regarding schedule and price, then it is in the public interest to transition to a new procurement and solicit competitive bids or proposals from all firms that might be interested in the construction services phase. It is not logical to enter into negotiations for construction services with a firm that was the next highest ranked firm for the preconstruction services because, at this point in the project delivery process, a large portion of the advisory services provided by the CM/GC firm for the preconstruction phase have been completed. In addition, the importance the contracting agency places on various qualifications and contractor experience may be different when it is seeking only construction services, as compared to seeking a combination of preconstruction and construction services. Thus, it does not make sense to enter into negotiations with the second highest scoring CM/GC firm merely for the sake of finalizing input and obtaining construction pricing. Where the contracting agency and CM/GC contractor are unwilling or unable to enter into a contract for construction services, it is appropriate to require either competitive sealed bidding (23 CFR 635.112) or a transition to another approved contracting method, such as design-build contracting under 23 CFR part 636. Therefore, FHWA is not adopting AASHTO's recommendation.

The Connecticut DOT suggested that the requirement in this section for FHWA approval before advertising for construction bids or proposals be

removed. The Connecticut DOT believed that an additional round of FHWA approvals would be more cumbersome than beneficial. The FHWA does not agree with this recommendation. In situations where the contracting agency and CM/GC contractor are unwilling or unable to enter into a contract for construction services, it is appropriate that the contracting agency notify the FHWA Division Administrator of this decision and request FHWA's concurrence before advertising for construction bids or proposals in accordance with 23 CFR 635.112 (bid-build) or 23 CFR part 636 (design-build). The reason is that contracting agency is effectively converting from a CM/GC contracting process to a non-CM/GC process subject to separate bidding requirements under title 23 (*e.g.*, bid-build or design-build). In such case, FHWA approval provisions applicable to those procedures will apply. In considering the comments, however, FHWA recognizes there is potential for confusion due to the use of the term "notification" in the proposed rule language. In the final rule, FHWA has substituted the term "concurrence" for "notification" in the first sentence of paragraph (6). This change better reflects FHWA's intent, which is that the contracting agency will follow appropriate procedures for required FHWA approvals prior to issuing new bid/proposal documents. The change makes the rule more consistent with the concurrence concepts used in 23 CFR 635.114(h) and 636.109(c). The concurrence point will help to ensure that FHWA's requirements are being met for before a new solicitation starts.

The ITD suggested using the term "competitive advantage" or better defining the term "conflict of interest." The Delaware DOT suggested a clarification of the terms in this section to say that ". . . the contracting agency may prohibit the CM/GC contractor from submitting competitive bids during the construction phase of the contract if the contracting agency determines that the inclusion of the CM/GC contractor may inhibit fair and open competition among the bidders." The FHWA generally agrees with these comments. The final rule permits the contracting agency to exclude the CM/GC contractor from bidding on construction of the project if the contracting agency determines the CM/GC contractor is likely to have a competitive advantage that could adversely affect fair and open competition.

The ARTBA commented that the contracting agency's ability to preclude a CM/GC contractor from bidding on the

construction services contract if the agency and firm have been unable to agree on a price will be a risk allocation factor affecting the price of CM/GC proposals. The commenter stated this type of provision should be clearly delineated in the initial CM/GC procurement documents and elsewhere. The GCA raised similar concerns. It suggested that the contracting agency's original solicitation must outline the process for how the project will be handled if the agency and the CM/GC contractor cannot reach agreement on a final contract. The GCA noted that the NPRM allows the contracting agency the option of allowing or preventing the CM/GC contractor from bidding on the construction in the event a final contract is not negotiated. The GCA believed that this is not acceptable because it exposes the CM/GC contractor to the risk that an agency will simply refuse to negotiate a reasonable price and thereby gain the advantage of the CM/GC's proposal without entering into a contract.

In response, FHWA recognizes that the possibility of contract termination for failure to agree on price for construction creates some risk to the CM/GC contractor when performing preconstruction services. FHWA decided not to revise the rule in response to these comments, however. First, the authority for such termination appears in the rule, which places potential CM/GC contractors on notice of the risk. We also expect contracting agencies to include this termination authority in their CM/GC contract documents. Under section 635.504(b)(3)(v), the solicitation documents must include or reference sample contract forms. Second, a decision to preclude the CM/GC contractor from bidding on construction (including an early work package where the parties failed to reach an agreed price) under a new procurement will be a very fact-specific determination that depends on the circumstances of the particular project. Facts relevant to the decision about a real or apparent competitive advantage often will not be fully available until well after the solicitation process has resulted in the selection of a CM/GC contractor. This would make it difficult for a contracting agency to make that decision at the time the CM/GC solicitation document is developed. The FHWA concluded it is important to provide contracting agencies with flexibility in timing their determination whether the CM/GC contractor has a competitive advantage that could adversely affect fair and open competition for the work in question. That said, we believe contracting

agencies need to be consistent with their State policies related to competition (and apparent competitive advantage). The contracting industry appropriately expects fairness and transparency in an owner's procurement process—including any notices to the industry in the solicitation process. Both the owner and the industry rightfully expect good faith negotiations regarding scope, schedule, and price for construction.

#### Section 635.504(c)

The FHWA received some comments on this section that relate to the relationship between CM/GC provisions and FHWA's Risk-Based Stewardship and Oversight (RSBO) Program. The FHWA's RSBO Program is meant to optimize the successful delivery of programs and projects and ensure compliance with Federal requirements. This risk-based program involves three main avenues: (1) Project approval actions, (2) data-driven compliance assurance, and (3) risk-based stewardship and oversight involvement in Projects of Division Interest (PoDIs) and Projects of Corporate Interest (PoCIs). The FHWA Division Offices are required to execute a Stewardship and Oversight agreement with their respective STA for the oversight of Federal-aid projects, including PoDI and PoCI projects. This agreement establishes the roles and responsibilities for project actions that require FHWA approval.

The Michigan DOT suggested that FHWA's review and approval of a State's procurement document should constitute FHWA's approval to use the CM/GC contracting method for all Federal-aid projects except those where full oversight is needed (*e.g.*, PoDIs or PoCIs). The Michigan DOT indicated that for non-PoDI or non-PoCI projects, FHWA's involvement could be designated in the STA's approved CM/GC procurement procedures, and therefore, the Michigan DOT recommended that FHWA revise numerous sections in part 635 to eliminate the requirement for FHWA approvals for non-PoCI and non-PoDI projects. The FHWA does not agree with this suggestion. Given the differences in FHWA's Stewardship and Oversight Agreements from State-to-State, it is not appropriate to implement a change that would eliminate FHWA Division Office review/approval requirements in our regulations. The FHWA Division Offices have the authority to assess program risks in their States and come to an agreement with their respective States regarding the stewardship of the Federal-aid program. Section 635.506(a) provides a discussion of the flexibilities

that are available for States in assuming certain FHWA responsibilities for project approval actions. The Stewardship and Oversight Agreement will formalize these responsibilities in each State. It is expected that the State's assumption of FHWA responsibilities will vary from State-to-State (even on PoDI and PoCI projects), and therefore, no revisions are made in section 635.504(c) related to this recommendation.

#### Section 635.504(d)

Two commenters on this section, Minnesota DOT and Connecticut DOT, suggested clarification of the terms used and requirements included in this section. The Minnesota DOT indicated that the NPRM appeared to require each construction services contract (*i.e.*, each work package) to include a minimum 30 percent self-performance requirement. The Minnesota DOT said that the application of the self-performance requirement might not be appropriate for particular work packages, such as supplying long lead time materials. The Minnesota DOT suggested that the rule specifically exclude providing materials from the self-performance requirement. They also suggested that the 30 percent self-performance requirement apply to the project overall and not to each individual work package. The Connecticut DOT suggested that the application of the 30 percent self-performance requirement be left to the discretion of the contracting agency, which would allow the use of the Construction Manager-at-Risk concept where the CM/GC contractor serves totally as a construction manager and does not perform any construction during the construction services phase of the project.

The three contracting associations providing comments on this section strongly supported the use of self-performance requirements; however, they differed in their recommended revisions to the NPRM. The AGC supported the use of the traditional 30 percent self-performance minimum requirement and suggested that the rule point out that States are free to use a higher self-performance requirement if they so desire or are mandated under State law. The AGC suggested that the regulation should clarify that there is no upper limit on self-performed work and that the "total cost of construction services" should be inclusive of any early work packages and/or task orders. The AGC took exception to the sentence that would allow States to require the CM/GC contractor to competitively let and award subcontracts for construction services to the lowest responsive bidder

if required by State law. The AGC believed that it is imperative that the CM/GC contractor have control over the solicitation, selection, and administration of subcontractors in much the same way as subcontractors are selected through the traditional design-bid-build process.

