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Design-Build Contracting; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 627, 635, 636, 637 and 710

[FHWA Docket No. FHWA–2000–7799]

RIN 2125–AE79

Design-Build Contracting

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is implementing regulations for design-build contracting as mandated by section 1307(c) of the Transportation Equity Act for the 21st Century (TEA–21), enacted on June 9, 1998. The TEA–21 requires the Secretary of Transportation (Secretary) to issue regulations to allow design-build contracting for selected projects. The regulations list the criteria and procedures that will be used by the FHWA in approving the use of design-build contracting by State Transportation Departments (STDs). The regulation does not require the use of design-build contracting, but allows STDs to use it as an optional technique in addition to traditional contracting methods.

EFFECTIVE DATE: The final rule is effective January 9, 2003.

FOR FURTHER INFORMATION CONTACT: For technical information: Mr. Gerald Yakowenko, Office of Program Administration (HIPA), (202) 366–1562. For legal information: Mr. Harold Aikens, Office of the Chief Counsel (HCC–30), (202) 366–1373, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

Internet users may access all comments received by the U.S. DOT Dockets, Room PL–401, by using the universal resource locator (URL) *http://dms.dot.gov.* It is available 24 hours each day, 365 days each year. Please follow the instructions on-line for more information and help. An electronic copy of this document may be downloaded using a modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661. Internet users may reach the **Federal Register**'s home page at *http://www.nara.gov/fedreg* and the Government Printing Office's web page at *http://www.access.gpo.gov/nara.*

Background

Section 1307 of the Transportation Equity Act for the 21st Century (TEA–21, Public Law 105–178, 112 Stat. 107 (1998)) amends 23 U.S.C. 112 to allow the design-build contracting method after the FHWA promulgates a regulation prescribing the Secretary's approval criteria and procedures on qualified projects. The TEA–21 defined qualified projects as projects that comply with the criteria in this regulation and whose total costs are estimated to exceed: (1) $5 million for intelligent transportation system projects, and (2) $50 million for any other project. It also provides certain key requirements that the FHWA must address in the development of these regulations. These requirements include, but are not limited to, the following:

- Prior to initiating the rulemaking process, the FHWA must consult with representatives from the American Association of State Highway and Transportation Officials (AASHTO) and representatives from other affected industries;
- The FHWA must complete the rulemaking process within three years of the date of TEA–21 enactment, or by June 9, 2001; and
- The regulation must: (1) Identify the criteria to be used by the Secretary in approving design-build projects, and (2) establish the procedures to be followed by Federal-aid recipients in seeking the FHWA's approval.
- Section 1307(f) of the TEA–21 requires the FHWA to assess the impacts of design-build contracting by June 9, 2003.

The FHWA has been allowing the STDs to evaluate design-build contracting under Special Experimental Project No. 14 (SEP–14). To date, approximately 25 STDs and several local public agencies have evaluated design-build projects under SEP–14.

Notice of Proposed Rulemaking (NPRM)

This final rule is based on the NPRM published at 66 FR 53288 on October 19, 2001. All comments received in response to the NPRM have been considered in adopting this final rule. Comments were received from 42 entities. The commenters include: fourteen STDs, two local public agencies, thirteen interest groups, and thirteen other representatives from government and industry.

Discussion of Rulemaking Text

The following discussion summarizes the comments submitted to the docket by the commenters on the NPRM, notes where and why changes have been made to the rule, and, where relevant, states why particular recommendations or suggestions have not been incorporated into the following regulations. Paragraph references are as designated in the NPRM.

Discussion of Comments and Responses by Section

General

The majority of commenters provided specific comments and/or recommendations for individual sections of the NPRM. In addition, some entities provided general comments on the NPRM as noted below.

Requests for an Extension of Comment Period

The General Machine Corporation requested a 120-day extension and the National Society of Professional Engineers (NSPE) requested a 60-day extension of the comment period to provide additional review time and opportunity for comment. Since a full 60-day comment period was provided and the majority of commenters did not state that an extension was necessary, the FHWA is not extending the comment period.

Request to Withdraw NPRM

The Council on Federal Procurement of Architectural & Engineering Services (COFPAES) opposed the proposed regulation and urged the FHWA to immediately withdraw the NPRM. The COFPAES stated the proposed regulation is inconsistent with Federal law based on the following: (1) The FHWA failed to meet the June 9, 2001, statutory deadline to issue the rule and therefore, the authority to issue the rule has expired; (2) representatives from affected industries were not consulted as required by section 1307 of the TEA–21; and (3) the NPRM violates other provisions of law. It stated that the FHWA does not have the authority to repeal or supersede other provisions of law that require the use of qualifications-based selection procedures for architectural and engineering service contracts (23 U.S.C. 112(b)(2)).

The FHWA recognizes the concern regarding the statutory deadline; however, the lateness of the proposed regulation does not relieve the FHWA of its statutory responsibilities. Section 1307 of the TEA–21 requires the FHWA to issue design-build regulations and the

FHWA will comply with this statutory provision even though we did not meet the statutory deadline.

The FHWA also acknowledges, but disagrees with the comment concerning outreach efforts prior to the NPRM. A similar comment from the Missouri DOT expressed a concern that the outreach efforts did not contact the AASHTO Subcommittee on Civil Rights, the Minority Contractor's Association, or the National Association of Women in Construction. On the other hand, other commenters expressed support for the manner in which the FHWA conducted its outreach efforts. The FHWA conducted an extensive outreach program in an effort to fulfill the TEA–21 requirement of consulting with representatives from the AASHTO and affected industries. The FHWA met on numerous occasions with entities that it believed would be affected by the proposed rulemaking. Due to the broad nature of design-build contracting, the FHWA was not able to identify all entities that might potentially be affected by the NPRM. However, several pre-rule coordination events were organized to capture the recommendations and opinions of various entities that might not be represented by the AASHTO or industry associations. These events include a special two-hour pre-rule outreach session related to the design-build rulemaking effort at the national ''Design-Build for Transportation Conference'' (April 21–23, 1999, Salt Lake City, UT) and a one-day pre-rule workshop (December 16, 1999, Washington, D.C.).

The FHWA also conducted a detailed field review of existing design-build projects in seven States. The FHWA representatives interviewed contractors, consultants, owners and other industry entities to gather information for the NPRM.

The FHWA disagrees with the comment from the COFPAES concerning the NPRM violating other provisions of law. By definition, design-build contracts include both construction and engineering services. Design-build contracts are not contracts strictly for the procurement of architectural or engineering services and, therefore, they are not subject to the requirement to use qualifications-based selection procedures. In many design-build contracts, the engineering or architectural services comprise a relatively small percent of the total contract amount. The FHWA recognizes the importance of architectural and engineering services in reducing the life-cycle cost of projects. However, design-build contracts are not architectural and engineering contracts and the provisions of 23 U.S.C. 112(b)(2) do not apply to design-build contracts.

Compliance With Other Federal Laws

The American Society of Civil Engineers (ASCE) and the NSPE expressed concerns similar to those suggested above. They suggested that the NPRM violates the requirements of the Federal Acquisition Reform Act of 1996 (Public Law 104–106, Div. D, 110 Stat. 642), which mandates the use of the two-phase competitive source selection procedures for federally funded projects.

The FHWA disagrees with these commenters. The Federal Acquisition Reform Act of 1996 does not apply to the Federal-aid highway program. The FHWA is encouraging the use of two-phase selection procedures in 23 CFR 636, Subpart B; however, it is not requiring the use of two-phase selection procedures.

Flexibility

The AASHTO, the Design-Build Institute of America (DBIA), the Transportation Corridors Agencies (TCA) and one private individual suggested that the NPRM is too prescriptive and did not provide enough flexibility to the States who are administering the Federal-aid program. These commenters noted that the provisions in 23 U.S.C. 112(b)(3)(A) provide an indication of congressional intent not to interfere in State and local legislative decisions regarding the appropriate methods for procurement of design-build contracts. They stated that this provision requires the FHWA to allow State and local agencies to use any procurement process permitted by State and local law. These commenters further said that, if not revised, the proposed regulation would require State and local agencies to follow specific requirements that may be inconsistent with their existing enabling authorization. The commenters expressed the belief that, if not changed, the proposed regulation would result in a monumental nationwide effort, requiring each agency to analyze its enabling authorization to determine whether it complies with the FHWA's requirements, and in many cases requiring agencies to seek legislative modifications to enable compliance.

The FHWA disagrees with these commenters. The language in section 1307 of the TEA–21 must be considered in its entirety. While section 1307(a) indicates that STDs ''may award a design-build contract for a qualified project described in subparagraph (c) using any procurement process permitted by applicable State and local law,'' other provisions in section 1307(c) prescribe specific responsibilities for the FHWA in developing a design-build regulation. Section 1307(c)(2) specifies the contents of the design-build regulation. This section states that the regulations shall ''(A) identify the criteria to be used by the Secretary in approving the use by a State transportation department or local transportation agency of design-build contracting; and (B) establish the procedures to be followed by a State or local transportation agency for obtaining the Secretary's approval of the use of design-build contracting by the department or agency.''

If the Congress intended that the design-build statute be implemented by States using applicable State or local laws (without identifying specific design-build criteria that a State must adhere to in order to receive the FHWA's approval), there would have been no need to add subsection (c) to section 1307. In Section 1307(c) of the TEA–21, the Congress set forth the need for the Secretary to identify specific criteria in approving design-build contracting and establish the procedures to be followed in obtaining the Secretary's approval for a design-build project. In order for section 1307(c) to have any meaning, the FHWA must identify the approval criteria (whether best practice criteria, minimum criteria or some combination of best practice) and establish procedures for contracting agencies to obtain the FHWA's approval. Thus, when read in its entirety, section 1307 requires the FHWA to develop approval criteria and procedures and not simply allow any procedure that meets State or local law.

The FHWA believes that only a few, if any, State and local agencies will need to seek legislative change to comply with the regulation. Generally, this situation would arise where a Federal regulation would prohibit certain procedures and the State or local law would require the same procedure. The FHWA is not aware of any State law that would not be in compliance with the regulation. Although some State laws may allow certain procedures that would not comply with the regulation (such as procedures that would give a preference to local firms in the selection process), these States could not use these procedures on Federal-aid design-build projects. In addition, the use of design-build is not mandatory. It is merely another project delivery technique for qualified projects.

One private individual suggested that the FHWA's decision to use modified Federal Acquisition Regulation (FAR)

terminology and requirements (48 CFR 15) is likely to create numerous problems in practice. This individual noted that even where State law is generally consistent with the procurement approach set forth in the Federal Acquisition Regulation, it is likely that terminology will be different, and that specific requirements will be inconsistent.

The FHWA's decision to adopt a modified version of the Federal Government's competitive negotiation policies (48 CFR part 15) was based on the fact that a large body of case law on this subject already exists. In the long run, the use of these concepts and terminology will promote fairness and minimize the opportunity for lawsuits and challenges on Federal-aid highway projects. Many firms in the industry work with Federal Government agencies and are familiar with the terminology and concepts in competitive negotiation. The adoption of these concepts is appropriate for Federal-aid highway program.

Several commenters indicated that much of the content of the proposed NPRM should be issued as guidance rather than as a regulation.

The TEA–21 clearly requires the development of a regulation and not a set of guidelines. Although some commenters suggested the need for guidelines in lieu of regulations, the FHWA is complying with the intent of the Congress in issuing this regulation. The FHWA acknowledges that there are many design-build issues where guidelines (developed with the assistance of AASHTO and industry) will be helpful. However, the approval criteria and procedures identified in this regulation are necessary for the FHWA to continue its stewardship of the Federal-aid highway program and to comply with the provisions of section 1307.

The TCA suggested that the FHWA approve design-build projects upon receipt of a certification from the contracting agency providing evidence that the project complies with, or will comply with, all applicable requirements. The TCA suggested that the FHWA issue a ''statement of no objection'' in response to a written request from the contracting agency.

The FHWA disagrees with this comment. The FHWA is accountable for the appropriate expenditure of funds from the highway trust fund. It is important for the FHWA to implement sufficient accountability standards so that it can fulfill its stewardship obligation.

Finally, the AASHTO and the Virginia DOT indicated that additional modifications should be made to ensure that the rule does not limit a State's ability to gain the maximum possible benefit from the design-build delivery method and to ensure that the rule does not restrict the States from using the most effective selection process for each individual project. They expressed support for the flexibility in the NPRM but also encouraged the FHWA to think progressively to provide for other variations of design-build, such as, design-build-warrant, design-build-operate, design-build-operate-maintain and finance-design-build-operate-maintain.

While we agree with these commenters, the FHWA believes the regulation provides sufficient flexibility for Federal-aid recipients while maintaining the FHWA's stewardship responsibilities for the Federal-aid highway program. We believe these requirements are necessary to maintain open, fair, competitive contracting while providing the States with complete flexibility in project selection and great flexibility in choosing the appropriate selection procedures, award criteria, and evaluation factors that fit their needs. With this flexibility, the STDs should have few, if any, requirements that hinder project delivery, innovation or cost savings. Sufficient flexibility has been provided to account for numerous variations of the design-build project delivery system. While not specifically addressed in the NPRM, the regulation applies to all variations of design-build contracts including contracts that would also include financing, warranties, operations, and maintenance functions.

