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(4) Required by governmental and appropriate regulatory commission requirements.

### § 140.916 Protection.

The cost of essential protective services which, in the opinion of a railroad company, are required to ensure safety to railroad operations during certain periods of the construction of a project, is reimbursable provided an item for such services is incorporated in the State-railroad agreement or in a work order issued by the State and approved by FHWA.

### § 140.918 Maintenance and extended construction.

The cost of maintenance and extended construction is reimbursable to the extent provided for in 23 CFR 646.216(f)(4), and where included in the State-Railroad Agreement or otherwise approved by the State and FHWA.

### § 140.920 Lump sum payments.

Where approved by FHWA, pursuant to 23 CFR 646.216(d)(3), reimbursement may be made as a lump sum payment, in lieu of actual costs.

### § 140.922 Billings.

(a) After the executed State-Railroad Agreement has been approved by FHWA, the company may be reimbursed on progress billings of incurred costs. Costs for materials stockpiled at the project site or specifically purchased and delivered to the company for use on the project may be reimbursed on progress billings following approval of the executed State-Railroad Agreement or the written agreement under 23 CFR 646.218(c).

(b) The company shall provide one final and complete billing of all incurred costs, or of the agreed-to lump sum, within one year following completion of the reimbursable railroad work. Otherwise, previous payments to the company may be considered final, except as agreed to between the SHA and the railroad.

(c) All company cost records and accounts relating to the project are subject to audit by representatives of the State and/or the Federal Government for a period of three years from the

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date final payment has been received by the company.

(d) A railroad company must advise the State promptly of any outstanding obligation of the State's contractor for services furnished by the company such as protective services.

[40 FR 16057, Apr. 9, 1975, as amended at 40 FR 29712, July 15, 1975; 62 FR 45328, Aug. 27, 1997]

## PART 172—ADMINISTRATION OF ENGINEERING AND DESIGN RELATED SERVICE CONTRACTS

### Subpart A—Procurement Procedures

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AUTHORITY: 23 U.S.C. 112(b), 114(a), 302, 315, and 402; 49 CFR 1.48(b) and 18; 48 CFR 12 and 31; 41 U.S.C. 253 and 259; and sec. 1060, Pub. L. 102-240, 105 Stat. 1914, 2003 (1991).

SOURCE: 56 FR 19802, Apr. 30, 1991, unless otherwise noted.

### Subpart A—Procurement Procedures

#### § 172.1 Purpose and applicability.

(a) To prescribe policies and procedures for contracting to ensure that a qualified consultant is obtained through an equitable selection process, and that prescribed work is properly accomplished in a timely manner, at a reasonable cost.

(b) This regulation applies to all engineering and design related service contracts financed with Federal-aid highway funds. Agencies with approved Certification Acceptance Plans (CA), Secondary Road Plans (SRP) and/or Combined Road Plans (CRP) shall submit for the Federal Highway Administration's (FHWA) approval, procedures

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consistent with this regulation if they intend to utilize Federal-aid highway funds for any of the above contract types. The use of procedures codified in State statutes to select consultant firms is also acceptable. Other types of negotiated contracts should be administered under the requirements of the common grant management rule, 49 CFR 18.

### § 172.3 Definitions.

As used in this part:

*Competitive negotiation.* Any form of negotiations that utilizes, (1) qualifications-based procedures complying with title IX of the Federal Property and Administrative Services Act of 1949 (Pub. L. 92-582, 86 Stat. 1278 (1972)), (2) equivalent State qualifications-based procedures or (3) a formal procedure permitted by State statute.

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

*Contract modification.* An agreement modifying the existing contract, such as an agreement to accomplish work beyond the scope of the original contract.

*Contracting agency.* The State highway agency or local governmental agencies which have responsibility for the procurement.

*Engineering and design services.* Program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services.

*Extra work.* Any services or actions required of the consultant above and beyond the obligations of the original or modified contract.

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

*Pre negotiation audit.* An examination of a consultant's records made in accordance with generally accepted auditing standards.

*Private sector engineering and design firms.* Any individual or private firm (including small business concerns and small businesses owned and controlled by socially and economically disadvantaged individuals as defined in 49 CFR

part 23) contracting with a State to provide engineering and design services.