The GCA had similar concerns. It indicated that it is critical to assure taxpayers that the contractor awarded the contract is the entity responsible for building the project and meeting all obligations. The GCA contended that contracting agencies must ensure that the CM/GC contractor has the same contractual responsibilities as a general contractor during the construction services phase of the project by ensuring that the CM/GC contractor has full control of the subcontractor selection process and is contractually and financially liable for delivering the project on schedule and at a fixed price. The GCA noted that a self-performance requirement of 40–50 percent is common in the industry and recommended that the CM/GC model contain a self-performance requirement higher than the NPRM 30 percent minimum.

The ARTBA also noted the importance of recognizing the difference between CM/GC contracting as currently used by transportation agencies and its use in the “vertical” construction industry. The ARTBA noted that by maximizing self-performance, CM/GC contractors can maximize innovation and efficiency, and enhance the value for the project’s owner-agency and the taxpayers. This process is in contrast to the customary practices in the vertical building industry, where the “construction manager” is often a broker of construction services by other firms.

In response, FHWA is not adopting the Connecticut DOT suggestion that the self-performance requirement be left to the contracting agency’s discretion so that the CM/GC contractor can serve in a solely managerial capacity during the construction services phase of the project. The FHWA recognizes such practice occurs in vertical construction, but it is not authorized under 23 U.S.C. 112(b)(4), which requires the CM/GC contractor to be responsible for construction of the project where the parties reach an agreed price for construction services.

After considering the comments, FHWA is revising the rule to clarify that the 30 percent self-performance requirement applies to the total of all construction services performed under the CM/GC contract, not to each individual contract for early work

packages and construction services for the main portion of the project. The CM/GC contractor should take steps to ensure its work meets this requirement, which may necessitate adjustments in work performance as the construction work progresses. The exception for specialty work is retained, but FHWA has not expanded the exception to materials. The NPRM language was clear that the 30 percent criteria is a minimum, and contracting agencies have the discretion to set higher threshold if provided for by State or local policy. The final rule retains that language. The FHWA is not revising the sentence that allows contracting agencies to require the CM/GC contractor to competitively let and award subcontracts for construction services to the lowest responsive bidder if required by State law, regulation, or administrative policy. The MAP–21 Section 1303 requirements did not address this issue, and FHWA believes that it is appropriate to allow States to develop their own policies.

Finally, it is important to note in this context that awards of subcontracts must be in accordance with the Disadvantaged Business Enterprise (DBE) regulations in 49 CFR part 26, including the good faith efforts requirements at 49 CFR 26.53 when a DBE contract goal has been set on the contract. Further discussion of FHWA’s DBE requirements for CM/GC contracts is provided below in the response to comments on section 635.506(e).

#### Section 635.504(e)

The Connecticut DOT noted that this section allows for compensation based on actual costs and commented that the accompanying requirement of indirect cost determinations would render this an extremely burdensome option for the CM/GC contractor and contracting agency. The Connecticut DOT recommended that FHWA consider eliminating this option since actual costs are not defined and would probably need to be audited; indirect cost rates would also need to be negotiated, audited, and established. If this method were to remain an option, the Connecticut DOT recommended that the indirect cost be defined as a specific amount, such as 10 percent. The FHWA believes that the use of actual cost rates would be very rare; however, there may be specific circumstances where it might be advantageous for a contracting agency to do so. In these cases, it is important to give the contracting agencies the flexibility to do this. FHWA does not believe that limiting indirect costs to 10 percent of direct

costs is appropriate and, therefore, did not adopt any limitations.

When reviewing this comment from Connecticut DOT, FHWA recognized the need for a correction in section 635.504(e). In the NPRM, language relating to indirect cost rates was mistakenly placed in paragraph 635.504(e)(3) rather than in paragraph (e)(2). The FHWA corrected this error in the final rule.

The Connecticut DOT requested that FHWA provide clarification for the basis for prohibiting the use of “cost plus a percentage of cost and percentage of construction cost methods” as methods of payment for preconstruction services. In response, FHWA notes that under these payment methods, there is a potential conflict of interest between the contractor’s professional responsibility to the contracting agency and the contractor’s financial interest in maximizing revenues. This is inherent in cost plus percentage of cost compensation, creating little incentive for the contractor to control its administrative costs or provide recommendations that would result in a more cost effective project. Furthermore, the use of the cost plus a percentage of cost and percentage of construction cost methods of contracting is prohibited in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR 200.323(d)). The FHWA made no revisions to the regulatory text in response to this comment. In reviewing the comment from Connecticut DOT on this topic, however, FHWA determined that including a similar sentence in paragraph (e)(3) (method of payment for construction services) would eliminate any confusion to the applicability of 2 CFR 200.323(d) for construction services payment methods.

#### Section 635.505—Relationship to the NEPA Process

As is evident from this preamble’s discussion of individual sections of the rule, there is some uncertainty among stakeholders about the types of CM/GC contractor activities allowed before the completion of the NEPA review for the project. The FHWA believes it may be useful to summarize how CM/GC contractor services can be used before the conclusion of NEPA under this rule as well as applicable NEPA requirements. This summary consolidates, and expands on, FHWA’s responses to specific comments on section 635.505.

- The FHWA may approve and authorize financial support for necessary and reasonable CM/GC contractor costs related to

preconstruction activities including but not limited to: Cost estimating, scheduling; constructability reviews/recommendations; risk analysis; development of implementation plans as required by the contracting agency (safety plans, environmental compliance plans, quality control plans, hazardous material plans, etc.); field studies that assist with preliminary design, including site coring and sampling; site studies; and other activities that do not materially affect the objective consideration of NEPA alternatives;

- The FHWA cannot approve or authorize financial support for final design or construction activities such as: Site preparation, structure demolition, hazardous material removal/treatment/abatement, preparation of shop drawings, early material acquisition contracts (regardless of lead time), or material fabrication contracts (e.g., structural steel, precast concrete members, etc.);

- On an at-risk basis, the contracting agency may perform at-risk final design activities at any level of detail and may contract with the CM/GC firm to perform preconstruction services related to final design if the contracting agency has a procedure for segregating the costs of the CM/GC contractor's at-risk work from the CM/GC contractor's preconstruction services eligible for reimbursement during the NEPA process; and

- Even on an at-risk basis, the contracting agency must not contract for (or direct the CM/GC contractor to perform) construction activities before the completion of NEPA review, including the following activities: Site preparation, demolition, hazardous material treatment/removal, materials acquisition (regardless of lead time), and fabrication of materials or other activities that would adversely affect the objective consideration of NEPA alternatives. Plans or submittals that require an agreement/contract with a supplier or fabricator, such as shop drawings or fabrication plans, are not allowed, even on an at-risk basis prior to the completion of the NEPA review process.

#### Section 635.505(b)

The Colorado DOT noted that the preamble discussion for this section prohibits contracting agencies from awarding early work packages (such as advanced material acquisition) before the NEPA review process is complete. The Colorado DOT stated that contracting agencies need an exception for long lead time procurements for advanced materials procured at their own risk. The Minnesota DOT stated

that the NPRM provides for very limited pre-NEPA activities, and it specifically prohibits advanced material acquisition. The Minnesota DOT recommended that the regulations allow contracting agencies to perform limited construction services, such as procuring materials on an at-risk basis before completing the NEPA review process. The Minnesota DOT suggested that these materials would not be incorporated into the work until NEPA is complete and would follow Federal procurement rules. The Minnesota DOT also suggested that this at-risk work should be eligible for Federal reimbursement once NEPA is completed and the project is authorized.

As noted in the discussion of section 630.106, the advanced acquisition of materials, even on at-risk basis, is an early construction activity which 23 U.S.C. 112(b)(4)(C)(ii) prohibits. That provision provides that contracting agencies may not with the award of the construction services phase before the completion of the NEPA review process. The FHWA acknowledges additional clarification regarding this issue is appropriate, and therefore, we have revised paragraph (b) to prohibit the contracting agency from initiating construction activities or allowing such activities to proceed, even on an at-risk basis, prior to the completion of the NEPA process. The prohibition includes construction work self-performed by the contracting agency and contracts let by the contracting agency for construction services (including construction services under a CM/GC contract such as early work packages for advanced material acquisition or site preparation work).