In the final rule, the FHWA removed proposed Subpart F, Notifications and Debriefings, and replaced these requirements with a provision that allows contracting agencies to provide notifications and debriefings in accordance with State law. While notifications and debriefings are a very important part of the overall procurement process, the FHWA believes that the goals of this rulemaking can still be achieved if contracting agencies rely on State approved procedures in this area (*see* the discussion for Subpart F below for additional information).

Applicability of Requirements

One private individual suggested that there should be greater flexibility when Federal funding is a relatively small percentage of the total project funding. This commenter stated that there is a national trend toward smaller projects that are largely funded with other than Federal funds. It was suggested that the FHWA recognize this special condition and allow STDs to proceed in accordance with applicable State laws and Federal requirements such as the National Environmental Policy Act (NEPA) but without some of the restrictions placed on the STD by this rule. It was further suggested that a modified SEP–14 process might be appropriate for such projects.

We disagree with this comment. There is no statutory basis for waiving selected regulatory requirements for certain projects because the overall percentage of Federal funding is relatively small. This would be inconsistent with the FHWA policy in other Federal-aid program areas.

Report to Congress

The Professional Engineers in California Government (PECG) questioned whether the study completed by Florida DOT (Transportation Research Record 1351) is applicable to other contracting agencies. The PECG questioned whether the limited number of projects is representative of the cost or efficiency of design-build projects in other States. This commenter suggested that a broader evaluation of the design-build concept with a detailed study of the costs incurred and the safety impacts on the user of completed projects would be warranted.

The American Council of Engineering Companies (ACEC) provided recommendations on issues that should be addressed in the Report to Congress. These include the following: (1) Design-build is an appropriate delivery method to select if it offers the best value, given the unique opportunities, constraints, risks and demands of a particular project; (2) preliminary design should be advanced to the extent that risks are identified and each properly allocated to the party who is best able to manage it; (3) the design-build regulation should not give preferential treatment to a firm based on its size during the selection process; and (4) there should be flexibility in all procurement policies to allow the situation where a design firm of any size serves as the leader on a design-build team.

The Florida DOT suggested that the FHWA evaluate the reduction in total time (from project authorization to the completion of construction) in comparison with design-bid-build projects and the reduction in STD construction engineering and inspection costs.

The Report to Congress required by section 1307(f) should provide an unbiased evaluation of a broad range of projects. However, to the FHWA's

knowledge, the Florida DOT study is the best comprehensive comparison of a limited number of transportation projects that is currently available. The FHWA will consider all of the issues that have been identified in the comment period during the development of the Report to Congress.

Simplification of SEP–14

Several commenters recommended that the SEP–14 be simplified. Others expressed an appreciation for the availability of this technique to proceed with projects that did not meet the statutory definition of a qualified project. Still others felt that it was appropriate for the FHWA to delegate approval authority to the Division Offices as proposed in the NPRM.

We agree with these comments. The NPRM described several proposed methods to simplify the SEP–14 approval process. In addition, given the statutory definition for ''qualified projects,'' it will be necessary to maintain the SEP–14 program and make it available for non-qualified projects and other innovative contracting techniques. See the discussion for § 636.107 for additional details.

Miscellaneous

Two private individuals representing construction companies did not provide specific recommendations but expressed their concern regarding the use of design-build in the Federal-aid highway program. Generally, these commenters indicated the following concerns: (1) Design-build will limit competition and overall prices will increase; (2) the proposal process is too expensive except for the largest of firms; (3) quality and safety will suffer because design-build provides no incentive for either; (4) some contracting agencies might be biased in the evaluation process against firms that have a claim on a previous project; and (5) the benefits of faster project delivery have been improperly addressed by some in the industry. One commenter believed that the actual inconvenience to the public during construction is no shorter for design-build than it is for the traditional design-bid-build delivery system and this should be a primary consideration in selecting a project delivery method.

The TCA provided specific recommendations to revise FHWA policy in 23 CFR 645.109, 23 CFR 645.113, and 23 CFR 645.115 to utilize design-build terminology.

The FHWA recognizes this concern; however, we note that some sections of 23 CFR use terms that relate to the traditional design-bid-build process (*i.e.*, plans, specifications, estimates, bids, etc.) and do not include terms that relate to the design-build process (*i.e.*, Request for Proposal document, proposals, offerors, etc.). We did not propose to revise all sections of 23 CFR with this rulemaking. Such revisions are beyond the scope of this rulemaking action and will be considered in future rulemakings by the appropriate FHWA program office.

Section-by-Section Analysis

Part 627—Value Engineering

Section 627.5 General Principles and Procedures

The ACEC and the Design Professionals Coalition (DPC) were generally in agreement with the proposed value engineering provisions and the flexibility provided in the NPRM.

The AASHTO, the DBIA, the Virginia DOT and the TCA suggested replacing the word ''shall'' with ''may'' in § 627.5(e) to allow for additional flexibility.

The Associated General Contractors of America (AGC) and the American Road and Transportation Builders Association (ARTBA) generally supported the proposed value engineering language in the NPRM and recommended against the use of value engineering as part of the design-build proposal process.

While the FHWA agrees with the commenters who suggested clarification of the NPRM language, we disagree with the suggestion that the use of the word ''may'' in lieu of ''shall'' would provide sufficient clarification. We agree that the final rule must explain how contracting agencies can meet the value engineering analysis requirement for design-build projects.

Several commenters suggested that the final sentence of § 627.5(e)(2) be deleted as the existing value engineering regulation does not address value engineering change proposals during construction. The FHWA agrees with these commenters. This issue is not addressed in the existing value engineering regulation. Therefore, we have removed that sentence from the regulation.

The AGC believed that including value engineering proposals as part of the proposal process only tends to add more subjective variables to the selection process. The ARTBA took a different viewpoint from the AGC. It suggested that the FHWA should consider the use of alternate technical concepts as a means of allowing the STDs to fulfill the value engineering analysis requirements.

The Washington State DOT indicated that design-build proposers should have the widest possible range of expertise at their disposal when developing a proposal in a competitive environment. It suggested that the FHWA should provide flexibility to allow value engineering proposals developed by a design-build proposer to fulfill the value engineering analysis requirement.

The TCA suggested that it had received a number of significant value engineering proposals under contract provisions and it is inappropriate for the FHWA to discourage such provisions.

The DBIA suggested that while it is possible to request value engineering ideas during the procurement process and post-award, the fruitfulness of this process is highly questionable and very unlikely to yield measurable results. It concurred with the NPRM provisions that stated that ''value engineering reviews are generally not recommended as part of the design-build proposal process.''

The FHWA recognizes the differing viewpoints concerning the use of value engineering reviews conducted during the procurement process and post award. While such reviews may be useful in meeting a contracting agency's project objectives, they do not necessarily meet the objectives of FHWA's value engineering analysis requirement.

The ARTBA, the TCA, the Colorado DOT and the Texas DOT suggested that the FHWA allow the use of alternate technical concepts during the proposal development process. These entities suggested that the alternate technical proposal process is similar to value engineering and may be even more thorough than any formal value engineering procedure presently required. These commenters stated that the proposed alternative technical proposals are typically well developed since they incorporate both designer and contractor input. Both the proposer and the contracting agency benefit from the use of this procedure as it gives the proposer a potential means of lowering its proposal price and the contracting agency receives 100 percent of the cost saving. The Colorado DOT requested that the FHWA make it clear that alternate technical concepts be allowed in the design-build procurement process.

While the FHWA questions the overall effectiveness of a value engineering requirement during the proposal process or after contract award, several commenters provided convincing testimony that such provisions should not be prohibited. As long as the contracting agency maintains a fair and competitive process in reviewing, evaluating and recognizing

alternate technical concepts, the FHWA has no objection to the use of alternate technical concepts. For this reason, we have modified the language in § 636.209 to allow the use of the alternate technical proposal concept as long as such alternate concepts do not change the assumptions used in the environmental decision making process. However, contracting agencies must not rely solely on an alternate technical concept requirement to fulfill the FHWA's value engineering analysis requirement.

SAVE International, a value engineering society, proposed a revision to this section that would require STDs to perform a value engineering analysis prior to the procurement process and allow other value engineering studies during the procurement process and during the life of the design-build contract at the discretion of the STD. This association stated that the greatest opportunity for savings exists prior to the initiation of the design-build procurement process, and therefore, recommended that the FHWA require a value engineering analysis at this point and allow additional value engineering studies afterwards.

The FHWA agrees with the concept of requiring a value engineering analysis prior to the release of the Request for Proposal (RFP) document. SAVE International suggested two additional value engineering reviews but recommended that these two be discretionary; therefore, we did not feel it was necessary to include these provisions in the regulation.

The AASHTO and the DBIA suggested that value engineering is inherent in the design-build process but also suggested that this section needs further clarification. The AASHTO questioned why the FHWA was modifying the existing value engineering regulation and several STDs (Florida, Utah, New Jersey and Washington) recommended no changes to the existing value engineering regulation. They indicated that the existing regulation applies to any Federal-aid highway project on the National Highway System greater than $25 million, regardless of whether is it a design-build or a design-bid-build project. These commenters suggested that the proposed modifications are not necessary.

Still other commenters suggested several modifications to the NPRM language to clarify requirements. The TCA suggested that contracting agencies should be given the flexibility to determine which project procedures or contract requirements could be used to fulfill the value engineering analysis required by the FHWA.

While the FHWA agrees with the commenters who suggested that value engineering concepts may be inherent in the design-build process, we disagree with the commenters who suggested that all design-build projects would fulfill the FHWA's value engineering analysis requirement. The use of the design-build project delivery method does not fulfill the congressional mandate for a value engineering analysis on National Highway System projects greater than $25 million.

In consideration of all of these comments, the FHWA believes that it is necessary to amend the NPRM language to clarify the minimum requirements for fulfilling the value engineering analysis requirement on design-build projects. For the purpose of clarification, we revised the language to require a value engineering analysis prior to the release of the RFP document. The NPRM provisions of paragraph (e)(2) have been deleted. The final rule clearly states that a value engineering analysis is required prior to the release of the RFP document. This will be the only requirement for fulfilling the value engineering analysis requirement for design-build projects on the National Highway System greater than $25 million. This does not preclude further value engineering reviews or studies at subsequent points in the procurement process or even after contract award. However, subsequent value engineering reviews will not be acceptable for the purposes of fulfilling the value engineering analysis requirement.

Part 630—Preconstruction Procedures

Section 630.203 Applicability

The TCA suggested that this section be modified to provide an exception for design-build projects such that contracting agencies would not be subject to the FHWA's requirements for the preparation, submission and approval of plans, specifications, estimates and supporting documents on Federal-aid projects.

The FHWA disagrees with this comment. The FHWA's requirements for reviewing and approving design-build RFP documents are contained in 23 CFR 635.112. Therefore, it is not necessary to modify § 630.203.

Section 630.1010 Contents of the Agency Procedures

The TCA suggested that a revision be made to the FHWA's policies in Subpart J, Traffic Safety in Highway and Street Work Zones, to accommodate design-build projects. This commenter suggested that the existing regulations be modified to indicate that, for design-build projects, the design-builder would develop the traffic control plan. It was also suggested that the responsible person be an employee of the design-builder or a subcontractor.

The FHWA disagrees with this comment. We did not modify this section and traffic control plans are beyond the scope of this rulemaking action. The FHWA will consider appropriate revisions to its policy in this area in a future rulemaking.

Part 633—Required Contract Provisions

Section 633.102 Applicability

The TCA suggested that this section be modified to allow contracting agencies to strike or modify Section VII of Form FHWA–1273, Required Contract Provisions, that concerns minimum contracting responsibilities of the prime contractor. A similar recommendation was provided for Appendix B, Section VIII(4) for Appalachian projects.

The FHWA disagrees with this comment. Although the FHWA proposed to change the contracting requirements of § 635.116 for design-build contracts in the NPRM, such a change would best be implemented with a modification to Form FHWA 1273, Required Contract Provisions and Attachment A for Appalachia projects. These changes are beyond the scope of this rulemaking.

Part 635—Construction and Maintenance

Section 635.102 Definitions

The ACEC indicated the proposed modifications were acceptable. The TCA suggested that the FHWA add a definition for the term ''contracting agency'' (or cross-reference the definition in part 636), revise the definition of ''design-build project,'' revise the definition of ''incentive/disincentive for early completion,'' and use the term ''contracting agency'' instead of ''STD'' in many sections within part 635. The TCA also suggested that the current definition of ''design-build project'' might preclude the STD from entering into multiple contracts relating to a single project.

The FHWA agrees with the comment concerning the definition of a design-build project. We have modified the definition to read as follows: ''Design-build project means a project to be developed using one or more design-build contracts.'' The other suggested revisions are either beyond the scope of this rulemaking or are not appropriate.