*Scope of work.* All services and actions required of the consultant by the obligations of the contract.

[56 FR 19802, Apr. 30, 1991, as amended at 59 FR 64848, Dec. 16, 1994]

### § 172.5 General principles.

(a) *Need for consultant services in management roles.* When Federal-aid highway funds participate in the contract, the contracting agency shall receive approval from the FHWA before hiring a consultant to act in a "management" role for the contracting agency. This concept should be limited to situations where unique or unusual circumstances exist and where the contracting agency has provided adequate justification to explain its reason for using a consultant in this role and the reason it cannot perform the work.

(b) *Written procedures.* The contracting agency shall prepare written procedures for each method of procurement it proposes to utilize. These procedures and all revisions shall be approved by the FHWA and describe, as appropriate to the particular method of procurement, each step used:

(1) In preparing a scope of work, evaluation factors and cost estimate for selecting a consultant,

(2) In soliciting proposals from prospective consultants,

(3) In the evaluation of proposals and the ranking/selection of a consultant,

(4) In negotiation of the reimbursement to be paid to the selected consultant,

(5) In monitoring the consultant's work and in preparing a consultant's performance evaluation when completed, and

(6) In determining the extent to which the consultant, who is responsible for the professional quality, technical accuracy, and coordination of services, may be reasonably liable for costs resulting from errors or deficiencies in design furnished under its contract.

(c) *Pre negotiation audits.* The contracting agencies shall prepare pre negotiation audits to provide the necessary data to assure that the consultant has an acceptable accounting

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system, adequate and proper justification of the various rates charged to perform work and is aware of the FHWA's cost eligibility and documentation requirements.

(1) Prenegotiation audits and the resultant audit opinions are required for all contracts expected to exceed \$250,000 and for contracts of less than \$250,000 where:

- (i) There is insufficient knowledge of the consultant's accounting system,
- (ii) There is previous unfavorable experience regarding the reliability of the consultant's accounting system, or
- (iii) The contract involves procurement of new equipment or supplies for which cost experience is lacking.

(2) The use of an independent audit, an audit performed by another State/Federal agency or an audit performed by another local governmental agency is acceptable if the information is current and of sufficient detail.

(3) Prenegotiation audits may be waived when sufficient audited consultant data is available to permit reasonable comparisons with the cost proposal.

(d) *State responsibility in local agency contracts.* The State highway agency shall ensure that procurement actions by or through other State agencies or local agencies comply with this regulation. When Federal-aid highway funds participate in the contract, a local agency shall use the same procedures as used by the State to administer contracts not under CA, the SRP or the CRP. These contracts shall be subject to the prior approval of the State highway agency and the FHWA. Nothing herein shall be taken as relieving the State of its responsibility under Federal-aid highway laws and regulations for the work to be performed under any agreements entered into by a local agency.

(e) *Disadvantaged Business Enterprise (DBE) program.* The contracting agency shall give consideration to DBE firms in the procurement of engineering and design related service contracts subject to 23 U.S.C. 112(b)(2).

(f) *Contractual responsibilities.* The contracting agency or State highway agency shall be responsible for the settlement of all contractual/administrative issues. All settlements shall be re-

viewed and approved by the FHWA before Federal-aid highway funds can participate in any additional costs.

### § 172.7 Methods of procurement.

This regulation addresses three methods of procurement for the hiring of consultants to perform engineering and design related services specified in 23 U.S.C. 112(b)(2). These methods are: competitive negotiations which follows qualifications-based selection procedures or another selection procedure permitted by State statutes; small purchase procedures for small dollar value contracts; and non-competitive negotiations where specific conditions exist allowing negotiations to take place with a single firm.

(a) *Competitive negotiation.* Competitive negotiation should be used for the selection of a consultant to provide engineering and design related services. The following procedures shall apply to the competitive negotiation process:

(1) *Scope, evaluation factors and cost estimate development.* The contracting agency shall prepare:

(i) A scope of work before issuing a Request for Proposal that reflects a clear, accurate, and detailed description of the technical requirements for the services to be rendered and a list identifying the evaluation factors and their relative importance.