#### Section 635.505(e)

The ITD commented that it is not readily apparent why the CM/GC contractor needs to know the NEPA alternatives, as they are only responsible for implementing the preferred alternative identified in the environmental decision. In response, while it is true that the CM/GC contractor will only be responsible for implementing the selected alternative identified in the NEPA process, the CM/GC contractor may provide technical information to the contracting agency during the preconstruction phase for use in the NEPA evaluation for the project. Issues such as constructability and cost often are relevant to the comparison of alternatives. The FHWA and the State are responsible for ensuring a fair and objective comparative evaluation of reasonable alternatives for the project under 40 CFR 1502.14. This includes an analysis of the proposed action and alternatives to it in a substantially

similar manner, using consistent criteria for evaluating and screening. See Question and Answer 5b, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," Council on Environmental Quality (46 FR 18026 (March 23, 1981)), as amended (available online at <https://ceq.doe.gov/nepa/regs/40/40P1.HTM>). For these reasons, it is incumbent on the contracting agency to ensure it will have access to comparable data for the evaluation of the reasonable alternatives for the project. To the extent the contracting agency wishes to use data provided by the CM/GC contractor, this means the contracting agency should include provisions in its CM/GC bid and contract documents that permit it to obtain such data from the CM/GC contractor as needed. After considering the comments, FHWA agrees with the commenter that the language proposed in the NPRM did not fully capture the intended meaning. To better capture the scope of the responsibility, this section was revised to place the responsibility on the contracting agency for ensuring its CM/GC contract gives it the ability to obtain, as needed, technical information needed for a fair and objective comparative evaluation of reasonable alternatives for the project.

#### Section 635.505(f)

The NPRM proposed a requirement that the CM/GC contract include provisions ensuring no commitments are made to any alternative during the NEPA process, and that the comparative merits of all alternatives identified and considered during the NEPA process, including the no-build alternative, will be evaluated and fairly considered. The ITD indicated that the provisions of this section are design functions, not functions of the CM/GC contractor. In response to this comment, FHWA agrees that the NEPA requirements reflected in this section have direct applicability to the contracting agency, but they have implications for the contracting agency's consultants as well. The proposed language, which is similar to language in the design-build regulations (23 CFR 636.109(b)(4)), is intended to ensure NEPA requirements for an independent and non-biased evaluation of project alternatives are satisfied. The provision will help contracting agencies and prospective CM/GC contractors understand the issues related to the NEPA review process, the need for the CM/GC contractor to be unbiased in the advice given to the contracting agency about alternatives, and the contracting agency's role in implementing these requirements during design development. After considering the

comment, FHWA concluded the provision is important to maintain the integrity of the NEPA process, and FHWA is not revising the regulatory text.

#### Section 635.505(h)

The Minnesota DOT noted a concern with the requirement for each construction services contract to include a provision ensuring that the CM/GC contractor will meet all environmental and mitigation measures committed to in the NEPA document. The Minnesota DOT said that in many situations, the NEPA document has mitigation measures beyond the control of the CM/GC contractor. The Minnesota DOT suggested modifying the clause to require the STA to include “applicable” commitments in each contract and deleting the “and” in the phrase “environmental and mitigation” as unnecessary. The proposed language is consistent with a provision in the design-build regulations at 23 CFR 636.109(b)(5), and FHWA believes that consistency should be maintained in the rule. FHWA agrees the provision would benefit from a clarification to address the concern that the CM/GC contractor ought not to be held responsible for environmental and mitigation work that is not part of the CM/GC contract scope of work. The FHWA revised this section to provide an exception for measures the contracting agency expressly describes in the CM/GC contract as excluded because they are the responsibility of others.

#### Section 635.506—Project Approvals and Authorizations

The AGC noted that the proposed FHWA review and approval requirements in this section showed a trend away from the past several years during which FHWA has given more flexibility and authority to the States in managing their Federal-aid projects. The ARTBA expressed a similar concern noting that some of the requirements for FHWA review were based on the MAP-21 provisions, while others originated from FHWA’s customary stewardship practices. The AGC expressed the concern that such involvement may unnecessarily delay project activities and suggested that, if FHWA believed such reviews were necessary, FHWA should also include timeframes for approval period as to not delay the start of the work. As noted in the discussion of section 635.504(b)(5), the ITD suggested that approvals by the FHWA Division Administrator be limited to only approving changes to the approved State solicitation template documents.

In response to these comments, it should be noted that 23 U.S.C. 112(b)(4)(C)(iii) explicitly requires FHWA’s review and approval of the following: (a) The price estimate of the contracting agency for the entire project and (b) any price agreement with the CM/GC contractor for the project or a portion of the project. Other proposed approvals in the NPRM are consistent with oversight provisions found in other title 23 procurement regulations, such as the design-build regulations in 23 CFR part 636. In drafting the proposed rule, FHWA believed it was appropriate to include decision points, designed to ensure the integrity of the Federal-aid Highway Program, but also to make clear which decisions may be assigned by FHWA to the STAs under the authority of 23 U.S.C. 106(c).

Under 23 U.S.C. 106(c), the States may assume certain FHWA responsibilities for project design, plans, specifications, estimates, contract awards, and inspections on the National Highway System (NHS), including projects on the Interstate System, and must assume such responsibilities off the NHS unless the State determines such assumption is inappropriate. After considering the comments, FHWA revised the regulatory text for section 635.506(a) to specify which FHWA review and approval activities in subpart E may, and which may not, be assumed by the STAs. In the final rule, section 635.506(a)(2) provides that STA’s may not assume the FHWA review or approval responsibilities for section 635.504(c) and 635.506(c). The approval of procurement procedures required by section 635.504(c) is not a project specific action and cannot be delegated or assigned to the STA. The section 635.506(c) approval of at-risk preconstruction costs for eligibility after the completion of the NEPA process is a Federal-aid eligibility determination and cannot be delegated or assigned to the STA under 23 U.S.C. 106(c). In situations where the State is directly responsible for NEPA compliance (either under an assignment of environmental responsibilities pursuant to 23 U.S.C. 326 or 327, or under a programmatic categorical exclusion agreement as authorized by section 1318(d) of MAP-21), the Division Administrator may rely on a State certification indicating the NEPA-related conditions are satisfied. New section 635.506(a)(3) lists the subpart E project-related FHWA approval responsibilities that are subject to State assumption. In addition to the listed subpart E approvals, the approval of advertising under 23 CFR 635.112(j) is

subject to State assumption pursuant to 23 U.S.C. 106(c). None of these approvals involve financial authorization or eligibility determinations, both of which remain solely FHWA functions. When a State first undertakes CM/GC contracting, the FHWA Division should work with the State on implementation of the requirements of this rule so that both parties can develop an understanding of which approvals the State should assume. As contracting agencies become more familiar with CM/GC contracting, it is likely that States will assume FHWA responsibilities for CM/GC project approvals listed in section 635.506(a)(3), and the risk of related delays will be minimal.

#### Section 635.506(a)(2)

The Connecticut DOT recommended deleting NPRM section 635.506(a)(2), which would require FHWA approval of project-specific solicitation documents. The Connecticut DOT commented that its interpretation of this requirement is that it would require FHWA approval of Requests for Qualifications and Requests for Proposals documents. The Connecticut DOT noted that for larger, more complex, projects these documents can be extremely large and would require longer than ideal review/approval periods, which would introduce additional risk to on-time project delivery. The Connecticut DOT noted that section 635.504(c) requires the submission of CM/GC procurement procedures to FHWA for approval. In response, FHWA agrees with this comment. With other methods of procurement, FHWA has no role in approving the contracting agency’s procurement procedures. The requirement for FHWA to review and approve a contracting agency’s CM/GC procurement procedures (including changes), combined with FHWA compliance oversight in accordance with FHWA’s RSBO Program, should be sufficient to satisfy FHWA’s interest. It should not be necessary for FHWA to review and approve individual solicitation documents. Therefore, FHWA removed proposed paragraph 635.506(a)(2) from the final rule. That said, FHWA emphasizes it expects all contracting agencies to follow their approved procurement procedures, and to provide for transparency and fairness in the solicitation process.

#### Section 635.506(b)(1)

The Michigan DOT requested clarification regarding the language and intent of this provision, which requires a contracting agency to request authorization of preliminary

engineering before incurring such costs. The Michigan DOT asked if the contracting agency needs to have funds obligated before incurring costs. In response, the requirements of this section are consistent with 23 CFR 1.9(a), which requires an FHWA funding authorization through an approved project agreement before costs are incurred. However, after the comment period on the NPRM closed, Congress enacted the FAST Act, which included an uncodified provision in section 1440 relating to reimbursement, under specified conditions, of preliminary engineering costs incurred prior to authorization. The FHWA revised the final rule language to recognize the enactment of section 1440.