Section 635.104 Method of Construction

The ACEC indicated the proposed modifications were acceptable. The TCA recommended that the FHWA modify this section to clearly indicate that contracting agencies do not need to justify design-build as being more cost-effective than design-bid-build.

Section 636.106 clearly indicates that a contracting agency may use design-build for any project that the contracting agency believes is appropriate. However, we added a sentence to § 635.104 to indicate that no justification of cost effectiveness is necessary in selecting projects for the design-build delivery method.

Section 635.105 Supervising Agency

The TCA recommended that the FHWA modify this section to clarify the relationships among the FHWA, the STDs and local agencies.

The FHWA disagrees with this comment. This subject is not appropriate for the scope of this rulemaking. Section 635.105(c) describes the responsibilities for STDs and locals when a project is administered by a local public agency. The details of these relationships are defined in the local stewardship agreement between the FHWA Division Office and the STD.

Section 635.107 Participation by Disadvantaged Business Enterprises

The ACEC and the ARTBA found the disadvantaged business enterprises (DBE) provisions in the NPRM to be satisfactory. On the other hand, numerous commenters suggested that the NPRM language in § 635.107(b) was not clear or that it conflicts with the requirements of 49 CFR part 26.

The Missouri DOT and several individuals were concerned with a provision that would allow contractors to furnish specific DBE commitment information after the award of contract. The DBIA and the California DOT suggested that the NPRM was not clear in defining what information, material and/or data should be used to make a fair and reasonable judgment concerning proposer's efforts to meet the DBE goal during the evaluation process.

Several individuals expressed the concern that post-award DBE commitment requirements would make the STD's enforcement efforts problematic since it would be difficult for the STD to be certain that any DBE participation would actually occur once the contract is awarded and underway.

Some individual commenters recommended that, as a minimum, proposers be required to sign and notarize letters of subcontract intent (co-signed by the DBE) confirming that the contractor actually discussed the project with the DBE for specific products/services at specific amounts.

The FHWA appreciates the concerns of the commenters who must administer DBE provisions on design-build projects. We agree with the commenters who suggested that it is not always feasible to require proposers to submit DBE commitments prior to award. The level of design provided in the RFP document is often not sufficient to allow the design-builder to enter into subcontracts. In many cases, the design-builder may not have advanced the design to a sufficient level during the proposal process to serve as a basis for negotiating subcontracts. In many cases, it will be impractical to require design-build proposers to provide DBE subcontract commitments prior to the award of the contract.

The New Jersey DOT commented that many DBEs do not have the capacity to perform significant subcontracts on large design-build projects and that opportunities for DBE engineering firms may be limited by contractors who are used to dealing with DBE construction contractors.

The California DOT suggested that separate goals for the design and construction phases might be appropriate to allow greater opportunities for DBE engineering firms.

We agree with these commenters. In setting project DBE goals, the STDs should consider separate DBE goals for the various elements of a design-build project. At the STD's discretion, separate goals may be used based on the amount and availability of DBEs for certain elements of the project. In some cases it may be appropriate to utilize separate DBE goals for design and construction services (or other services such as right-of-way acquisition, construction inspection, etc.). However, we recognize that the goal setting process is governed by 49 CFR part 26 and STDs are to be guided by interpretations provided for in § 26.9.

The AASHTO commented that the use of DBE commitments as proposal evaluation factors, as described in § 635.107(b)(4) should be left to the State's discretion. On the other hand, the AGC suggested that DBE commitments ''above or below'' the contractual requirements must not be used as a proposal evaluation factor in determining the successful offeror. The AGC indicated that where the design-builder has demonstrated a good faith effort to achieve contract goals, failure to achieve the goals should not be a determining factor in the selection process.

The FHWA appreciates the differing viewpoints of both contracting agencies and industry participants. At their discretion, contracting agencies may require design-build proposers to submit DBE utilization information or DBE commitments and such information may be used in a determination of responsiveness prior to contract award. However, we kept the NPRM provision that precludes contracting agencies from using proposal evaluation factors that are based on DBE commitments above the contractual requirements. The degree of DBE use in excess of the goal should not be used as an evaluation factor that would provide an additional credit or preference in the selection process.

The AASHTO and three STDs (Florida, South Carolina, and Virginia) suggested that this section was too prescriptive and did not account for all possible measures of ensuring equality. The AASHTO recommended that this section of the regulation merely provide a requirement for the contracting agency's design-build program to comply with the State's approved DBE plan. The Colorado DOT suggested that the regulations give the STDs more flexibility to determine the methodology to implement DBE programs based on the specific requirements of the design-build project. The FHWA agrees with these commenters.

In light of the above, the FHWA believes that the comments provided to the docket concerning this section of the NPRM raised significant DBE/design-build issues and highlighted the fact that NPRM paragraph (b) was not clear. However, few commenters provided suggestions that would provide sufficient clarity for the resolution of these issues in all cases. We have elected to simplify the language in the regulatory section by requiring compliance with 49 CFR part 26 and the STD's approved DBE plan. It will be incumbent upon those States that are using the design-build project delivery method to modify their DBE plans to address these issues. The STDs will have the flexibility to structure their DBE plans to meet individual design-build project goals while complying with the requirements of 49 CFR part 26.

Section 635.109 Standardized Changed Condition Clauses

Several commenters suggested that the FHWA does not have the statutory authority to require the use of the standardized change condition clauses on design-build projects. Title 23, U.S.

Code, section 112(e)(2)(B) specifically exempts design-build contracts from being required to include these clauses. Some of these commenters believed that the terminology used in the existing clauses might be incompatible with the common use of design-build terminology. For example, the standardized ''Suspension of Work Ordered by the Engineer'' clause uses the term ''engineer'' to refer to the owner's representative. However, several commenters noted an inconsistency with common design-build terminology where the term ''engineer'' refers to the design-builder's engineer.

The ARTBA recommended that the FHWA ''strongly encourage'' STDs to use these clauses instead of mandating the use of standardized clauses. The DPC suggested that the use of these clauses should generally be left to each STD to assess on a project-by-project basis. There could potentially be a situation where risk allocation is unbalanced because of the use of such clauses. The TCA suggested that where the design-builder is given responsibility for tasks, such as, quality assurance or environmental mitigation, the owner may want to have the ability to temporarily stop work, without providing a time extension or declaring a default, so as to enable it to determine whether a problem exists.

Several commenters representing the contracting industry strongly urged the FHWA to require the use of a standard ''changed conditions'' clause and also supported the use of a ''Suspensions of Work Ordered by the Engineer'' clause on design-build projects. These commenters believed that the clauses are appropriate for the risk and responsibilities that are shared with the design-builder in creating a fair and equitable contract for all parties. They suggested that inappropriate risk shifting will only increase the overall project cost and may increase the potential for unneeded litigation.

The FHWA believes that flexibility is appropriate for this issue. Section 1307 of the TEA–21 clearly indicates that the standardized change condition clauses may not be applied to design-build projects. In the proposed rule, the FHWA took the position that it would be appropriate to require one of the three clauses—the suspensions of work ordered by the engineer. The FHWA also proposed that the two other standardized clauses be used appropriately where the risk and responsibility are shared with the design-builder.

In traditional design-bid-build projects, risk and responsibility are generally well defined and there is little variation from project to project. The standardized changed condition clauses are very appropriate for these projects. However, for design-build projects, risk sharing and the ability to manage and control risk vary with each project. In light of the comments received, the FHWA has elected to provide flexibility to the contracting agencies who must perform risk analysis and structure contract provisions based on the individual characteristics of each project. Therefore, the final rule strongly encourages but does not mandate the use of ''suspensions of work ordered by the engineer'' clause. Contracting agencies may also consider ''differing site condition'' and ''significant changes in the character of work'' clauses which are appropriate for the risk and responsibilities that are shared with the design-builder.

Section 635.110 Licensing and Qualification of Contractor

Several commenters agreed with the NPRM language that allows STDs to use their own licensing and pre-qualification requirements. However, the ARTBA expressed a concern regarding a provision that would allow proposers to demonstrate their ability to become licensed. Instead it recommended that, if required, proof of licensing and/or prequalification should be demonstrated at the time of submission of the proposal. We disagree and have not made this change to the rule.

The ACEC expressed a concern that by allowing STDs to use their own prequalification and licensing statutes and procedures, design firms may be precluded from leading a design-build team if the State requirements are too stringent.

The DPC agreed with the FHWA's approach in allowing STDs to use their prequalification procedures, but expressed a concern that STDs may rely heavily on existing prequalification practices instead of developing procedures specifically for design-build. This commenter believed that this could limit the formation of joint ventures. The FHWA recognizes this concern but does not believe that it is appropriate to require STDs to modify their existing procedures to use design-build.

The TCA suggested that the NPRM language for this section was confusing and did not appear to be necessary. This commenter was concerned that the NPRM could be interpreted to require local agencies to comply with State prequalification requirements. The FHWA agrees and incorporated minor revisions in § 635.110(f)(2) to clarify that local public agencies are not required to comply with State prequalification requirements.

The AASHTO questioned a perceived discrepancy between the prohibition against geographical preferences in the preamble versus the use of the words ''may not'' in the regulatory section of 23 CFR 635.110(f)(1). The final rule provides a prohibition for geographic preferences. Such preferences limit competition and may not be used.

In consideration of the above comments, the FHWA made minor changes to this section. As stated in the NPRM, prequalification and licensing procedures may be used, however, such procedures may not limit competition or preclude an otherwise qualified proposer from submitting a proposal. The STDs have the flexibility to develop prequalification procedures appropriate for the specific characteristics of a given design-build project.

Section 635.112 Advertising for Bids and Proposals

The DBIA suggested that the FHWA authorization should be based on the contract award rather than the RFP document. The DBIA and the Orange North-American Trade Rail Access Corridor Authority were concerned that the requirement for the FHWA to approve the RFP document would only lead to extensive time delays. The DBIA believed that the FHWA's approval process would serve to add additional time to what is usually a very time-sensitive project schedule, thereby diminishing any possible time savings advantage. The DBIA further suggested that STDs be allowed to proceed ''at risk'' with the procurement process, with the recognition that they must comply with the rules in order to obtain the FHWA authorization prior to contract award.

The FHWA disagrees with these comments. Since the release of the RFP document is a key point in the project development process, it is also an appropriate point for the FHWA's project approval.

The TCA suggested that contracting agencies should have the ability to proceed with a project using their own funds and at their own risk, without the FHWA's approval, pending the final NEPA decision. This commenter suggested that the FHWA project authorization is only necessary prior to the commencement of final design or the initiation of construction work. This commenter recommended that the FHWA issue a ''statement of no objection'' in response to a written request from the contracting agency accompanied by certificates evidencing

compliance with applicable requirements.

The FHWA disagrees with this comment. It is not appropriate to make Federal-aid participation decisions after major project decisions have been made and possibly after a contracting agency has incurred costs.

The Colorado DOT recommended that the FHWA clarify the difference between ''major'' and ''minor'' addenda. The FHWA does not agree that this clarification is appropriate in the final rule. The FHWA Division Administrator currently has the flexibility to define ''major'' and ''minor'' addenda. This flexibility will continue for design-build projects.

Several commenters provided recommendations concerning the delegation of the FHWA's approval authority from Headquarters to the Division Offices. See § 636.107 for details.

In summary, the FHWA is not revising this section. As previously noted, the FHWA is accountable for the appropriate expenditure of funds from the highway trust fund. It is important for the FHWA to implement sufficient review and accountability procedures so that it can fulfill its stewardship obligation. The FHWA Division Administrator's review and approval of the RFP document is an important and timely approval in the FHWA's authorization of a design-build project. The STD and the FHWA Division Office should identify the review and approval procedures that will enable the FHWA to fulfill its stewardship obligations for design-build projects.

Section 635.113 Bid Opening and Bid Tabulations

The Orange North-American Trade Rail Access Corridor Authority was concerned about the requirement to furnish a tabulation of proposal costs. This commenter was concerned with a possible breach in confidentiality procedures and the need to maintain the integrity of the selection process while minimizing chances for protests or disputes over the selection method.

One private individual suggested that the requirement to furnish a tabulation of price information should only be associated with post contract award information.

The TCA recommended that the FHWA revise § 635.113(c)(2) to refer to ''price proposal line items'' instead of ''proposal costs.'' In addition, this commenter suggested changing references to ''STD'' to ''contracting agency.''

In consideration of these comments, the FHWA has incorporated some minor revisions in this section to indicate that the tabulation of proposal prices is to be done after the award of contract. This should address the confidentiality concerns expressed by two commenters. The FHWA does not believe is it necessary to use the term ''price proposal line item'' as the rule language is sufficiently clear. The FHWA also prefers to use the term ''STD'' rather than ''contracting agency'' to maintain consistency throughout this part.

Section 635.114 Award of Contract and Concurrence in Award

Several commenters suggested that paragraph (k) appeared to preclude STDs from entering negotiations following the proposal being submitted but before the contract award. The AASHTO suggested revising this statement to read ''Design-build contracts shall be awarded in accordance with the RFP document.'' The TCA suggested that the reference to Part 636 is inconsistent with the TEA–21 requirement that allows contracting agencies to use any procurement process permitted by applicable State or local law.