(ii) A detailed cost estimate, except for contracts awarded under small purchase procedures, with an appropriate breakdown of specific types of labor required, work hours, and an estimate of the consultant's fixed fee (considering the risk and complexity of the project) for use during negotiations.

(2) *Soliciting proposals—(i) Solicitation.* The solicitation process shall be by advertisement (project, task or service), by mailing Requests for Proposals to certified/prequalified consultants, or any other method that ensures qualified in-State and out-of-State consultants are given the opportunity to be considered for award of a contract. It shall include a process where either:

(A) General interest is solicited for performing the work; responding consultants are ranked based on an evaluation of their qualification statements (submitted with their letters of interest or on file with the contracting

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agency); and proposals are requested from three or more firms starting with the highest ranked firm, or

(B) Proposals are solicited from all consultants that are interested in being considered for the work.

(ii) *Request for proposal.* The request for proposal shall:

(A) Provide a description of the scope of work and identification of the evaluation factors including their relative importance as included in paragraph (a)(1) of this section.

(B) Specify the method(s) of payment (lump sum, cost plus a fixed fee, cost per unit of work, or specific rate(s) of compensation).

(C) Request the submission of a proposal. Priced proposals may be used in the selection phase if allowed for under a State statute, but shall not be used in the selection phase when qualifications-based procedures are used.

(D) Allow sufficient time for the consultant to prepare and submit the proposal.

(3) *Analysis and selection*—(i) The consultants' proposals, containing the information required by paragraph (a)(2) of this section, shall be evaluated and ranked by the contracting agency. This process shall include an analysis of the proposals in comparison to the evaluation factors. In addition, the consultants' applicable work experience, present workload, past performance, staffing capabilities, etc., should be evaluated and included in the ranking process.

(ii) The award of engineering and design related services shall:

(A) Utilize qualifications-based procedures that either comply with the provisions of Title IX of the Federal Property and Administrative Services Act of 1949 (Pub. L. 92-582, 86 Stat. 1278 (1972), as amended) or utilize equivalent State qualifications-based procedures, or

(B) Utilize a formal procurement procedure that is established by State statute or is subsequently established by State statute.

(iii) The contracting agency shall retain acceptable documentation of the proposal, evaluation and selection of the consultant. Records shall be maintained in accordance with the provisions of 49 CFR 18.42.

(4) *Negotiation responsibilities.* (i) The negotiator shall use all resources available to conduct effective negotiations, including but not limited to, the refined scope of work, the evaluation factors and their relative importance, the agency's cost estimate as required in paragraph (a)(1) of this section and the audit opinion issued as a result of the prenegotiation audit required in § 172.5(c) of this part.

(ii) The negotiator shall separately negotiate the dollar amounts for elements of cost and a fixed fee except for services normally negotiated on a per unit (includes costs and fees) cost.

(iii) The contracting agency shall maintain records of negotiations to document negotiation activities and set forth the resources considered by the negotiator. Records shall be maintained in accordance with the provisions of 49 CFR 18.42.

(5) *Execution of contracts.* The proposed contract including the agreed upon cost figures shall be submitted to the FHWA for approval prior to its execution.

(b) *Small purchases.* Contracting agencies may use small purchase procedures for the procurement of engineering and design related services when the contract cost does not exceed \$25,000.

(c) *Noncompetitive negotiation.* Noncompetitive negotiation may be used to obtain engineering and design related services when the award of a contract is not feasible under small purchase or competitive negotiation procedures. The contracting agency shall submit justification and receive approval from the FHWA before using this form of contracting when Federal-aid highway funds are used in the contract.

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

(i) The service is available only from a single source, or

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

(iii) After solicitation of a number of sources, competition is determined inadequate.

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(2) The contracting agency shall comply with the following procedures for noncompetitive negotiations:

(i) Establish a process to determine when noncompetitive negotiation will be used,

(ii) Develop an adequate scope of work, evaluation factors and cost estimate as required in paragraph (a)(1) of this section,

(iii) Conduct negotiations as required in paragraph (a)(4) of this section, and

(iv) Submit the proposed contract and cost estimate to the FHWA for approval.