#### Section 635.506(b)(2)

The Minnesota DOT asked for clarification regarding the requirement for FHWA's Division Administrator review and approval of a cost or price analysis for every procurement before authorizing pre-construction services. The Minnesota DOT asked if the phrase "every procurement" pertains to just the pre-construction services or also construction services contracts. The Minnesota DOT also said that it was not clear if the requirement applies only when the contracting agency is requesting Federal-aid funding in preconstruction service contracts or in all situations. The FHWA agrees with the need for clarification. It is anticipated that there will be a single procurement for CM/GC preconstruction services. The requirement for a cost or price analysis would apply to that agreement and to any modifications of that agreement, when the contracting agency is requesting (or, under FAST Act section 1440, may request in the future) Federal-aid funding for the cost of preconstruction services. The FHWA revised the language of the rule to explicitly state the requirement applies to preconstruction services procurements when Federal-aid funding is involved in the preconstruction services contract. The NPRM language is further clarified by replacing the phrase "currently \$150,000" with a reference to the simplified acquisition threshold in 2 CFR 200.88. This change avoids the need for amending the regulation in the event the simplified acquisition threshold changes in the future.

#### Section 635.506(d)(1)

The Michigan DOT asked if the language of this section requires the contracting agency to have funds obligated before incurring costs. In response to this inquiry, consistent with 23 CFR 1.9(a) and as discussed in

FHWA's response to a similar comment on section 635.506(b)(1), the contracting agency must request FHWA's construction authorization through an approved project agreement before incurring any costs if Federal assistance is being requested. The FHWA made no revisions to the regulatory text.

#### Section 635.506(d)(2)

The Minnesota DOT and the Connecticut DOT noted that the requirement for FHWA approval of a price estimate for the entire project prior to authorizing construction activities may be problematic when early work packages are involved. The Minnesota DOT said that in these cases, it may not be possible to provide a very accurate estimate, depending on how far the design has progressed. The FHWA recognizes the Minnesota DOT's concern; however, the requirement for FHWA to approve a price estimate for the entire project is a statutory requirement (23 U.S.C. 112(b)(4)(C)(iii)). In addition, the authorization of CM/GC construction services occurs only after completion of the NEPA review, which typically includes preliminary design work that reaches (and sometimes exceeds) 80 percent. After considering the comments, FHWA concluded the contracting agency should have sufficient data available at the time of a request for construction services authorization to provide a good faith estimate of the price for the entire project. The FHWA understands that when a contracting agency is using early work packages, the level of final design for the entire project (*i.e.*, final construction plans and detailed specifications) may not be at an advanced stage, and thus, the price estimate for the entire project at this point in the design process may not be as accurate as a detailed engineer's estimate later in the design phase. The FHWA believes, however, the contracting agencies can provide a sound enough price estimate to meet the statutory requirement. This requirement applies to the first request for an authorization for activities meeting the definition of "construction services." Where a contracting agency requests construction authorization for only a portion of the project (*e.g.*, early work packages), the contracting agency may submit a revised price estimate once final design is complete if such revision is needed to support subsequent authorization requests. The FHWA made no revisions in response to these comments.

The GCA noted the need for openness and transparency in the CM/GC procurement process and the need for

FHWA to conduct its review and approval in a timely and reasonable manner. In response, we agree with openness and transparency are important in these procurements, but have concluded no revision is needed. We believe this rule and other applicable Federal laws (including regulations) already foster open and transparent procurement practices. In addition, States must act in accordance with State procurement integrity and other requirements. The FHWA fully appreciates the need for time and reasonable decisions on price estimates, but does not believe there is a need to establish standards in the regulation.

#### Section 635.506(d)(3)

As noted in the above in the discussion for section 635.506(b)(2), the use of the phrase "currently \$150,000" in this section is replaced with a reference to the simplified acquisition threshold in 2 CFR 200.88. This change will avoid the need to amend this rule each time the simplified acquisition threshold is adjusted.

#### Section 635.506(e)

The GCA believed that the CM/GC rule should clarify that CM/GC is similar to design-build with respect to the use of DBE program requirements. The GCA believed that design-build and CM/GC are similar in that it is difficult to identify specific DBE commitments up front as part of the bid documents. The GCA stated that the CM/GC contractor should only be required to put forth the list of the DBEs to be used for work in the first year of the project, or for early work items, and, for work that will be performed in later years, to list the categories of work that will be available for DBE participation. The ARTBA noted that the DBE program requirements are still geared toward the traditional design-bid-build delivery process and that the increased use of alternative contracting techniques has precipitated apparent compliance gaps in the DBE program. The ARTBA stated that it is critical that FHWA provide clarity in exactly how DBE program compliance is to be harmonized with the CM/GC process as the latter evolves in use. The ARTBA indicated that uncertainty in this regard merely invites various agencies, or individual officials, to inject their own, unrelated policy priorities into the procurement process. As it relates to DBE compliance, the GCA and ARTBA believed that CM/GC projects should be treated like design-build projects where the contractor has some flexibility in identifying DBE commitments when submitting its technical and price proposals.

In response, FHWA agrees that CM/GC contracting presents a variation from the DBE selection process used in traditional design-bid-build projects. The FHWA recognizes ARTBA's concerns regarding potential DBE implementation issues on alternative contracting projects, but DBE policy revisions are best made through the rulemaking process for the DBE program. The FHWA believes that it is possible for the CM/GC contractor to provide the DBE documentation required by 49 CFR 26.53(b)(2) when the CM/GC contractor is providing its initial proposal for the construction services. There may be situations, however, where at this stage there is not sufficient detail (such as price, scope, and schedule) to provide the required DBE information. The FHWA has added language to the rule that will allow the CM/GC contractor to provide a contractually binding commitment at the time of initial proposal that will commit the contractor to meet the DBE contract goal if the contractor is awarded the construction services contract. This would give the CM/GC contractor time to provide the information required by 49 CFR 26.53(b)(2) before the contracting agency awards the contract. For example, CM/GC contractors may be able to gather and provide the required DBE documentation when the contracting agency and the CM/GC contractor enter into final price discussions because the level of design would be relatively high, and the scope and schedule would be defined so that risk and price can be assigned. This allowance is consistent with 49 CFR 26.53.(b)(3)(ii) for negotiated procurement situations.

The ITD stated that it is critical to use the term "agreement" when discussing preconstruction services and the term "contract" for the construction services. The FHWA appreciates this comment regarding Idaho's policy; however, we believe that the terms "agreement" and "contract" are used interchangeably for professional services. In addition, FHWA's regulations on "Procurement, Management, and Administration of Engineering and Design Related Services" (23 CFR 172) define a contract as a written procurement contract or agreement. For clarity, the terms "preconstruction services contract" and "construction services contract" will be used throughout this subpart. The term "agreement" will be reserved for agreements between FHWA and the STA.

The Connecticut DOT requested clarification of the requirement for FHWA approval of price estimates and project schedules for the entire project

before authorization of construction services. The commenter expressed specific concern about situations which need to begin early work activities, such as building of temporary facilities and utility relocations, while the project's cost and/or schedule are still being refined. The commenter noted that, if the final rule retained the requirement as proposed, FHWA should appreciate that project costs and/or schedules may evolve and warrant subsequent review(s)/approval(s). In response, to the extent this comment relates to approval of a price estimate for the entire project before beginning construction services, FHWA addressed this issue in the discussion for section 635.506(d)(2). The requirement for FHWA to approve a price estimate for the entire project is a statutory requirement (23 U.S.C. 112 (b)(4)(C)(iii)). The references to agreed price, scope, and schedule in section 635.506(e) relate to the approval of those elements for each individual contract awarded as part of the overall CM/GC contract. Award approval reflects an underlying determination that procurement requirements, such as price reasonableness, are satisfied and it is reasonable to award of the contract.

#### Section 635.507—Cost Eligibility

The Colorado DOT asked if the indirect cost rate provisions of section 635.507(b) applied to both preconstruction and construction contracts, and if the requirement applies to any other contracts besides cost-reimbursement contracts (*e.g.*, lump sum, unit price, etc.).

In response, the requirement to use an approved indirect cost rate applies where payments for preconstruction services are based on actual costs (cost reimbursement contracts). Indirect cost rates do not apply in the construction services context, where actual cost work required due to unforeseen conditions is subject to applicable force account provisions.