We made a minor change to this section to indicate that design-build contracts shall be awarded in accordance with the RFP document. The FHWA did not intend to preclude the use of the part 636 competitive acquisition procedures. The comment regarding inconsistencies was previously addressed in the Background portion of this preamble.

Section 635.116 Subcontracting and Contractor Responsibilities

Peter Kiewit and Sons, Inc. supported the proposed changes while the ARTBA objected to waiving the current 30 percent self-performance requirement. The ARTBA believed that the 30 percent requirement should remain in place for projects under the $50 million threshold that will continue to be approved under SEP–14. The ARTBA suggested that the FHWA should clarify what type of work done by a design-builder would be applicable to a minimum percentage level of work (design work for example). The ARTBA, ACEC and the DPC recommended that the FHWA offer some guidance to the STDs so that self-performance requirements match the actual needs of the project and are not set arbitrarily.

The FHWA appreciates these concerns, however, we do not believe it is appropriate to provide guidance concerning self-performance requirements in the final rule. Contracting agencies will have the flexibility to implement minimum self-performance requirements for a project if they feel that this is appropriate. The FHWA believes that flexibility is appropriate in this area and does not believe that it is appropriate for continued evaluation under SEP–14. While a joint AASHTO/Industry/FHWA guidance paper on this subject may be desirable, that is outside of the scope of this final rule.

The TCA believed the term ''design-builder'' as used in this section warranted further definition to include any firms which are equity participants in the design-builder, their sister and parent companies, and their wholly owned subsidiaries. The FHWA agrees with this comment. We added a sentence to clarify the definition of a design-builder for this section to include equity participants in the design-build firm, its sister and parent companies, and their wholly owned subsidiaries.

Several commenters expressed opposition to the FHWA's proposal to eliminate the 30 percent requirement. These commenters believed that such requirements are necessary to minimize the potential for fraud that could occur when certain companies are used as pass-through firms to meet DBE requirements.

We disagree with this comment. We do not believe that the elimination of the 30 percent self-performance requirement will lead to an increased potential for fraud. The DBE provisions at 49 CFR part 26 define commercially useful function and provide adequate guidance for the crediting of DBE related work to minimize the potential for fraud.

The Colorado DOT objected to the prohibition regarding subcontract goals. This commenter believed that subcontract goals ensure that the design-build contractor on large projects use all different sizes and levels of subcontractors. This commenter further suggested that provision be reduced to a guideline and a recommendation. We disagree with this comment. The FHWA continues to believe that such requirements could serve as a local contracting preference and thereby create an artificial contractual barrier to the design-builder's ability to manage an efficient contract. Therefore, we did not make any modifications to this paragraph.

Section 635.122 Participation in Progress Payments

Three commenters suggested that this proposed section was satisfactory. One commenter suggested that the term ''STD'' be revised to ''contracting agency.'' For reasons previously

indicated, the FHWA prefers to use the term STD throughout this section.

Section 635.309 Authorization

The Wisconsin DOT suggested an amendment to the proposed language in § 635.309(p)(2) that would allow a design-build project to continue during a conformity lapse, if the NEPA process was completed as it applies to transportation and the project has not changed significantly in design scope. This commenter recommended that the project be allowed to continue because it has already gone through the air quality analysis and it had been shown not to increase regional emissions. The FHWA agrees with this comment but also recognizes that projects cannot proceed during a conformity lapse unless the FHWA has granted project approval or authorization prior to the conformity lapse. Accordingly, the FHWA has elected to revise the language in § 635.309(p)(2) to allow a design-build project to continue during a conformity lapse if the NEPA process was completed and the FHWA authorized the design-build project, prior to the conformity lapse.

The Florida DOT suggested that contracting agencies should not have to provide any certification of right-of-way prior to release of the RFP document. This commenter suggested that the project assurances required by 49 CFR 24.4 should be adequate to cover all subsequent federally assisted projects. Several commenters suggested a revision to § 635.309(p)(1)(v) since the design-builder's schedule is not known at the time of the release of the RFP document. The suggested revision would allow the STD to certify that all necessary arrangements will be made for the completion of right-of-way, utility, and railroad work and would allow the STD to include such work in the design-build contract if desired.

The TCA suggested the contracting agency should be allowed to certify that arrangements have been made by: (1) Delegating responsibility to the design-builder, or (2) obtaining a commitment from the contracting agency to complete or arrange for the completion of all right-of-way, utility and railroad relocations.

The FHWA agrees with these commenters and has elected to revise the language in § 635.309(p)(1)(v) to allow contracting agencies to certify that sufficient arrangements will be made for the completion of the necessary right-of-way, utility, or railroad relocation work. The FHWA agrees that STDs may base this certification on their use of provisions in the RFP document to accomplish this work or by their own coordination efforts during the contract. The STDs need this flexibility in allocating risk and preparing the appropriate contract documents.

The TCA suggested that there could be numerous problems interpreting § 635.309 paragraphs (a) through (o) unless paragraph (p) supersedes rather than supplements prior paragraphs. We agree in part with this comment. We provided a modification of this section such that the certification requirements of § 635.309 are superseded by paragraph (p).

Several commenters suggested a change to § 635.309(p)(1)(iii) to allow STDs to release the RFP document prior to the conclusion of the NEPA process. The AASHTO recommended that the NEPA process be allowed to continue until contract award, as the amount of time between RFP and contract award can be significant and time savings is one of the primary advantages of the design-build process. The New York State DOT suggested that the design-builder be allowed to perform some work necessary to complete the NEPA document as long as appropriate trigger points were included (*i.e.* stop or control points for final design and construction). The FHWA disagrees with these commenters. The issue of NEPA compliance is discussed in § 636.109 below.

Section 635.411 Material or Product Selection

Several commenters indicated that the NPRM language in this section was acceptable. Several commenters agreed with the NPRM language and expressed a concern regarding the use of proprietary product provisions in the RFP document that may limit DBE participation. These commenters believed that certain DBE firms might lack access to purchasing, distribution or production of certain proprietary materials. The TCA suggested that the intent of this paragraph was to supersede existing paragraphs (a) through (e) of the existing regulation and recommended language to accomplish this. The FHWA does not agree with this comment.

No revisions of this section are provided. It was not the FHWA's intent to supersede paragraphs (a) through (e). The intent of the existing regulation is to ensure open competition in the contracting agency's material or product selection requirements. The intent of the language was to supplement the existing regulation for design-build projects by limiting the requirement to materials, specifications, or processes specifically set forth in the RFP document.

Section 635.413 Warranty Clauses

The ARTBA suggested that the FHWA should not require warranties but that this decision should be at the STD's discretion. However, the ARTBA went on to say that it agreed with the FHWA's proposal to only allow warranties for specific products or construction features on Federal-aid design-build projects. It suggested that if warranties are allowed beyond this, that their coverage be limited to line items related to workmanship and materials. Peter Kiewit and Sons', Inc. recommended that warranty requirements should include specific performance criteria for a specific product or feature.

Several commenters representing STDs and local public agencies suggested that the use of warranties should be left to the discretion of the States and that the limitation of warranties to specific products or construction features is too restrictive. These commenters suggested that ''bumper-to-bumper, blanket, or general workmanship-and-material warranties'' are appropriate for design-build. The AASHTO and the Virginia DOT cited an agreement with the advocacy for asset management at the Federal level for recommending this. The FHWA appreciates the concern of these commenters. We agree that it is desirable to provide performance criteria in the RFP document for performance warranties but we also believe that contracting agencies should have some flexibility in preparing warranty provisions.

The Texas DOT suggested that there is a significant difference between the use of warranties on a traditional design-bid-build project and a design-build project that must be taken into account. It suggested that a warranty identifying specific pieces of the work may omit a particular component and shift the very risk the contracting agency was hoping to delegate back to the project owner, thereby nullifying one of the critical benefits and innovations of design-build. The Texas DOT went on to describe the successful use of ''blanket warranty'' clauses on major design-build projects and suggested that such warranties are already an industry standard and are expected, priceable and enforceable. It was suggested that the FHWA allow the use of ''blanket warranty'' clauses for a limited, but reasonable period of time, in order to give the owner time after the completion of the project to discover defects in the work. The FHWA agrees that limited, general project warranties may be appropriate in some circumstances.

The DBIA suggested that performance warranties are routinely negotiated into design-build contracts. It further suggested that due to the unique and specific performance requirements of each project, STDs need the flexibility to negotiate these warranties with the offerors on each project. The FHWA agrees that some flexibility is appropriate, however, we are concerned with the concept of negotiating warranties into design-build contracts. Contracting agencies must include warranty performance criteria in the RFP document. These conditions should not be ''negotiated into the contract'' through discussions with the proposers. This is important to keep a level playing field and provide all proposers with the opportunity to provide competitive proposals.

The DPC supported the proposed limitation of warranties to certain features or construction products. This association was concerned with the potential for unbalanced risk allocation, especially as it might apply, directly or indirectly, to the project design. The ACEC expressed concern regarding attempts by STDs to directly or indirectly extend uninsurable warranty provisions to professional engineering services, for example, those that go beyond legal standards of care in the industry. The FHWA appreciates the concern of these commenters, however, we do not believe it is appropriate to address this in the final rule.

The National Association of Surety Bond Producers expressed support for the FHWA's proposed position not to alter the current level of discretion provided STDs on the use of warranties. It suggested that the STDs must have sufficient discretion in developing contracts to provide for the proper allocation of risk. However, this commenter went on to express many concerns regarding the potential negative effects of warranties that extend beyond a reasonable duration or include requirements that are beyond the control of the design-builder.

In light of the above comments, we elected to provide additional flexibility in the final rule. We agree with the STDs who suggested that contracting agency discretion is appropriate in this area. Based on the comments provided, it appears that general project warranties are a valuable asset in preventing and correcting construction defects on design-build projects. Contracting agencies must still incorporate a quality assurance program as a means for accepting the final product; however, the FHWA agrees that short term, general warranties may be beneficial in providing the contracting agency with a method for addressing obvious defects with the work. Several commenters indicated that this is already industry practice for workmanship and material warranties. In addition, the FHWA is aware that certain State laws already require contractors to furnish one-year maintenance bonds on traditional construction contracts to protect against any failure due to defective workmanship or materials. For this reason, we revised this section to allow general project warranties on NHS design-build projects with the conditions that: (1) They are short term (one to two years); (2) they are not the sole means of acceptance; (3) they do not include items of routine maintenance which are not eligible for Federal participation; and (4) they may include the quality of workmanship, materials and other specific tasks identified in the contract.

A provision for performance warranties for specific products or features is also provided. The contracting agency must include detailed performance criteria in the RFP document so that all proposers are competing on a level playing field. The final rule also includes a provision that allows contracting agencies to receive alternate warranty proposals that improve upon the warranty terms in the RFP document. For best value selections, such alternate warranty proposals must be in addition to the base proposal that responds to the RFP requirements.

Also, see the discussion regarding quality assurance programs in Section 637.207.

Part 636—Design-Build Contracting

Section 636.101 What Does This Part Do?

The TCA suggested revisions to this section to indicate that the TEA–21 allows contracting agencies to use any procurement procedure allowed by applicable State and local law. It stated that the Congress did not authorize the FHWA to regulate this area and suggested that the FHWA's role should be limited to providing guidelines on this subject. For the reasons listed in the General section above, the FHWA disagrees and we did not make any changes in this section.

Section 636.102 Does This Part Apply to Me?

One commenter indicated that the language for this section was acceptable. Other commenters did not provide specific comments on this section. Therefore, no revisions are made in the final rule for this section.

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

The DBIA recommended several revisions to the definitions used in this section. The suggested revisions include the following:

- Delete the term ''clarifications'' and revise the definition of ''communications'' to apply to a single-phase selection procedure or both phases of a two-phase procedure. The DBIA suggested that all exchanges between the contracting agency and the offerors prior to establishing a competitive range (and subsequent discussions) or selection without discussions, are for the purpose of correcting non-substantive errors and omissions and addressing issues and ambiguities in order to enhance understanding and facilitate evaluation of the qualification submissions or proposals.

The FHWA disagrees with the recommendation to delete the term ''clarifications'' and revise the term ''communications.'' These terms have specific meanings based on case law. The use of the commenter's recommended definition would not clarify this issue. However, there is merit in clarifying that the terms ''clarifications, communications, and discussions'' only apply to information exchanges after the release of the RFP document. We added a new section, 636.401 titled ''What types of information exchange may take place prior to the release of the RFP document?'' to clarify that such information exchanges (in the first-phase of a two-phase selection procedure) must be consistent with State and/or local procurement integrity requirements. In the final rule, we revised Section 636.401 to Section 636.402 ''What types of information exchange may take place after the release of the RFP document?''