### § 172.9 Compensation.

(a) Contracting agencies may establish cost principles for determining the reasonableness and allowability of costs. Federal reimbursement shall be limited to the Federal share of the costs allowable under the cost principles in 48 CFR part 31 (Federal Acquisition Regulations). Any references included in 48 CFR part 31 to other parts of 48 CFR do not apply to these contracts.

(b) Applicable cost principles shall be referenced in each contractual document.

(c) *Methods of payment.* (1) The method of payment to compensate the consultant for all work required shall be set forth in the original contract and in any contract modifications thereto. It may be a single method for all work or may involve different methods for different elements of work. The methods of payment which shall be used are: lump sum, cost plus fixed fee, cost per unit of work or specific rates of compensation.

(2) Compensation based on cost plus a percentage of cost or percentage of construction cost shall not be used.

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

(4) The lump sum method shall not be used to compensate a consultant for construction engineering and inspection services except when the agency has established the extent, scope, complexity, character and duration of the work to be required to a degree that

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fair and reasonable compensation including a fixed fee can be determined.

(d) *Fixed fees.* (1) The determination of the amount of the fixed fee shall take into account the size, complexity, duration, and degree of risk involved in the work. The establishment of the fixed fee shall be project specific.

(2) Fixed fees normally range from 6 to 15 percent of the total direct and indirect cost. Subject to the approval of the FHWA, a fixed fee over 15 percent may be justified when exceptional circumstances exist.

### § 172.11 Contract modifications.

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

(b) A contract modification shall clearly outline the changes made and determine a method of compensation. FHWA approval of contract modifications shall be obtained prior to beginning the work except as discussed in paragraph (d) of this section.

(c) Overruns in the costs of the work shall not warrant an increase in the fixed fee portion of a cost plus fixed fee contract. Significant changes to the Scope of Work may require adjustment of the fixed fee portion in a cost plus fixed fee contract or in a lump sum contract.

(d) In unusual circumstances, the consultant may be authorized to proceed with work prior to agreement on the amount of compensation and execution of the contract modification, provided the FHWA has previously approved the work and has concurred that additional compensation is warranted.

### § 172.13 Monitoring the contract work.

(a) A public employee qualified to ensure that the work being pursued is complete, accurate and consistent with the terms, conditions, and specifications of the contract shall be in responsible charge of each contract or project. The employee's responsibilities include:

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(1) Scheduling and attending progress meetings with the consultant and being involved in decisions leading to change orders or supplemental agreements,

(2) Being familiar with the qualifications and responsibilities of the consultant's staff,

(3) Visiting the project and/or consultant's offices on a frequency that is commensurate with the magnitude, complexity and type of work. This includes being aware of the day-to-day operations for Construction Engineering Service contracts, and

(4) Assuring that costs billed are consistent with the acceptability and progress of the consultant's work.

(b) A final performance evaluation report, except for contracts awarded under small purchase procedures shall be prepared by the public employee in responsible charge of the contract and shall be submitted to the State highway agency's contracting office. The report should include, but not be limited to, an evaluation of such items as timely completion of work, conformance with contract cost and the quality of work. A copy of the report shall be sent to the firm for its review and/or comments and any written comments submitted to the contracting agency by the firm shall be attached to the final report.

(c) Contracting agencies should include a clause in engineering contracts requiring the consultant to perform such additional work as may be necessary to correct errors in the work required under the contract without undue delays and without additional cost to the owner. However, in general, a consultant should not be held responsible for additional costs in subsequent related construction resulting from errors or omissions which are not a result of gross negligence or carelessness.

### § 172.15 Alternate procedures.

(a) This is a process whereby the contracting agency can be authorized to substitute its contract review and approval actions for those of the FHWA. Before a contracting agency can operate under the alternate procedures concept, it shall submit procedures to the FHWA that include the following:

(1) A formal request to operate under the alternate procedure concept.

(2) The written procedures, as required by §172.5(b) of this part, it will follow, and

(3) A statement signed by the chief administrative officer of the contracting agency certifying that it will conform with its written procedures, the provisions of this regulation, and all applicable Federal and State laws and administrative requirements.