The Michigan DOT noted that most construction contractors do not have an approved indirect cost rate. The Michigan DOT recommended, in the absence of an official indirect cost rate, a documented industry standard be used (*e.g.*, a rate in the STA's Standard Specifications). The FHWA appreciates and understands the Michigan DOT comment, and the extent of the issue within the highway contracting community; however, if a contracting agency elects to use a payment method based on actual costs for preconstruction services, then it is necessary to ensure that the indirect

cost rates comply with the Federal cost principles in 2 CFR 200 Subpart E.

The Connecticut DOT questioned the applicability of 2 CFR 200, Subpart E to CM/GC projects. The Connecticut DOT questioned the meaning and intent of the term "individual elements of costs" and asked for clarification if extra work is negotiated and an agreed upon price or cost plus is determined, could this extra work be seen as "negotiated based on individual elements of costs" and therefore also require indirect cost rates be established as part of its negotiations.

In response, the provisions of 2 CFR 200 apply to all Federal assistance programs such as the Federal-aid Highway Program. Unless there is a specific statutory exception, the requirements of 2 CFR 200 apply, including the "Cost Allowability" provisions of Subpart E. Regarding the use of the term "individual elements of costs," the FHWA agrees that this term is not clear. The requirement for the use of indirect cost rates applies in cost-reimbursement type contracts. We agree that the NPRM language would benefit from a revision. We have changed the first sentence of section 635.507(b) to require the CM/GC contractor to provide an indirect cost rate established in accordance with the Federal cost principles when preconstruction service payments are based on actual costs. The FHWA notes that requirement is not applicable to competitive sealed bidding contracts that are typically bid on a lump sum or unit price basis. For competitive sealed bid contracts, the determination of price reasonableness is based on a price analysis (a comparison with the engineer's estimate or an independent cost estimate). For construction change order situations, where as a last resort, it is necessary to perform the construction work on an actual cost basis, the contracting agency may use its force account specifications as the basis for payment (23 CFR 635.120(d)).

Finally, as it relates to cost eligibility, the NYSDOT referenced two recent National Cooperative Highway Research Program studies that cited the use of an independent third party to prepare cost estimates for the purpose of evaluating the acceptability of the engineer estimate and CM/GC price proposals.<sup>3</sup> The NYSDOT suggested that costs

<sup>3</sup> National Cooperative Highway Research Program, Synthesis 402, "Construction Manager-at-Risk Project Delivery for Highway Programs, [http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp\\_syn\\_402.pdf](http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_syn_402.pdf); National Cooperative Highway Research Program Report 787, "Guide for Design Management on Design-Build and Construction Manager/General Contractor Projects", [http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp\\_rpt\\_787.pdf](http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_787.pdf).

associated with the use of an independent estimator should be eligible for participation. The FHWA agrees. The use of an independent cost estimate is mentioned in section 635.506(d)(3) as an allowable activity. Experience to date has shown the independent cost estimate has been helpful in verifying price reasonableness. The preparation of an independent cost estimate falls within the statutory definition of "construction" in 23 U.S.C. 101(a)(4) as a preliminary engineering activity. The FHWA Division Office has the authority to make all decisions regarding cost eligibility based on whether a cost is necessary, reasonable, and allocable to a Federal-aid project consistent with the Cost Principals in 2 CFR part 200, subpart E. Given the contracting agency's objectives of verifying price reasonableness in the price analysis required by section 635.506(d)(3), the costs associated with the independent cost estimate are eligible for participation.

#### **Rulemaking Analyses and Notices**

The FHWA considered all comments received before the close of business on the comment closing date indicated above, and the comments are available for examination in the docket (FHWA-2015-0009) at *Regulations.gov*. The FHWA also considered comments received after the comment closing date and filed in the docket prior to this final rule.

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

The FHWA determined that this rule 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 amendments clarify and revise requirements for the procurement, management, and administration of engineering and design related services using Federal-Aid Highway Program (FAHP) funding and directly related to a construction project. Additionally, this action complies with the principles of Executive Order 13563. The changes to parts 630 and 635 provide additional clarification, guidance, and flexibility to stakeholders implementing these regulations. This rule is 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. After evaluating the costs and benefits of these amendments, FHWA anticipates that the economic impact of this rule will be minimal; therefore, a full regulatory evaluation is not necessary.

#### **Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (Public Law 96-354, 5 U.S.C. 601-612), FHWA evaluated the effects of this rule on small entities, such as local governments and businesses. The FHWA determined that this action would not have a significant economic impact on a substantial number of small entities. The 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, FHWA has determined the projected impact upon small entities which utilize FAHP funding for consultant engineering and design related services would be negligible. Therefore, FHWA certifies that the rule would not have a significant economic impact on a substantial number of small entities.

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

This final rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Public Law 104-4, March 22, 1995, 109 Stat. 48). Furthermore, in compliance with the Unfunded Mandates Reform Act of 1995, FHWA evaluated this rule to assess the effects on State, local, and tribal governments and the private sector. This rule does not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$156 million or more in any one year (2 U.S.C. 1532). 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 rule was analyzed in accordance with the principles and criteria contained in Executive Order 13132,

dated August 4, 1999, and it was determined that this rule 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 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 rule 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**

Agencies must adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: Those that normally require preparation of an EIS; those that normally require preparation of an EA; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). This action qualifies for an FHWA categorical exclusion under 23 CFR 771.117(c)(20) (promulgation of rules, regulations, and directives). The FHWA has evaluated whether the action would involve unusual circumstances or extraordinary circumstances and has determined that this action would not involve such circumstances. As a result, FHWA finds that this rule would not result in significant impacts on the human environment.

#### **Executive Order 12898 (Environmental Justice)**

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, and DOT Order 5610.2(a) (the DOT Order), 91 FR 27534, May 10, 2012 (available at [www.fhwa.dot.gov/environment/environmental\\_justice/ej\\_at\\_dot/order\\_56102a/index.cfm](http://www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/order_56102a/index.cfm)), require DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations in the United States. The DOT Order requires DOT agencies to address compliance with Executive Order 12898 and the DOT

Order in all rulemaking activities. In addition, FHWA has issued additional documents relating to administration of Executive Order 12898 and the DOT Order. On June 14, 2012, FHWA issued an update to its EJ order, FHWA Order 6640.23A, *FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations* (the FHWA Order) (available at [www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm](http://www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm)).

The FHWA has evaluated this rule under the Executive Order, the DOT Order, and the FHWA Order and has determined that this rule would not cause disproportionately high and adverse human health and environmental effects on minority or low income populations.

**Executive Order 13175 (Tribal Consultation)**

The FHWA analyzed this rule under Executive Order 13175, dated November 6, 2000, and believes that this rule 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 rule 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 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 analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. We determined that this rule 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, FHWA certifies that a Statement of Energy Effects under Executive Order 13211 is not required.

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

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

**Regulation Identifier Number**

A regulation identifier 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**

*23 CFR Part 630*

Government contracts, Grant programs—transportation, Highway safety, Highways and roads, Reporting and recordkeeping requirements, Traffic regulations.

*23 CFR Part 635*

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

Issued on: November 23, 2016.

**Gregory G. Nadeau,**  
*Administrator, Federal Highway Administration.*

In consideration of the foregoing, FHWA amends title 23, Code of Federal Regulations, parts 630 and 635 as follows:

**PART 630—PRECONSTRUCTION PROCEDURES**

■ 1. Revise the authority citation for part 630 to read as follows:

**Authority:** 23 U.S.C. 106, 109, 112, 115, 315, 320, and 402(a); Sec. 1501 and 1503 of Pub. L. 109–59, 119 Stat. 1144; Pub. L. 105–178, 112 Stat. 193; Pub. L. 104–59, 109 Stat. 582; Pub. L. 97–424, 96 Stat. 2106; Pub. L. 90–495, 82 Stat. 828; Pub. L. 85–767, 72 Stat. 896; Pub. L. 84–627, 70 Stat. 380; 23 CFR

1.32 and 49 CFR 1.48(b), and Pub. L. 112–141, 126 Stat. 405, section 1303.

■ 2. Amend § 630.106 by adding paragraph (a)(8) to read as follows:

**§ 630.106 Authorization to proceed.**

(a) \* \* \*

(8) For Construction Manager/General Contractor projects, the execution or modification of the project agreement for preconstruction services associated with final design and for construction services, and authorization to proceed with such services, shall not occur until after the completion of the NEPA process. However, preconstruction services associated with preliminary design may be authorized in accordance with this section.

\* \* \* \* \*

**PART 635—CONSTRUCTION AND MAINTENANCE**

■ 3. Revise the authority citation for Part 635 to read as follows:

**Authority:** Sections 1525 and 1303 of Pub. L. 112–141, 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 1.85(a)(1).