- Revise the second sentence of the definition of ''fixed price/best design'' to read: ''Design solutions and other qualitative factors are evaluated and rated, with award going to the firm offering the best qualitative proposal for the established price.'' This commenter suggested this change to eliminate potentially restrictive and ambiguous language. We agree with this recommendation and have incorporated this in the final rule.
- Revise the definition of ''stipend'' by inserting the term ''unsuccessful offerors'' in lieu of the term ''most highly qualified unsuccessful offerors.'' This commenter stated that some

agencies pay stipends to all responsive, unsuccessful offerors; others pay only to those offerors in the competitive range. The commenter suggested a change in the definition to remove a potential ambiguity. We agree with this recommendation and have incorporated this in the final rule. With this revision, contracting agencies will have more discretion in providing stipends.

• Revise the term ''technical proposal'' to read as follows: ''Technical proposal means that portion of a design-build proposal which contains design solutions and other qualitative factors, which may include, without limitation, schedule, quality control/quality assurance (QC/QA), management plans, maintenance of traffic, maintainability and community relations.'' This commenter suggested that the term could include any relevant information that the contracting agency deems to be important. We partially agree with the recommended revision for the term ''technical proposal,'' however, it would seem more practical to keep the definition as simple as possible. Therefore, we provided the following definition in the final rule: ''Technical proposal means that portion of a design-build proposal which contains design solutions and other qualitative factors that are provided in response to the RFP document.''

• Revise the definition of ''tradeoff'' to read as follows: ''Tradeoff means an analysis technique involving tradeoffs among price and non-price factors, which can be used by the contracting agency to assist in the comparative assessment of proposals to determine the best value when considering selection of other than the lowest priced proposal.'' This commenter believed that a tradeoff is not a separate best value selection method, but rather an analysis technique to determine best value. We agree with this recommendation and have incorporated this in the final rule.

• Revise the definition of ''discussions'' to use the plural versions of the words offeror and proposal to be consistent with the requirement to include all offerors in the competitive range in discussions. We agree with this recommendation and have incorporated this in the final rule.

• Revise the definitions of the ''request for qualification'' and ''short listing'' to provide consistent terminology by using the term ''most highly qualified offerors'' in each. We agree with this recommendation and have incorporated this in the final rule.

A private individual suggested revisions similar to the recommendations above for the terms ''discussions,'' ''fixed price/best design,'' ''stipend,'' ''technical proposal,'' ''tradeoff,'' ''request for qualification,'' and ''short listing.'' In addition, this commenter suggested that FHWA consider the following:

• It would make more sense to include the definitions for ''clarifications'' and ''communications'' in the same section as the regulatory text. We disagree with this suggestion.

• Consider deleting the term ''modified design-build.'' This commenter stated that the design-builder's role is not generally limited to completion of the design and construction. It was suggested that there is no need to have a defined term for a level of preliminary design if the FHWA kept this definition. We agree that the level of design should be removed, however, many contracting agencies continue to utilize modified design-build method of contracting and therefore, we believe that it is appropriate to maintain this definition in the final rule.

• The FHWA needs to recognize the difference in meaning between the terms ''price'' and ''cost.'' The price offered by the design-builder is the owner's cost. From the design-builder's perspective, the price is its cost plus overhead and profit. This commenter suggested that when considering mostly fixed price, lump sum design-build contracts, the FHWA should consider using the term ''price'' when discussing the consideration and evaluation of proposals (*e.g.*, in the definitions for ''best value selection,'' ''single-phase selection,'' ''two-phase selection,'' and ''weighted criteria process,'' and §§ 636.201, 636.203, and 636.302). We agree with this recommendation and revisions have been made as appropriate in the final rule.

The TCA suggested that the terminology used in part 636 is inconsistent with the terminology contained in legislation in various States allowing agencies to use design-build and further suggested that this would not be an issue if the part 636 requirements were converted to guidance. This entity also suggested revisions to two proposed definitions as follows:

• Revise the definition of ''contracting agency'' as follows: ''Contracting agency means the public agency awarding and administering a design-build contract, which may be the STD or another State or local public agency.'' This commenter stated that in some cases, projects are developed by an entity which is not the ultimate owner, and which is not acting as an agent for the ultimate owner. We agree with this comment and have incorporated similar language in the final rule.

• Revise the definition of ''design-build contract'' as follows: ''Design-build contract means an agreement that provides for design and construction of improvements by a contractor or private developer. The term encompasses design-build-maintain, design-build-operate, design-build-finance and other contracts that include services in addition to design and construction. Franchise and concession agreements are included in the term if they provide for the franchisee or concessionaire to develop the project that is the subject of the agreement.'' We agree with this recommendation and have incorporated this revision in the final rule.

The ASCE suggested that the FHWA incorrectly used the term ''stipend'' but did not provide a recommendation for the proper term to use. We disagree with this comment. Many contracting agencies have used stipends in SEP–14 design-build projects. The definition in § 636.103 reflects the current usage and is appropriate.

Section 636.104 Does This Part Apply to All Federal-Aid Design-Build Projects?

Several commenters recommended different revisions to the first sentence of this section to clarify the applicability of the regulation to Federal-aid projects. We agree with these commenters. The FHWA is revising the first sentence of this section to remove references to highway systems. The final rule applies to all Federal-aid design-build projects within the highway right-of-way or linked to a Federal-aid highway project (*i.e.*, the project would not exist without another Federal-aid highway project). Projects that are not located within the highway right-of-way, and not linked to a Federal-aid highway project may use State-approved procedures. This rule applies to all Federal-aid projects in the highway right-of-way (or linked to a Federal-aid highway project) regardless of whether that project is located on the NHS or non-NHS systems.

The TCA suggested that it would be advisable to divide this section into two subparts—one of which is binding and one of which is advisory. This commenter went on to say that many of the rules should be converted to guidelines, rather than imposing restrictions that reduce the agency's flexibility under applicable State and local procurement law, and which in some cases may conflict with requirements of State and local laws. This entity suggested that the public interest would be best served by

allowing applicable State and local law to control the procurement process, including the rules that apply to the source selection decision. We disagree with this comment. The FHWA response to this issue was previously provided in the ''Flexibility'' section above.

Section 636.105 Is the FHWA Requiring the Use of Design-Build?

Peter Kiewit Sons', Inc. supported the language and indicated that a program that gives the States options is appropriate. The FHWA agrees and did not make any revisions to this section.

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

Several commenters supported the flexibility provided by this section; however, one commenter suggested that contracting agencies be required to justify their decision to use design-build. The AGC recommended that STDs be required to submit their rationale for electing to use the design-build contracting method for a specific project rather than using the traditional design-bid-build selection procedure. This association further stated that contracting agencies should be required to specify what they hope to gain in using design-build that could not be achieved by using the traditional process.

On the other hand, Sundt Construction, Inc. suggested that owners should be able to select a contracting method that will provide the greatest opportunity for success based on the project objectives deemed to be most important for that particular project. This commenter stated that project size, type and location are immaterial to the contracting method and should not limit the selection of the appropriate delivery method.

While the FHWA appreciates the differing viewpoints voiced by the construction industry association, we agree with the majority of commenters who agreed with the flexibility provided by this section, and therefore, no changes are provided in the final rule.

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

The Missouri DOT acknowledged that the definition of a ''qualified project'' is a statutory requirement that the FWHA cannot change. The Utah DOT recommended that if the definition could be modified, it be revised to include small projects and not list a dollar amount. Several commenters believed the definition of a qualified project is too narrow and suggested that the FHWA expand the definition to include what is currently termed ''modified design-build,'' as well as ''quality based selection,'' where selection is based solely on technical merit and where cost is negotiated at a later date with the selected contractor. While we appreciate the concerns of the contracting agencies concerning the implications of the definition of a ''qualified project,'' the FHWA cannot revise the statutory definition. Furthermore, the FHWA believes that this definition will have little or no impact on a contracting agency's decision to use design-build.

The New Jersey DOT suggested that neither the TEA–21 nor the proposed rule clearly defines a qualifying design-build project. It suggested that if the final rule does not provide a more complete definition, the STDs should have the ability to select design-build projects under the authority of 23 U.S.C. 145. We agree with this commenter. The final rule incorporates the statutory definition of a ''qualified project'' without further limitation. The FHWA believes that it is important to provide discretion to contracting agencies in the selection of design-build projects.

The Missouri DOT recommended the removal of SEP–14 from existing rules. However, the New York State DOT was pleased that the SEP–14 process would continue so that design-build could continue for projects that did not meet the ''qualified projects'' definition. This commenter believed the statutory definition of a ''qualified project'' was too narrow and hoped that future legislation would remedy this. Numerous commenters agreed with the concept of delegating SEP–14 approval authority to the FHWA Division offices. In addition, several commenters suggested that, for those States with an approved design-build program in place, the STD may elect to assume the approval authority for the design-build RFP, any addenda, and for the SEP–14 process.

The TCA recommended specific revisions to this section and suggested the rule also address the use of SEP–14 for innovative contracting approaches for ''qualified projects.''

The FHWA believes the rule is clear; however, we agree with one of the commenters who suggested that SEP–14 approval might be appropriate for qualified projects that incorporate innovative contracting techniques and might not fully comply with the rule. These types of projects would still need SEP–14 concept approval. Therefore, the last sentence of § 636.107(a) is revised to read as follows: ''Projects which do not meet the requirements of this part (either ''qualified'' or ''non-qualified'' projects) must be submitted to the FHWA Headquarters for concept approval.''

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

The AASHTO suggested that there needs to be consistency between the definitions of ITS among the various segments of the Federal government but did not offer a specific recommendation. The ITS definition is taken from section 1307 of the TEA–21. No revisions are made in the final rule.

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

As noted in § 635.309 above, several commenters suggested that the FHWA remove the limitation that prohibits the STDs from releasing the RFP document prior to the conclusion of the NEPA process. The AASHTO suggested that this could be accomplished without compromising the intent of NEPA process. It suggested that the procurement process could stretch out over several months, or even years. The AASHTO believed that the FHWA's requirement for a complete NEPA process followed by the release of the RFP document would only lengthen an already lengthy process and negate any potential time saving benefits of the design-build delivery method. We disagree with this commenter for the NEPA policy reasons noted below.

An individual commenter suggested that, without the limitation on the release of the RFP document, offerors could simultaneously be preparing and submitting their proposals for evaluation while the NEPA process is concluding. In addition, contract award, mobilization and continuation of preliminary design by the design-builder could also take place if the contracting agency elected to do so. We disagree with this commenter for the NEPA policy reasons noted below.

The New York State DOT suggested that the design-builder be allowed to perform work necessary to complete the NEPA document as long as appropriate trigger points were included in the contract (*i.e.* stop or control points for final design and construction). Other commenters suggested that the RFP document could be released prior to the completion of the NEPA process, but award of the contract should not be made until the NEPA process is complete. The TCA suggested that a design-build contract award could be made prior to the conclusion of the

NEPA process, as long as there were provisions made to modify or terminate the contract. It indicated that the design-builder could proceed with the contract work as long as it did not include final design or construction. We disagree with these commenters for the NEPA policy reasons stated below. We have made no changes to the rule.

On the other hand, the AGC and the ACEC agreed with the NPRM limitation on the release of the RFP document. The AGC stated that asking for proposals prior to the conclusion of NEPA shifts an unnecessary risk to the proposers. It believed that it is not fair to ask proposers to undertake design and proposal costs on a project that has the potential for not moving forward. The AGC believed that STDs would not be willing to compensate proposers for their development costs should the project be stopped in the NEPA process. The AGC believed that this would limit competition to those firms that are willing to accept certain risks. The ARTBA suggested that it is important to maintain an even playing field with the traditional low-bid system that currently requires the NEPA process to reach conclusion before a project advances. The DPC expressed a concern regarding concurrent NEPA and project delivery processes with a guaranteed completion date that would add significant cost if the project is unexpectedly delayed. We agree with the industry commenters who are concerned about unreasonable risk allocation through an early release of the RFP document. However, we do not believe that modifications are necessary in the final rule.

The New Jersey DOT and Sundt Construction, Inc. seem to be concerned that the proposed rule would require all environmental clearances (permits) to be obtained prior to advertising design-build projects. The AASHTO noted that the subject of environmental permitting was not discussed in the NPRM, but suggested that there be no FHWA restrictions that would prohibit the STDs from delegating the responsibility for obtaining environmental permits to the design-builder.

The FHWA agrees with AASHTO's comment. The rule does not address the subject of environmental permits and provides complete flexibility to contracting agencies regarding the responsibility for obtaining these permits. Contracting agencies may delegate the responsibility for obtaining such permits from other resource agencies (*e.g.*, Corps of Engineers, U.S. Coast Guard, *etc.*) to the design-builder. Therefore, the FHWA made no changes concerning this topic.

The AASHTO and the DBIA noted that there is no requirement in the TEA–21 or the NEPA that limits a contracting agency from issuing the RFP prior to concluding the NEPA process. They suggested the limitation in the rule would unnecessarily extend the time for putting the project under contract and therefore the ultimate timeline for project completion. The FHWA disagrees with this comment. While there may be some delay in the procurement process for certain projects, the overriding NEPA policy concerns noted below are more important from the FHWA's perspective.