(b) The alternate procedures and all revisions shall be approved by the FHWA.

(c) The alternate procedures concept may apply to all Federal-aid highway funded contracts.

(d) A copy of the original executed contract and all contract modifications shall be submitted to the FHWA.

## Subpart B—Private Sector Involvement Program

SOURCE: 59 FR 64848, Dec. 16, 1994, unless otherwise noted.

### § 172.21 Purpose and applicability.

(a) The purpose of this subpart is to implement a program to encourage States to contract for engineering and design services with the private sector whenever such contracts would be cost effective.

(b) This subpart applies to all engineering and design services contracts financed with Federal-aid highway funds.

### § 172.23 Evaluation and selection.

(a) When funds are appropriated for this program, the FHWA will invite States to submit applications to participate in the program. The FHWA will use the applications to make the program allocations under the program.

(b) The FHWA will make a comparison of the applicants based on the amount of Federal-aid highway funds each State has expended on contracts for engineering and design services. In assessing the amount of funds a State spent in procuring engineering and design services, the FHWA will also consider the amounts expended by States

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on 100 percent State-funded engineering and design services contracts involving projects to be constructed with Federal-aid highway funds to the extent the State provides such information with its application.

(c) The FHWA will select not less than three States each fiscal year to receive funds under this program.

(1) Selection of the States to receive funding under this program will be made by determining which States were the most effective in increasing the percentage of funds expended on engineering and design services contracts in the year preceding the fiscal year in which funds are to be allocated. In the selection process, the FHWA will evaluate each State's program of contracting for engineering and design services. The evaluation will primarily consider such information as the amount and percentage of Federal-aid highway funds and State funds expended on engineering and design services contracts, the number of contracts awarded for such services, the relative size of the State's Federal-aid highway program and the increases in use of private sector firms during the preceding year and the preceding five years.

(2) Upon the FHWA's request for applications, each State interested in being considered should submit its application through its appropriate FHWA Division Office. The application may be in letter form and should include current information on the extent of the State's use of consultants for engineering and design on Federal-aid highway projects. In addition, the State may provide data on the amount of 100 percent State-funded engineering and design services contracts involving projects to be built with Federal-aid highway funds and any other information demonstrating the State's effectiveness in increasing the percentage of funds expended on engineering and design services contracts in the past five years.

### § 172.25 Funding.

(a) Funds received by a State under this program may only be used for awarding engineering and design services contracts with the private sector. These contracts shall carry out services and activities eligible for Federal-

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aid funding under title 23, United States Code.

(b) The Federal share of any project obligated with funds allocated under this program shall be the same as the Federal share applicable to the type of work or project being developed or the system on which the project is located. Funds allocated under this program shall remain available until expended.

(c) Funds will be allocated to the States each fiscal year from 1995 through 1997 to the extent funds are appropriated.

## PART 180—CREDIT ASSISTANCE FOR SURFACE TRANSPORTATION PROJECTS

AUTHORITY: Secs. 1501 *et seq.*, Pub. L. 105-178, 112 Stat. 107, 241, as amended; 23 U.S.C. 181-189 and 315; 49 CFR 1.48.

SOURCE: 64 FR 29750, June 2, 1999, unless otherwise noted.

### § 180.1 Cross-reference to credit assistance.

The regulations in 49 CFR part 80 shall be followed in complying with the requirements of this part. Title 49 CFR part 80 implements the Transportation Infrastructure Finance and Innovation Act of 1998, secs. 1501 *et seq.*, Pub. L. 105-178, 112 Stat. 107, 241.

## PART 190—INCENTIVE PAYMENTS FOR CONTROLLING OUTDOOR ADVERTISING ON THE INTERSTATE SYSTEM

Sec.

190.1 Purpose.

190.3 Agreement to control advertising.

190.5 Bonus project claims.

190.7 Processing of claims.

AUTHORITY: 23 U.S.C. 131(j) and 315; 49 CFR 1.48(b).

SOURCE: 43 FR 42742, Sept. 21, 1978, unless otherwise noted.

### § 190.1 Purpose.

The purpose of this regulation is to prescribe project procedures for making the incentive payments authorized by 23 U.S.C. 131(j).