■ 4. Amend § 635.102 by adding, in alphabetical order, the definition of “Construction Manager/General Contractor (CM/GC) project” to read as follows:

**§ 635.102 Definitions.**

\* \* \* \* \*

*Construction Manager/General Contractor (CM/GC) project* means a project to be delivered using a two-phase contract with a construction manager or general contractor for services during both the preconstruction and construction phases of a project.

\* \* \* \* \*

■ 5. Amend § 635.104 by adding paragraph (d) to read as follows:

**§ 635.104 Method of construction.**

\* \* \* \* \*

(d) In the case of a CM/GC project, the requirements of subpart E and the appropriate provisions pertaining to the CM/GC method of contracting in this part will apply. However, no justification of cost effectiveness is necessary in selecting projects for the CM/GC delivery method.

■ 6. Amend § 635.107 by revising paragraph (b) to read as follows:

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

\* \* \* \* \*

(b) In the case of a design-build or CM/GC project funded with title 23 funds, the requirements of 49 CFR part 26 and the State's approved DBE plan apply.

■ 7. Amend § 635.109 by revising paragraph (a) introductory text to read as follows:

**§ 635.109 Standardized changed conditions clauses.**

(a) Except as provided in paragraph (b) of this section, the following changed conditions contract clauses shall be made part of, and incorporated in, each highway construction project, including construction services contracts of CM/GC projects, approved under 23 U.S.C. 106:

\* \* \* \* \*

■ 8. Amend § 635.110 by revising paragraph (f) introductory text to read as follows:

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

\* \* \* \* \*

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

\* \* \* \* \*

■ 9. Amend § 635.112 by adding paragraph (j) to read as follows:

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

\* \* \* \* \*

(j) In the case of a CM/GC project, the FHWA Division Administrator's approval of the solicitation document will constitute the FHWA's approval to use the CM/GC contracting method and approval to release the solicitation document. The STD must obtain the approval of the FHWA Division Administrator before issuing addenda which result in major changes to the solicitation document.

■ 10. Amend § 635.113 by adding paragraph (d) to read as follows:

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

\* \* \* \* \*

(d) In the case of a CM/GC project, the requirements of this section do not apply. See subpart E of this part for approval procedures.

■ 11. Amend § 635.114 by adding paragraph (l) to read as follows:

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

\* \* \* \* \*

(l) In the case of a CM/GC project, the CM/GC contract shall be awarded in accordance with the solicitation

document. See subpart E for CM/GC project approval procedures.

■ 12. Amend § 635.122 by adding paragraph (d) to read as follows:

**§ 635.122 Participation in progress payments.**

\* \* \* \* \*

(d) In the case of a CM/GC project, the STD must define its procedures for making construction phase progress payments in either the solicitation or the construction services contract documents.

■ 13. Amend § 635.309 by revising paragraphs (p) introductory text, (p)(1)(vi) and (p)(3) to read as follows:

**§ 635.309 Authorization.**

\* \* \* \* \*

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

(1) \* \* \*

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

\* \* \* \* \*

(3) Changes to the design-build or CM/GC project concept and scope may require a modification of the transportation plan and transportation improvement program. The project sponsor must comply with the metropolitan and statewide transportation planning requirements in 23 CFR part 450 and the transportation conformity requirements (40 CFR parts 51 and 93) in air quality nonattainment and maintenance areas, and provide appropriate approval notification to the design builder or the CM/GC contractor for such changes.

■ 14. Add subpart E to read as follows:

**Subpart E—Construction Manager/General Contractor (CM/GC) Contracting**

Sec.

635.501	Purpose.
635.502	Definitions.
635.503	Applicability.
635.504	CM/GC requirements.
635.505	Relationship to the NEPA process.
635.506	Project approvals and authorizations.
635.507	Cost eligibility.

**Subpart E—Construction Manager/General Contractor (CM/GC) Contracting**

**§ 635.501 Purpose.**

The regulations in this subpart prescribe policies, requirements, and procedures relating to the use of the CM/GC method of contracting on Federal-aid projects.

**§ 635.502 Definitions.**

As used in this subpart:

*Agreed price* means the price agreed to by the Construction Manager/General Contractor (CM/GC) contractor and the contracting agency to provide construction services for a specific scope and schedule.

*CM/GC contractor* means the entity that has been awarded a two-phase contract for a CM/GC project and is responsible for providing preconstruction services under the first phase and, if a price agreement is reached, construction services under the second phase of such contract.

*CM/GC project* means a project to be delivered using a two-phase contract with a CM/GC contractor for services during the preconstruction and, if there is an agreed price, construction phases of a project.

*Construction services* means the physical construction work undertaken by a CM/GC contractor to construct a project or a portion of the project (including early work packages). Construction services include all costs to perform, supervise, and administer physical construction work.

Construction services may be authorized as a single contract for the project, or through a combination of contracts covering portions of the CM/GC project.

*Contracting agency* means the State Transportation Agency (STA), and any State or local government agency, public-private partnership, or Indian tribe (as defined in 2 CFR 200.54) that is acting under the supervision of the STA and is awarding and administering a CM/GC contract.

*Division Administrator* means the chief FHWA official assigned to conduct business in a particular State.

*Early work package* means a portion or phase of physical construction work (including but not limited to site preparation, structure demolition, hazardous material abatement/treatment/removal, early material acquisition/fabrication contracts, or any action that materially affects the objective consideration of alternatives in the NEPA review process) that is procured after NEPA is complete but before all design work for the project is complete. Contracting agencies may procure an early work package when construction risks have been addressed (both agency and CM/GC contractor risks) and the scope of work is defined sufficiently for the contracting agency and the CM/GC contractor to reasonably determine price. The requirements in § 635.506 (including § 635.506(d)(2)) and § 635.507 apply to procuring an early work package and FHWA authorization for an early work package.

*Final design* has the same meaning as defined in § 636.103 of this chapter.

*NEPA process* means the environmental review required under the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), applicable portions of the NEPA implementing regulations at 40 CFR parts 1500–1508, and part 771 of this chapter.

*Preconstruction services* means consulting to provide a contracting agency and its designer with information regarding the impacts of design on the physical construction of the project, including but not limited to: Scheduling, work sequencing, cost engineering, constructability, cost estimating, and risk identification. Under a preconstruction services contract, the CM/GC contractor may provide consulting services during both preliminary and, subject to provisions in this subpart, final design. Such services may include on-site material sampling and data collection to assist the contracting agency's design team in its preliminary design work, but do not include design and engineering-related services as defined in § 172.3 of this chapter. The services may include the preparation of plans typically developed by a construction contractor during the construction phase (such as preliminary staging or preliminary falsework plans) when needed for the NEPA process. However, services involving plans or submittals that are considered elements of final design and not needed for the NEPA process (such as shop drawings or fabrication plans) is not allowed, even on an at-risk basis, prior to the completion of the NEPA review process.

*Preliminary design* has the same meaning as defined in section 636.103 of this title.

*Solicitation document* means the document used by the contracting agency to advertise the CM/GC project and request expressions of interest, statements of qualifications, proposals, or offers.

*State transportation agency* (STA) has the same meaning as the term State transportation department (STD) under § 635.102 of this chapter.

#### **§ 635.503 Applicability.**

The provisions of this subpart apply to all Federal-aid projects within the right-of-way of a public highway, those projects required by law to be treated as if located on a Federal-aid highway, and other projects which are linked to such projects (*i.e.*, the project would not exist without another Federal-aid highway project) that are to be delivered using the CM/GC contractor method.

#### **§ 635.504 CM/GC Requirements.**

(a) *In general.* A contracting agency may award a two-phase contract to a CM/GC contractor for preconstruction and construction services. The first phase of this contract is the preconstruction services phase. The second phase is the construction services phase. The construction services phase may occur under one contract or under multiple contracts covering portions of the project, including early work packages.

(b) *Procurement requirements.* (1) The contracting agency may procure the CM/GC contract using applicable State or local competitive selection procurement procedures as long as those procedures do not serve as a barrier to free and open competition or conflict with applicable Federal laws and regulations.

(2) Contracting agency procedures may use any of the following solicitation options in procuring a CM/GC contract: Letters of interest, requests for qualifications, interviews, request for proposals or other solicitation procedures provided by applicable State law, regulation or policy. Single-phase or multiple-phase selection procedures may also be used.

(3) Contracting agency procedures shall require, at a minimum, that a CM/GC contract be advertised through solicitation documents that:

(i) Clearly define the scope of services being requested;

(ii) List evaluation factors and significant subfactors and their relative importance in evaluating proposals;

(iii) List all required deliverables;

(iv) Identify whether interviews will be conducted before establishing the final rank (however, the contracting agency may reserve the right to make a final determination whether interviews are needed based on responses to the solicitation); and

(v) Include or reference sample contract form(s).