The DBIA stated that Congress enacted 23 U.S.C. 112 (b)(3)(B) to resolve disputes between the FHWA and State and local agencies regarding whether the NEPA prohibits local and State agencies from entering into design-build contracts prior to the completion of the NEPA process. This commenter contended that 23 U.S.C. 112(b)(3)(B) resolved this dispute by clarifying that those portions of the design-build process, up to but not including final design, may be initiated prior to the completion of the NEPA process. The FHWA disagrees with this commenter who interprets the TEA–21 provisions to allow the release of the RFP document at any time during the NEPA process. We disagree for the NEPA policy reasons noted below.

Several commenters suggested that case law interpreting the NEPA permits State and local agencies to proceed with projects at their own risk prior to completion of the NEPA process, so long as the agency does not take irretrievable action to develop the project. These commenters believed that STDs should be granted the flexibility to take these actions when warranted on a particular project. We disagree with these commenters and have made no changes in the final rule.

Based on the comments provided to the docket, there is apparently a certain degree of confusion regarding NEPA compliance as it relates to design-build. First, the FHWA disagrees with the commenters who suggested that the provisions of the TEA–21 allow the RFP document to be released at any time during the NEPA process. Title 23, U.S. Code, section 112(b)(3)(B) states the following: ''Final design under a design-build contract referred to in subparagraph (A) shall not commence before compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).'' We believe the congressional intent of this provision was to ensure full compliance with the NEPA for all design-build projects. It was not meant to nullify the independent NEPA decision-making process by allowing STDs to award design-build contracts and proceed with all work except for final design and construction. To ensure a completely unbiased NEPA process, it is imperative that the STDs perform a level of design and environmental review that is adequate to fully evaluate the range of reasonable alternatives chosen to meet project goals and avoid adverse environmental impact. Only after the STD concludes the NEPA independent decision-making process, is it acceptable to release the final RFP document.

Second, the FHWA's NEPA review process was developed to ensure that environmental impact information for any federally funded action is available to public officials and citizens before decisions are made and before actions are taken. The success of the NEPA process is based on the assumption that there will be an objective and unbiased review of all reasonable alternatives that address project needs and are prudent in terms of avoiding potential environmental effects. Moreover, the public perception of the NEPA review process is very important to the FHWA and the States. The perception of an unbiased review process (which includes a no-build alternate) must not be compromised by a decision to release the design-build RFP prior to the conclusion of the NEPA review process. Therefore, the NEPA review process must be complete (an approval received for a Categorical Exclusion, Finding of No Significant Impact, or a Record of Decision as defined in 23 CFR 771.113(a)) prior to releasing the RFP document. The FHWA's environmental regulations in 23 CFR 771 require the evaluation of alternatives, their environmental consequences, and the incorporation of mitigation measures (avoidance, minimization, and compensation) prior to proceeding with an action. Project activities beyond those necessary to answer environmental questions during the NEPA review process (for example: final design, right-of-way acquisition, and construction) are not permitted prior to the conclusion of the NEPA review process.

Third, due to the nature of the design-build process, proposers often expend significant effort preparing technical and price proposals in response to an RFP. Therefore, STDs have a responsibility to: ensure that the RFP scope of work includes the details related to all environmental commitments, and, assure proposers that the scope will not change as a result

of the environmental review process. All proposers on design-build projects must be given the opportunity to consider environmental mitigation commitments in their price proposals. This is important for ensuring reasonable risk allocation for environmental commitments and maintaining the integrity of the competitive acquisition process.

Fourth, many of the commenters to the docket may not have been aware that the rule provides some degree of flexibility in this area. Section 636.109 allows contracting agencies to solicit qualifications prior to the conclusion of the NEPA process as long as the solicitation informs proposers of the general status of the NEPA process. Therefore, a contracting agency can request, receive, and evaluate qualifications and develop a short list of the most qualified offerors. In addition, § 636.115 allows contracting agencies to issue draft RFPs and to exchange certain types of information prior to releasing the final RFP document. Draft RFPs may be released prior to the conclusion of the NEPA process as long as the draft RFP informs proposers of the general status of the NEPA process and lists all NEPA alternatives (including the no-build alternative) under consideration by the contracting agency. The draft RFP document, however, must make it clear that the final RFP document will not be released until the conclusion of the NEPA process. Contracting agencies have the discretion to determine how a draft RFP document may be revised to develop and release a final RFP document.

For all of the above reasons, the FHWA is not revising the language for this section. We believe that the limitation concerning the release of the RFP document is appropriate and necessary to maintain an objective and unbiased NEPA review process for design-build projects.

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

Peter Kiewit and Sons'', Inc. indicated the proposed rule was acceptable however, they expressed a concern that all contracting agencies might not actually have ''procedures'' to adequately address a process that involves design-build. It was suggested that the FHWA work with industry to develop guidelines in this area. The FHWA will be glad to work with the AASHTO and industry in developing any guidelines that might be appropriate for design-build contracting. However, we believe the language for this section is satisfactory and we made no revisions to the final rule.

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

Most comments supported this section, however, the TCA suggested this section should be converted to a guideline. The FHWA believes the language for this section is satisfactory and no revisions are made in the final rule.

Section 636.112 May Stipends Be Used?

Most comments supported this section. The DBIA recommended that all information regarding the proposed use of stipends on a particular procurement must be included in the solicitation documents. The FHWA believes that flexibility is appropriate here. Therefore, contracting agencies may, at their own discretion, include information regarding the use of stipends in solicitation documents.

Peter Kiewit and Sons'', Inc. and the DBIA recommended the deletion of the phrase ''the most highly ranked'' for the reasons noted in the preamble discussion for § 636.103 above. We agree with these commenters. As noted in the definitions section above, the final rule provides a revision to delete the phrase ''the most highly ranked'' from the definition of a ''stipend'' in § 636.103 and the regulatory text in § 636.112. Otherwise, the FHWA believes this section is sufficiently clear.

Section 636.113 Is the Stipend Amount Eligible for Federal Participation?

Most comments supported this section. Several commenters suggested that the proposed language could be interpreted to mean that there is a difference between ''If provided by State law'' and ''If not prohibited by State law.'' These commenters provided differing recommendations to allow flexibility if it is not prohibited by State law.

The FHWA agrees with the recommendation for clarity. The final rule provides a revision for § 636.113(b) to read as follows: ''Unless prohibited by State law, you may retain the right to use ideas from unsuccessful offerors if they accept stipends.''

Section 636.114 What Factors Should Be Considered in Risk Allocation?

Most comments supported this section. The ACEC suggested that contracting agencies should consider establishing a comment period on proposed terms and conditions prior to requesting qualifications on a project. Additionally, they might consider owner controlled insurance programs as market trends indicate an increasing unavailability of policies for design firms in the design-build market based on severe owner provisions and requirements.

The TCA suggested that this section be converted to guidance. This commenter also suggested adding the phrase ''or the impact of a given risk'' be added to the second sentence of paragraph (a), as in some cases a party may not be able to control the occurrence of a risk, but does have the ability to manage the impact.

The FHWA appreciates the concerns of the industry representatives regarding risk allocation, and we believe that a minor revision is appropriate in the final rule. The FHWA has incorporated the TCA's recommendation in the second sentence of § 636.114(a) in the final rule.

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

Several commenters recommended the use of the term ''potential offerors'' or ''other offerors'' instead of the word ''public'' in paragraph (e) so that a public hearing process is not inadvertently invoked. The FHWA agrees that this language needs clarification so the term ''all potential offerors'' is used instead of the term ''the public.''

Peter Kiewit Sons'', Inc. supported the proposed language and the concept of information exchanges about project risks that have become known as ''industry review sessions.'' This commenter believed that such sessions benefit both offerors and contracting agencies and often result in a less costly project with fewer disputes and claims.

The TCA suggested that this section be converted to guidance and also recommended that a clause be added to the second sentence of paragraph (e) such that it would read as follows: ''Information provided to a particular offeror in response to that offeror's request shall not be disclosed if such information was provided in accordance with procedures established in the RFP and if disclosure would reveal the potential offeror's confidential business strategy.'' This commenter suggested that this revision is necessary to avoid problems that may arise when the procedures for communications set forth in the RFP document are not followed. The FHWA does not believe that the second sentence of paragraph (e) needs additional clarification.

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

The AASHTO, the New York State DOT and the Virginia DOT recommended that paragraph (a)(2)(v) be revised to require all proposers to provide information concerning potential organizational conflicts of interest in their proposals (not prior to award as stated in the proposed rule). These commenters believed that this would avoid unnecessary delays. The FHWA agrees and the final rule provides the following for this section: ''(v) Requires offerors to provide information concerning potential organizational conflicts of interest in their proposals.''

The Colorado DOT suggested that this section is inconsistent with its State law, which is more specific than the proposed language. This commenter said it is not clear whether its State rules would have to be amended to comply with the proposed rules even though the State rules are more specific. This commenter also questioned the use of the phrase ''Involvement with the design-build procurement process'' in paragraph (a)(1)(ii). This entity believed that all actions leading up to issuance of the RFP document are part of the design-build process. Finally, this commenter believed that this section be converted to guidance or that the regulation provide that local statutes or policies regarding conflicts of interest are applicable to design-build projects. The FHWA does not agree that this section should be converted to guidance because paragraph (b) indicates this section only provides minimum standards to identify actual or potential conflicts of interest. To the extent State or local standards are more stringent than those in the rule, the State or local standards prevail. We partially agree with this commenter that this section needs clarification (see below).

Two individual commenters suggested that consultants and sub-consultants used by owners in the development or preparation of the RFP document be prohibited from participating on a team proposing on the project. These commenters suggested that as a minimum, contracting agencies should require written disclosure. The commenters suggested that the FHWA's proposed language, which gives the STDs flexibility in this area, is a mistake given the potential for STDs to ignore these conflicts in the interest of contracting expediency. We note the concerns of these commenters and have revised paragraph (a)(1) for clarification (see below).

The TCA recommended a number of revisions to paragraph (a)(1) to clarify that contracting agencies may determine that an organizational conflict of interest does not exist for both consultants and sub-consultants under certain conditions. The recommended revision reads as follows:

(1) Consultants and/or sub-consultants who assist the owner in the preparation of a RFP document will not be allowed to participate as an offeror or join a team submitting a proposal in response to the RFP. However, a contracting agency may determine there is not an organizational conflict of interest for a consultant or sub-consultant where:

(i) The role of the consultant or sub-consultant was limited to provision of preliminary design, reports, or similar ''low-level'' documents that will be incorporated into the RFP, and did not include assistance in development of instructions to offerors or evaluation criteria, or

(ii) Where all documents and reports delivered to the agency by the consultant or sub-consultant is made available to all offerors.

We agree with this recommendation to clarify paragraph (a)(1) and the final rule incorporates the text recommended by the TCA.

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

The Shamrock Paving Company suggested that the regulations should require that those involved in the selection process sign a certification (under penalty of perjury) that no bias entered into the selection process. The TCA recommended specific revisions to require contracting agencies to adopt a policy rather than imposing Federal Acquisition Requirements.

The FHWA believes the language is appropriate and no revisions are made in the final rule. The rule clearly indicates that the requirements of 48 CFR Part 3, Improper Business Practices and Personal Conflicts of Interest, will only apply in the absence of such State provisions.

Section 636.118 Is Team Switching Allowed After Contract Award?

The AASHTO and the Virginia DOT noted that the proposed language did not address the subject of consultants joining multiple teams. These commenters recommended that the FHWA continue to allow flexibility in this area. The TCA suggested that this section be converted to guidance.

The FHWA's primary concern is that post-award team switches do not result in a reduction in the quality of team members. We did not specifically address the subject of consultants joining multiple teams in the proposed rule. We do not believe it is appropriate to develop a policy in this area as this is a business decision that should be left to the discretion of the industry representatives. No revisions are made in the final rule.

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

The ARTBA suggested that the NPRM provisions regarding public-private partnerships were confusing. This commenter questioned the appropriateness of the requirement for a competitive process as a basis for Federal-aid participation. The commenter believed that there may be situations where a public agency followed its own policies, but would not be eligible for Federal-aid because the process was not deemed to be a competitive process by the FHWA. We do not agree with this comment.

The Texas DOT suggested that the language needs to be clarified to describe the eligibility of a process where a contracting agency receives an unsolicited proposal based on a State law that does not require a competitive process. While the language in this section needed some clarification, the FHWA maintains that we are not obligated to participate in a project simply because a contracting agency followed its own procedures. Such procedures may include local preferences, minimal incentives for open competition or other provisions that are unacceptable for Federal-aid participation. Generally speaking, the FHWA does not participate in contracts that are based on unsolicited proposals (or developed under other non-competitive procedures) unless an emergency exists or the contract is shown to be cost effective. Upon receiving an unsolicited proposal, a contracting agency has the option of notifying other potential proposers of the receipt of an unsolicited proposal in the hope of receiving other competitive proposals or developing a new project with a similar scope of work. If a contracting agency wishes to use Federal-aid funding, it should develop procedures that address unsolicited proposals and provide for open and fair competition.

The TCA reiterated its belief that these provisions should be revised to be consistent with the TEA–21 provisions allowing ''any procurement process permitted by applicable State and local law.'' This commenter also suggested that a requirement that private developers comply with Federal

procurement procedures is likely to ''chill'' private interest in public-private agreements and negate potential private sector efficiencies. This entity believed that private developers should be permitted to enter into subcontracts in accordance with the terms of the public-private agreement and any applicable requirements of State and local laws without any Federal requirements that might be tied to Federal funding. This commenter also suggested that contracting agencies be allowed to provide price justifications if the private partner elected not to follow Federal procurement requirements for a project where Federal-aid funding was requested. The price justifications would be used to convince the FHWA that prices are fair and reasonable.

The FHWA disagrees with this commenter. Private developers will need to be aware of FHWA's requirements if the contracting agency anticipates using Federal-aid funds in the project. We disagree with the approach of using price justifications instead of open competition as a basis for Federal-aid participation.

We believe this section is consistent with the FHWA's long-standing policies for competitive contracting and to assure adequate procedures for the stewardship of public funds. The FHWA is merely being consistent with traditional Federal-aid funding and loan assistance programs in setting the policy for this section. Owners must be aware that they will have to comply with the FHWA's policies if they wish to use Federal-aid funding at some point in the project development process.

The final rule includes a provision that requires a competitive process and compliance with State and local laws as a basis for Federal participation in public-private partnerships. In addition, in order for such projects to be eligible for traditional Federal-aid funds, the final rule clarifies the FHWA's eligibility criteria. When the developer is acting as an agent of the owner, it must follow the appropriate Federal-aid procurement requirements (part 172 for engineering service contracts, part 635 for construction contracts and the requirements of this part for design-build contracts) for all prime contracts.

General Comments—Subparts B Through F

Several commenters felt that these sections are more prescriptive than necessary and that Federal preferences should not be stated in a rule. These commenters believed that the procurement mechanism used for a design-build project should be left to each contracting agency's discretion. Several of these commenters suggested that 23 U.S.C. 112(b)(3)(A) provides a clear indication of congressional intent not to interfere in State and local legislative decisions regarding the appropriate methods for procurement of design-build contracts.

The AASHTO and the TCA indicated that if this language is not changed, a monumental nationwide effort would be necessary to revise State and local laws and regulations to comply with the FHWA's requirements. Several of the commenters recommended that Subparts B through F be removed from the regulation and be provided to the industry as guidance. We disagree with these comments. The FHWA has already addressed the issue of congressional intent and disagrees with the recommendation to provide this section as guidance (see the discussion in the Flexibility section above).

The DBIA supported the use of two-phase selection procedures but recommended that all selection procedures have value and that the FWHA should consider allowing qualification-based selection procedures. This commenter suggested that qualification-based selection procedures are already authorized in a number of States and this would be consistent with the congressional intent of section 1307. The FHWA disagrees with this recommendation. We believe that price must be considered in the selection of the design-builder where construction is a major component of the scope of work under the design-build contract. The use of qualifications-based selection procedures or even quality based selection procedures is appropriate when the scope of work primarily consists of engineering or architectural services; however, where construction is the major component of the contract, price must be considered in selecting the design-builder.

A private individual supported the use of an alternate procurement process and suggested that, even when a competitive procurement process is used, the regulations should not preclude the opportunity for negotiations between the selected offeror and the contracting agency prior to award. This commenter believed that it is impossible to award a contract, where the design-builder is to provide financing, without a negotiations phase. The commenter stated that there simply are too many variables to address through a proposal process and suggested that this section be revised to specifically allow negotiations and to permit use of alternative procurement processes. This commenter further suggested that, where a pure qualifications-based selection process is used, or another alternative procurement process is used that does not include price competition, it would be appropriate to require some sort of price justification as a condition for Federal participation.

The FHWA agrees that there is merit in allowing limited negotiations after the selection of the design-builder but prior to the execution of the contract, however, we believe that such negotiations should be restricted to the clarifications that are necessary to prepare the final contract language. In order to be fair to the other proposers, such negotiations must not be used to substantially change the basic concepts that were provided in the successful offeror's proposal. We agree that when the design provided in the RFP documents is very conceptual, limited negotiations may be beneficial and necessary in order for both parties to clearly understand the issues and to ensure the contract clearly reflects this understanding.

Therefore, we have added § 636.513, Are limited negotiations allowed prior to contract execution? This provision allows for limited negotiations to clarify any remaining misunderstanding regarding scope, schedule and financing issues. However, the limited negotiations must not violate the prohibitions of § 636.507. It is not acceptable to use concepts from other proposers in final negotiations prior to contract execution.

The Texas DOT suggested, that when design is in the very conceptual stage (less than 5 percent complete), negotiations prior to award are often beneficial and necessary in order for both parties to ensure that their intent is clearly understood and reflected in the contract documents. This commenter noted that the Federal Transit Administration encourages negotiated design-build contracts. As noted above, we agree with the need for limited negotiations; however, we note that the Federal Transit Administration also requires a competitive acquisition process where price must be considered in the selection process if construction is a major element of the scope of work.

The ACEC recommended that contracting agencies use fully developed, pre-defined point award systems and judging rules that are described in the RFQ and/or RFP documents. This commenter believed that contracting agencies should place significant weight on technical qualifications and not over emphasize price at the expense of other essential criteria. The commenter believed that owners must assign knowledgeable

people to the selection team and require separate price and technical proposal submissions whereby price proposals are opened only after the technical scoring is completed and published. We agree that a contracting agency's evaluation and selection process need to be clearly defined in the RFQ and RFP documents; however, we believe the final rule provides appropriate flexibility while fostering an open and competitive process.

Section 636.201 What Selection Procedures and Award Criteria May Be Used?

The ASCE and NSPE expressed support for the mandatory use of the two-phase competitive source selection procedures and recommended that the FHWA amend the proposed regulation to require all STDs to use the two-phase competitive source-selection procedures for design-build projects, to the extent that the awarding of a design-build contract is consistent with State law.

On the other hand, the AGC supported the provisions that recommend, but do not require, the use of two-phase selection procedures. Based on its experiences, this commenter suggested that the two-phase selection process works well in most instances, but there may be certain cases where it might be appropriate to use a different selection procedure. This commenter highlighted the fact that the Congress recognized this, when debating the inclusion of design-build language in the TEA–21, it decided to reject a requirement for the use of the two-phase process. This commenter believed that the provisions address both of these concerns.

The FHWA does not believe it is appropriate to mandate the use of two-phase selection procedures in the Federal-aid highway program. While the Federal Government has elected to do so for Federal contracting, we do not believe that this is appropriate for the transportation industry. We strongly encourage contracting agencies to utilize two-phase selection procedures, however, the use of two-phase procedures remains optional.

Sections 636.202, 636.203, 636.204, 636.208 and 636.212

Very few substantive comments were received regarding these sections and, therefore, we are addressing these sections cumulatively. Peter Kiewit Sons', Inc. expressed support for these provisions while the TCA suggested that these provisions be converted to guidance.

We previously addressed the section to convert this rule to guidance. We made a minor revision in the final rule to use the term ''price'' instead of ''cost'' when referring to price proposals.

Section 636.205 Can Past Performance Be Used as an Evaluation Criteria?

The AGC suggested that in order for a two-phase selection process to work properly, it is important that contractors have faith in the system and that as much subjectivity as possible be removed from the process. It suggested that the FHWA work with the industry to develop guidance for the fair evaluation of past performance. The AGC indicated that this guidance should provide for a neutral appeals process, a means of ensuring the opinions of a single individual do not control the process, and a means to eliminate or at least mitigate a poor performance evaluation.

The ARTBA opposed the use of past performance as an evaluation criteria since it opens up the process to significant subjectivity. This commenter suggested that, if contracting agencies are allowed to use past performance as a selection criteria, its use should be limited to the short listing process and should not be used in final selection.

While the FHWA appreciates the industry concerns concerning the use of past performance, we believe that contracting agencies should have the ability to consider past performance in the procurement process; therefore, no revisions are made in the final rule. The FHWA concurs with the suggestions that guidance be cooperatively developed with the industry but this is outside the scope of this rulemaking.

Section 636.206 How Do I Evaluate Offerors Who Do Not Have a Record of Relevant Past Performance?

The DBIA and the Colorado DOT suggested that the provisions of this section were problematic and inconsistent with the provision in § 636.205(a) and (b). These commenters suggested that this requirement be deleted in its entirety. The TCA suggested that these provisions be converted to guidelines.

The FHWA utilized the FAR provisions for the language in this section. The intent of this section is to provide an equal footing for those firms who do not have a record of relevant past performance. Federal agencies have used similar requirements for several years and are available as a resource for contracting agencies that may have questions in this area.

Section 636.207 Is There a Limit on Short Listed Firms?

The AASHTO and the Virginia DOT suggested using the word ''shall'' with ''should'' in the first sentence and striking the phrase, ''and is consistent with the purposes and objectives of two-phase design-build contracting,'' as this appears to reinforce a preference for a two-phase procurement process. The South Carolina DOT recommended removing any restriction on the maximum number of firms to be short listed.

On the other hand, the DBIA supported the provisions; however, it suggested that there are times when it is appropriate to short list only two offerors and a provision should be made for this in the regulation as well.

The FHWA believes that there is sufficient flexibility in the language of the rule to address most of these concerns. However, it is not appropriate to short list only two firms as one commenter suggested.

Section 636.209 What Items Must Be Included in a Phase-Two Solicitation?

The AASHTO and the DBIA supported the provisions of this section. The TCA suggested that these provisions be converted to guidelines. Peter Kiewit Sons', Inc. suggested that the phase-two solicitation also should include the prime contract, applicable design and construction standards and criteria, procedures for requesting clarifications or changes in the RFP documents, intergovernmental agreements (if applicable), and any other item that offerors reasonably require to develop their proposed price, schedule and technical approach for the project.

The FHWA believes that language in the rule is sufficiently broad and clear. As noted in § 627.5 above, the final rule is also modified to clarify that contracting agencies may allow proposers to submit alternate technical proposals.

Section 636.210 What Requirements Apply to Projects Which Use the Modified Design-Build Procedure?

The New Jersey DOT disagreed with the provision that indicated the modified design-build technique should be limited to projects that are ''simple in scope.'' Based on its experience, this commenter believed that it is possible to use modified design-build on very complex projects. The FWHA agrees and has removed the term ''simple in scope'' from the final rule. We agree that many projects that have used the modified design-build method are not simple projects.

The AASHTO, the Florida DOT and the Virginia DOT recommended that this section be deleted. Assuming that the STDs would have discretion in choosing the appropriate procurement method for a given project, these commenters believed that the information in this section is unnecessary. The FHWA disagrees and believes that it is important to include a provision that describes this process.

The ASCE and the NSPE recommended that the FHWA delete any reference to the use of the ''modified design-build contracting method'' included in this section as it believed that this novel low-bid method is not sanctioned by other provisions of law and violates the requirements of the Federal Acquisition Reform Act of 1996. We disagree with these commenters. The Federal Acquisition Reform Act of 1996 does not apply to the Federal-aid highway program.

The Utah DOT noted the benefits of tradeoff techniques and questioned why tradeoffs were not allowed for modified design-build projects. This commenter suggested that the FHWA re-evaluate this decision. We disagree with this suggestion. Since modified design-build projects are awarded to the lowest price responsive proposer, it is not appropriate to consider tradeoffs between price and non-price factors when awarding such projects.

Section 636.211 When and How Should Tradeoffs Be Used?

Several commenters recommended that this section be deleted from the regulation as STDs should have the discretion to develop their own evaluation criteria, award formulas and selection procedures for each project.

The DBIA and Peter Kiewit Sons', Inc. questioned the requirement that cost or price must have a weight of at least 50 percent in the award criteria. These commenters believed that contracting agencies should have more flexibility in developing evaluation criteria and award formulas in order to obtain a best value selection. The DBIA questioned why the procedure of dividing the submitted price by the technical evaluation score would be viewed as complying with the 50 percent requirement. We appreciate the concern regarding the 50 percent price-weight criteria. The FHWA has used this criteria as a rule of thumb in providing guidance for the SEP–14 program. However, we recognize the problems associated with compliance with this requirement. Therefore, we have revised this section and § 636.302 of the final rule to be consistent with the provisions in 48 CFR 15.302 which provides that the solicitation shall state, at a minimum, whether all evaluation factors other than cost or price, when combined, are—(1) Significantly more important than cost or price; (2) Approximately equal to cost or price; or (3) Significantly less important than cost or price.

The DBIA and a private individual suggested that the term ''tradeoff process'' be replaced with ''tradeoff technique'' as discussed in the definition discussion above. As noted in § 636.103 above, we agree. We have revised the appropriate sections of this part in the final rule.