(4) If interviews are used in the selection process, the contracting agency must offer the opportunity for an interview to all short listed firms (or firms that submitted responsive proposals, if a short list is not used). Also, if interviews are used, then the contracting agency must not engage in conduct that favors one firm over another and must not disclose a firm's offer to another firm.

(5) A contracting agency may award a CM/GC contract based on qualifications, experience, best value, or any other combination of factors considered appropriate by the contracting agency and the Division Administrator and which are clearly specified in the solicitation documents.

(6) In the event that the contracting agency is unwilling or unable to enter into a contract with the CM/GC contractor for the construction services phase of the project (including any early work package), after the concurrence of the Division Administrator, the contracting agency may initiate a new procurement process meeting the requirements of subpart A of this part, or of another approved method for the affected portion of the construction work. If Federal-aid participation is being requested in the cost of construction, the contracting agency must request FHWA's approval before advertising for bids or proposals in accordance with § 635.112 and part 636 of this chapter. When the contracting agency makes a decision to initiate a new procurement, the contracting agency may determine that the CM/GC contractor is likely to have a competitive advantage that could adversely affect fair and open competition and not allow the CM/GC contractor to submit competitive bids.

(c) *FHWA approval of CM/GC procedures.* (1) The STA must submit its proposed CM/GC procurement procedures to the FHWA Division Administrator for review and approval. Any changes in approved procedures and requirements shall also be subject to approval by the Division Administrator. Other contracting agencies may follow STA approved procedures, or their own procedures if approved by both the STA and FHWA.

(2) The Division Administrator may approve procedures that conform to the requirements of this subpart and which do not, in the opinion of the Division Administrator, operate to restrict competition. The Division Administrator's approval of CM/GC procurement procedures may not be delegated or assigned to the STA.

(d) *Subcontracting.* Consistent with § 635.116(a), contracts for construction services must specify a minimum percentage of work (no less than 30 percent of the total cost of all construction services performed under the CM/GC contract, excluding specialty work) that a contractor must perform with its own forces. If required by State law, regulation, or administrative policy, the contracting agency may require the CM/GC contractor to competitively let and award subcontracts for construction services to the lowest responsive bidder.

(e) *Payment methods.* (1) The method of payment to the CM/GC contractor shall be set forth in the original solicitation documents, contract, and any contract modification or change order thereto. A single contract may

contain different payment methods as appropriate for compensation of different elements of work.

(2) The methods of payment for preconstruction services shall be: Lump sum, cost plus fixed fee, cost per unit of work, specific rates of compensation, or other comparable payment method permitted in State law and regulation. When compensation is based on actual costs, an approved indirect cost rate must be used. The cost plus a percentage of cost and percentage of construction cost methods of payment shall not be used.

(3) The method of payment for construction services may include any method of payment authorized by State law (including, but not limited to, lump sum, unit price, and target price). The cost plus a percentage of cost and percentage of construction cost methods of payment shall not be used.

**§ 635.505 Relationship to the NEPA process.**

(a) In procuring a CM/GC contract before the completion of the NEPA process, the contracting agency may:

(1) Issue solicitation documents;

(2) Proceed with the award of a CM/GC contract providing for preconstruction services and an option to enter into a future contract for construction services once the NEPA review process is complete;

(3) Issue notices to proceed to the CM/GC contractor for preconstruction services, excluding final design-related activities; and

(4) Issue a notice-to-proceed to a consultant design firm for the preliminary design and any work related to preliminary design of the project to the extent that those actions do not limit any reasonable range of alternatives.

(b) The contracting agency shall not initiate construction activities (even on an at-risk basis) or allow such activities to proceed prior to the completion of the NEPA process. The contracting agency shall not perform or contract for construction services (including early work packages of any kind) prior to the completion of the NEPA process.

(c) A contracting agency may proceed, solely at the risk and expense of the contracting agency, with design activities at any level of detail, including final design and preconstruction services associated with final design, for a CM/GC project before completion of the NEPA process without affecting subsequent approvals required for the project. However, FHWA shall not authorize final design activities and preconstruction services associated with final design, and such

activities shall not be eligible for Federal funding as provided in § 635.506(c), until after the completion of the NEPA process. A contracting agency may use a CM/GC contractor for preconstruction services associated with at-risk final design only if the contracting agency has a procedure for segregating the costs of the CM/GC contractor's at-risk work from preconstruction services eligible for reimbursement during the NEPA process. If a contracting agency decides to perform at-risk final design, it must notify FHWA of its decision to do so before undertaking such activities.

(d) The CM/GC contract must include termination provisions in the event the environmental review process does not result in the selection of a build alternative. This termination provision is in addition to the termination for cause or convenience clause required by Appendix II to 2 CFR part 200.

(e) If the contracting agency expects to use information from the CM/GC contractor in the NEPA review for the project, then the contracting agency is responsible for ensuring its CM/GC contract gives the contracting agency the right to obtain, as needed, technical information on all alternatives analyzed in the NEPA review.

(f) The CM/GC contract must include appropriate provisions ensuring no commitments are made to any alternative during the NEPA process, and that the comparative merits of all alternatives identified and considered during the NEPA process, including the no-build alternative, will be evaluated and fairly considered.

(g) The CM/GC contractor must not prepare NEPA documentation or have any decisionmaking responsibility with respect to the NEPA process. However, the CM/GC contractor may be requested to provide information about the project and possible mitigation actions, including constructability information, and its work product may be considered in the NEPA analysis and included in the record.

(h) Any contract for construction services under a CM/GC contract must include appropriate provisions ensuring that all environmental and mitigation measures identified in the NEPA documentation and committed to in the NEPA determination for the selected alternative will be implemented, excepting only measures the contracting agency expressly describes in the CM/GC contract as excluded because they are the responsibility of others.

**§ 635.506 Project approvals and authorizations.**

(a) *In general.* (1) Under 23 U.S.C. 106(c), the States may assume certain FHWA responsibilities for project design, plans, specifications, estimates, contract awards, and inspections. Any individual State's assumption of FHWA responsibilities for approvals and determinations for CM/GC projects, as described in this subpart, will be addressed in the State's FHWA/STA Stewardship and Oversight Agreement. The State may not further delegate or assign those responsibilities. If an STA assumes responsibility for an FHWA approval or determination contained in this subpart, the STA will include documentation in the project file sufficient to substantiate its actions and to support any request for authorization of funds. The STA will provide FHWA with the documentation upon request.

(2) States cannot assume FHWA review or approval responsibilities for §§ 635.504(c) (review and approval of CM/GC procurement procedures) or 635.506(c) (FHWA post-NEPA review of at-risk final design costs for eligibility).

(3) In accordance with 23 U.S.C. 106(c), States may assume FHWA review or approval responsibilities for §§ 635.504(b)(6) (approval of bidding), 635.504(e)(3) (approval of indirect cost rate), 635.506(b) (approval of preconstruction price and cost/price analysis), 635.506(d)(2) (approval of price estimate for entire project), 635.506(d)(4) (approval of construction price analysis for each construction services contract), and 635.506(e) (approval of preconstruction services and construction services contract awards) for CM/GC projects on the National Highway System, including projects on the Interstate System, and must assume such responsibilities for projects off the National Highway System unless the State determines such assumption is not appropriate.

(b) *Preconstruction services approvals and authorization.* (1) If the contracting agency wishes Federal participation in the cost of the CM/GC contractor's preconstruction services, it must request FHWA's authorization of preliminary engineering before incurring such costs, except as provided by section 1440 of the Fixing America's Surface Transportation Act, Pub. L. 114-357 (December 1, 2015).

(2) Before authorizing preconstruction services by the CM/GC contractor, the Division Administrator must review and approve the contracting agency's cost or price analysis for the preconstruction services procurement (including contract modifications). A cost or price analysis

is encouraged but not required for procurements less than the simplified acquisition threshold in 2 CFR 200.88. The requirements of this paragraph apply when the contracting agency is requesting Federal assistance in the cost of preconstruction services.

(c) *Final design during NEPA process.*

(1) If the contracting agency proceeds with final design activities, including CM/GC preconstruction services associated with final design activities, at its own expense before the completion of the NEPA process, then those activities for the selected alternative may be eligible for Federal reimbursement after the completion of the NEPA process so long as the Division Administrator finds that the contracting agency's final design-related activities:

- (i) Did not limit the identification and fair evaluation of a reasonable range of alternatives for the proposed project;
- (ii) Did not result in an irrevocable commitment by the contracting agency to the selection of a particular alternative;
- (iii) Did not have an adverse environmental impact; and
- (iv) Are necessary and reasonable and adequately documented.

(2) If, during the NEPA process, the Division Administrator finds the final design work limits the fair evaluation of alternatives, irrevocably commits the contracting agency to the selection of any alternative, or causes an adverse environmental impact, then the Division Administrator shall require the contracting agency to take any necessary action to ensure the integrity of the NEPA process regardless of whether or not the contracting agency wishes to receive Federal reimbursement for such activities.

(d) *Construction services approvals and authorizations.* (1) Subject to the requirements in § 635.505, the contracting agency may request Federal participation in the construction services costs associated with a CM/GC construction project, or portion of a project (including an early work package). In such cases, FHWA's construction contracting requirements will apply to all of the CM/GC project's construction contracts if any portion (including an early work package) of the CM/GC project construction is funded with title 23 funds. Any expenses incurred for construction services before FHWA authorization shall not be eligible for reimbursement except as may be determined in accordance with § 1.9 of this chapter.

(2) The Division Administrator must approve the price estimate for construction costs for the entire project

before authorization of construction services (including authorization of an early work package).

(3) The contracting agency must perform a price analysis for any contract (or contract modification) that establishes or revises the scope, schedule or price for the construction of the CM/GC project or a portion of the project (including an early work package). The price analysis must compare the agreed price with the contracting agency's engineer's estimate or an independent cost estimate (if required by the contracting agency). A price analysis is encouraged but not required for procurements less than the simplified acquisition threshold in 2 CFR 200.88.

(4) The Division Administrator must review and approve the contracting agency's price analysis and agreed price for the construction services of a CM/GC project or a portion of the project (including an early work package) before authorization of construction services.

(5) Where the contracting agency and the CM/GC contractor agree on a price for construction services that is approved under paragraph (d)(4) of this section, FHWA's authorization of construction services will be based on the approved agreed price for the project or portion of the project. The authorization may include authorization of an early work package, including the advanced acquisition of materials consistent with § 635.122 and this subpart. In the event that construction materials are acquired for a CM/GC project but not installed in the CM/GC project, the cost of such material will not be eligible for Federal-aid participation. In accordance with § 635.507 and 2 CFR part 200, FHWA may deny eligibility for part or all of an early work package if such work is not needed for, or used for, the project.

(e) *Contract award.* The award of a Federal-aid CM/GC contract for preconstruction services and the award of contract(s) for construction services require prior concurrence from the Division Administrator. The concurrence is a prerequisite to authorization of preconstruction and construction services (including authorization for an early work package). Concurrence in the CM/GC contract award for construction services constitutes approval of the agreed price, scope, and schedule for the work under that contract. Where the contracting agency has established a Disadvantaged Business Enterprise (DBE) contract goal for the CM/GC construction services contract, the initial proposal for CM/GC construction services must include the

DBE documentation required by 49 CFR 26.53(b)(2), or it must include a contractually binding commitment to meet the DBE contract goal, with the information required by 49 CFR 26.53(b)(2) provided before the contracting agency awards the contract for construction services. A copy of the executed contract between the contracting agency and the CM/GC contractor, including any contract for construction services, shall be furnished to the Division Administrator as soon as practical after execution. If the contracting agency decides not to proceed with the award of a CM/GC construction services contract, then it must notify the FHWA Division Administrator as provided in § 635.504(b)(6).

**§ 635.507 Cost eligibility.**

(a) Costs, or prices based on estimated costs, under a CM/GC contract 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 (as specified in 2 CFR part 200, subpart E). Contracting agencies must perform a cost or price analysis in connection with procurement actions, including contract modifications, in accordance with 2 CFR 200.323(a) and this subpart.

(1) For preconstruction services, to the extent that actual costs or cost estimates are included in negotiated prices that will be used for cost reimbursement, the costs must comply with the Federal cost principles to be eligible for participation.

(2) For construction services, the price analysis must confirm the agreed price is reasonable in order to satisfy cost eligibility requirements (see § 635.506(d)(3)). The FHWA will rely on an approved price analysis when authorizing funds for construction.

(b) *Indirect cost rates.* Where preconstruction service payments are based on actual costs the CM/GC contractor must provide an indirect cost rate established in accordance with the Federal cost principles (as specified in 2 CFR part 200 subpart E).

(c) *Cost certification.* (1) If the CM/GC contractor presents an indirect cost rate established in accordance with the Federal cost principles (as specified in 2 CFR part 200 subpart E), it shall include a certification by an official of the CM/GC contractor that all costs are allowable in accordance with the Federal cost principles.

(2) An official of the CM/GC contractor shall be an individual executive or financial officer of the CM/GC contractor's organization, at a level

no lower than a Vice President or Chief Financial Officer, or equivalent, who has the authority to make representations about the financial information utilized to establish the indirect cost rate proposal submitted.

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

*Certificate of Final Indirect Costs*

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

1. All costs included in this proposal (identify proposal and date) to establish final indirect cost rates for (identify period covered by rate) are allowable in accordance with the cost principles in 2 CFR part 200 subpart E; and

2. This proposal does not include any costs which are expressly unallowable under applicable cost principles of 2 CFR part 200 subpart E.

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**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**24 CFR Parts 91 and 92**

[Docket No. FR 5792-I-01]

RIN 2501-AD69

**Changes to HOME Investment Partnerships (HOME) Program Commitment Requirement**

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Interim final rule.

**SUMMARY:** This rule changes the method by which HUD will determine participating jurisdictions' compliance with the statutory 24-month commitment requirement. Beginning with Fiscal Year (FY) 2015 grants, HUD will implement a grant-specific method for determining compliance with these requirements. This rule also establishes a method of administering program income that will prevent participating jurisdictions from losing appropriated funds when they expend program income.

**DATES:** *Effective Date:* January 31, 2017.  
*Comment Due Date:* January 3, 2017.

**ADDRESSES:** Interested persons are invited to submit comments regarding this interim final rule. All communications must refer to the above docket number and title. To receive consideration as public comments, comments must be submitted through one of the two methods specified below:

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410-0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the [www.regulations.gov](http://www.regulations.gov) Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

*No Facsimiled Comments.* Facsimiled (faxed) comments are not acceptable.

*Public Inspection of Public Comments.* All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number). Copies of all comments submitted are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Virginia Sardone, Director, Office of Affordable Housing Programs, Department of Housing and Urban Development, Office of Community Planning and Development, 451 7th Street SW., Suite 7286, Washington, DC 20410; or at 202-708-2684 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Section 218(g) of the National Affordable Housing Act of 1990 (NAHA), as amended, requires that

participating jurisdictions place Home Investment Partnerships Program (HOME) funds under binding commitment within 24 months after the last day of the month in which HUD made the funds available (*i.e.*, obligated the grant by executing the HOME grant agreement). This section of NAHA further states that a participating jurisdiction loses the right to draw any funds that are not placed under binding commitment by that date and that HUD shall reduce the participating jurisdiction's line of credit by the expiring amount.

To date, HUD has measured compliance with the HOME program 24-month requirement for committing funds using a cumulative methodology. Because HUD's Integrated Disbursement and Information System (IDIS) committed and disbursed funds on a first-in, first-out basis through participating jurisdictions' FY 2014 HOME grants, participating jurisdictions did not have the ability to designate funds from a specific allocation when committing HOME funds to a project. Consequently, HUD implemented the commitment requirement through a cumulative methodology under which HUD determined a participating jurisdiction's compliance with the 24-month deadline by determining whether the total amount committed by the participating jurisdiction from all HOME grants it had received was equal to or greater than the participating jurisdiction's cumulative commitment requirement for all grants that had been obligated for 24 months or longer. This methodology has been described in the HOME program regulations since 1997.

HUD will begin using a grant-specific method of determining compliance with the 24-month commitment deadline, beginning with FY 2015 HOME grants. HUD has made changes to IDIS so that, beginning with FY 2015 grants, the participating jurisdiction will select the grant year's funds that will be committed to a specific project or activity. When the participating jurisdiction requests a draw of grant funds for that project or activity, HUD, through IDIS, will disburse the funds committed to that project or activity, rather than the oldest funds available.

As mentioned above, prior to this change, IDIS did not permit participating jurisdictions to specify which grant years' funds they were committing to a specific project. This system change makes it possible for participating jurisdictions to commit funds and for HUD to assess commitment deadline compliance on a grant-specific basis, beginning with FY 2015 HOME grants.