The ARTBA suggested that when tradeoff techniques are used, the solicitation should not only include all of the factors that will be evaluated, but also the numeric scale that will be applied to each factor. This commenter believed that many design-build solicitations only list weighted percentages for each factor, which can be easily manipulated after the fact. We disagree with this suggestion and believe contracting agencies need the ability to develop and appropriately weight evaluation criteria.

Section 636.301 How Should Proposal Evaluation Factors Be Selected?

The Illinois DOT suggested that STDs be provided maximum discretion in their decisionmaking process concerning the selection of evaluation factors. This commenter suggested that they be allowed to mirror the prequalification requirements in the request for proposal.

The FHWA believes the provisions were sufficiently broad and flexible. No revisions were made to the final rule.

Section 636.302 Are There Any Limitations on the Selection and Use of Proposal Evaluation Factors?

Two private individuals, the AASHTO, the Virginia DOT and the South Carolina DOT suggested that this section be deleted and rewritten to give the STDs broad discretion in selecting proposal evaluation factors. Peter Kiewit Sons', Inc. and the Washington State DOT questioned the requirement that cost or price must have a weight of at least 50 percent in the award criteria and suggested that contracting agencies be provided more flexibility.

On the other hand, the AGC and the Shamrock Paving Company believed that both the FHWA and the States have a fiduciary responsibility to manage the expenditure of Highway Trust Fund dollars in the most efficient fashion possible. This commenter recommended that price be a significant factor in contractor selection in the design-build process whether using the two-phase selection method or some other method.

As noted in the discussion for § 636.211 above, we are revising the language in this section to remove the 50 percent criteria. The final rule provides the following text in paragraph (a)(1): ''You must evaluate price in every source selection where construction is a significant component of the scope of work.''

Section 636.303 May Pre-Qualification Standards Be Used as Proposal Evaluation Criteria in the RFP?

Peter Kiewit Sons', Inc. commented that it is unclear whether ''proposal evaluation criteria'' are the same as ''selection criteria.'' This commenter believed that prequalification standards should be included in the selection criteria because qualifications are part of the value an owner receives. The FHWA believes that the proposed rule was clear in this respect. The term ''proposal evaluation criteria'' was used to describe the criteria for evaluating proposals.

A private individual suggested that there is always a range in the quality of the short listed offerors and it would be appropriate to further consider these differences in the second phase of a two-phase selection procedure. This commenter recommended that this section be deleted. The FHWA disagrees with this commenter. For most projects utilizing a two-phase selection process, proposers who are prequalified or short listed must be allowed to submit price and technical proposals with the understanding that the contracting agency considers their qualifications to be satisfactory and that they will be afforded equal standing in their preparation of price and technical proposals. However, we acknowledge that there may be certain projects where it is important to consider technical expertise and financial considerations as evaluation factors in the second phase of a two-phase selection process. For this reason, we have included the term ''specialized financial qualifications'' in paragraph (b)(1).

The TCA believed that it is absolutely critical that contracting agencies have the ability to reconsider the offeror's qualifications during proposal evaluations. This entity believed that this is especially true for revenue-financed projects, where the contractor's financial status and other qualifications are a key factor in making underwriting decisions. As noted above, we agree that a firm's financial qualification is an important criteria which, at the owner's discretion, merits additional consideration as an evaluation factor in

the second phase of a two-phase selection process.

Section 636.304 What Process May Be Used To Rate and Score Proposals?

The AASHTO and the Virginia DOT recommended that this statement be deleted from the rule as it does not add value. They recommended that a reference be made to compliance with each State's procurement laws.

The TCA believed the intent of this section is to reduce subjectivity in the evaluation process. This commenter suggested that, as a practical matter, it will not reduce subjectivity, because the decisions underlying a ''best value'' determination are, by their nature, subjective. The commenter stated that the best way to assure fairness in the evaluation process is to make sure that the individuals conducting the evaluations are qualified and do not have personal or business interests that would impact their evaluations.

We disagree with the recommendation to delete this section. The intent of this section is to clearly indicate that proposals will be evaluated solely on the factors and subfactors in the solicitation; to clearly indicate rating methods that are acceptable; and to clearly indicate that the relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation must be documented in the contract file. These provisions are necessary to ensure the integrity of the competitive proposal process. No revisions were made in the final rule.

Section 636.305 Can Price Information Be Provided to Analysts Who Are Reviewing Technical Proposals?

Peter Kiewit Sons' Inc. recommended that the FHWA require technical evaluations to be completed before the price proposals are reviewed, so that knowledge of pricing does not affect technical evaluations.

The TCA suggested that some contracting agencies may wish to use qualifications-based selection procedures and may not have a price proposal.

While it is desirable to perform the technical evaluations first so that knowledge of price does not influence technical review team members, the FHWA does not believe that it is appropriate to require this. This section is consistent with the FAR provisions used by the Federal government. No revisions are made in the final rule.

Sections 636.401 and 636.402

Peter Kiewit Sons' Inc. suggested that communications should be controlled to prevent the appearance of positive or negative prejudice towards an offeror.

The DBIA suggested eliminating the term ''clarifications'' and revising the term ''communications'' (see the discussion for § 636.103). A private individual suggested revising these sections to eliminate the need for the defined terms ''clarifications'' and ''communications'' but this commenter did not provide a recommended revision. The FHWA disagrees with the recommendations to modify the definitions of ''clarifications'' and ''communications'' for the reasons previously discussed (*see* § 636.103). Communications, clarifications and discussions are all important aspects of competitive acquisition. Each has a specific meaning based on case law. While the FHWA appreciates the concern of the commenter who suggested that such communications be controlled to prevent the appearance of positive or negative prejudice, we believe that the policies incorporated in this final rule will form the cornerstone of a fair, equitable process.

The TCA and the Colorado DOT recommended § 636.402 be revised to make it clear that proposers may get clarifications of the owner's RFP. That process is necessary to allow owners to clarify any sections of the RFP that are not clear at the time of issuance. The FHWA does not object to the concept of proposers asking the contracting agency for clarifications of the RFP documents. If it is necessary to clarify and revise the RFP document, the contracting agency could issue an addenda for this purpose. The following sentence will be added to § 636.402 for clarity: ''You may wish to clarify and revise the RFP document through an addenda process in response to questions from potential offerors.''

Sections 636.403, 636.404, 636.405, and 636.406

Peter Kiewit Sons' Inc. objected to the use of the competitive range. This commenter suggested, that if properly used, a two-phase selection process should eliminate the need to establish a competitive range.

The TCA believed that the issues associated with establishment of a competitive range are complex, and are intertwined with the laws applicable to the contracting agency, as well as its policies, and therefore, it is not appropriate for the FHWA to regulate the procurement process used by State and local agencies.

The FHWA disagrees with these commenters. The intent of § 636.403 is to allow contracting agencies to establish a competitive range to minimize the overall impact to industry proposers in a lengthy procurement process. The contracting agency will have the discretion to do this. This section will serve as the FHWA basis for participation in such decisions provided they do not unnecessarily restrict competition. No revisions are made in the final rule.

Sections 636.407 and 636.408

The New York State DOT recommended that these sections be revised to allow ''communications'' to cure minor proposal deficiencies, such as, inadvertent omissions. The Texas DOT perceived the provisions in § 636.407 as prohibiting the correction of a clerical error, an unclear term or an omission in a proposal. This commenter stated that design-build projects are typically long and costly, the proposals are relatively complex, and the proposal review process is very detailed. This commenter felt that it is reasonable to allow proposers to cure minor omissions.

The FHWA believes the rule language is satisfactory. The table that accompanies § 636.401 clearly indicates that minor or clerical revisions in a proposal are allowable during a clarification. The term ''deficiencies'' has a specific meaning based on case law (see § 636.103) , and therefore, the language in § 636.407 appropriately prohibits the use of communications to cure proposal deficiencies or material omissions. No revisions are made to the final rule.

Sections 636.501 Through 636.512

The AASHTO recommended that the provision of § 636.512(a) be deleted. It recommended that the evaluation of proposals be based on each State's procurement laws. Peter Kiewit Sons', Inc. strongly objected to the use of bargaining in the selection process as described in § 636.501. This commenter believed that the contracting agency should be limited to identifying sections of a proposal that do not meet RFP requirements, but no assistance or guidance should be given to the offeror regarding how the deficiency should be corrected. However, if all price proposals exceed an advertised budget, this commenter suggested that the contracting agency should have individual discussions with all offerors regarding the factors that may have led to high prices. The contracting agency should then issue a revised RFP document to all offerors.

The FHWA appreciates the viewpoints of this commenter. While we agree that contracting agencies will need to be judicious in their use of bargaining techniques, we also believe that the

provisions of § 636.507 will offset some of these concerns. The FHWA also believes that contracting agencies must have the right to maximize their ability to obtain the best value based on the requirements and evaluation factors set forth in the RFP document.

The Orange North-American Trade Rail Access Corridor Authority suggested that contracting agencies be allowed to negotiate with the apparent winning proposer as they would under a qualifications-based selection procedure. This commenter believed that negotiating with more than one team at a time can often lead to misunderstandings and disputes. As previously noted in the discussion of Subparts B through F, we believe that limited negotiations may be appropriate for clarifying certain contract provision prior to contract execution.

The DBIA, the Texas DOT and a private individual noted the use of the term ''final proposal revision'' in § 636.511 and suggested that it would be helpful to add the phrase ''also called best and final offer (BAFO)'' to the end of that sentence. We agree with this suggestion and have revised § 636.511 to incorporate the term ''best and final offer'' in the final rule.

The AASHTO and the Virginia DOT recommended the provisions of § 636.512(a) be deleted and, if necessary, a reference be provided for compliance with each State's procurement laws. We disagree with this recommendation and believe the rule is sufficiently clear.

Subpart F—Sections 636.601 Through 636.608

The AASHTO and the South Carolina, Virginia, Colorado and Washington State DOTs recommended that § 636.602(a) be replaced with the following sentence: ''The STD must follow State procedures and regulations for notification of unsuccessful offerors.'' These commenters stated that the procurement code in certain States does not allow the inclusion of the issues listed in paragraph (a) to be listed in the contracting agency's written notification to unsuccessful offerors.

These commenters also suggested that §§ 636.605 through 636.608 be deleted as these provisions are too prescriptive and contradict too many existing State procurement laws. The AASHTO recommended that § 636.604 be replaced with the following: ''Any offeror may request a debriefing. The STD may provide preaward and postaward debriefings in accordance with the State's procurement process.'' The Colorado DOT indicated that three days was not sufficient time to provide proposers with the information required by § 636.602.

The FHWA agrees with the commenters that this subpart is prescriptive. While notifications and debriefings are very important in maintaining the integrity of a competitive acquisition process, the FHWA believes that the goals and objectives of this rule can be maintained by allowing contracting agencies to follow State procedures in these areas. Therefore, the proposed rule for Subpart F is removed in its entirety. A new section, § 636.514 How may I provide notifications and debriefings?, has been added to Subpart E to allow contracting agencies to conduct pre-award and post-award notifications and debriefing in accordance with State approved procedures.

Section 637.207 Quality Assurance Program

Similar to the comments made in § 635.413, a number of commenters indicated that the use of warranties should be left to the discretion of the States and that the limitation of warranties to specific products or construction features is too restrictive. The FHWA is providing minor revisions to § 637.207(a)(1)(iv) to reference the revisions made to § 635.413(e). This will provide greater flexibility to STDs in allocating risk and appropriately structuring design-build contracts.

The Florida DOT suggested that contracting agencies be allowed to incorporate all construction engineering and inspection services (including verification testing) under the design-build contract. While this STD would still provide some level of oversight, it expressed a preference for including all construction, engineering and inspection services under one contract to avoid redundant inspection services. This commenter suggested that the FHWA's requirement for independent verification leads to unnecessary duplication, inefficient operations and wasted funding that could be better used elsewhere.

We disagree with this commenter and believe that it is necessary to have a reliable, verifiable program for accepting the completed work. This program must rely on a system of checks and balances, including verification tests that must be done by the owner (or the owner's agent). It is not acceptable to allow the design-builder to perform (or contract with another firm to perform) all of the acceptance tests for the project. While the FHWA's quality assurance policy provides the STDs with the flexibility to structure a broad-based acceptance program (even including the design-builder's quality control test results as part of the acceptance program), it is still absolutely critical that there be an independent, verification check on the design-builder's results by the owner for acceptance purposes.

The TCA suggested revisions to use the term ''engineer of record'' in lieu of the term ''State Engineer''. We disagree with this comment. In the case of the materials certification documentation referenced in this section, the term ''State Engineer'' is a term used to refer to the contracting agency's representative, and if a project was performed by a local public agency, it would refer to that agency's engineer, not the design-builder's engineer. The responsibility for this certification must remain with the contracting agency.

The Washington State DOT recommended that this section be modified to direct STDs not to use warranties for items of routine maintenance. We do not agree with this comment. The reference to § 635.413 should be sufficient for this purpose.

Part 710—Right-of-Way and Real Estate

Section 710.313 Design-Build Projects

The DPC agreed with the flexibility provided in this section, but noted that contracting agencies have powers that the private sector does not have (such as the right of eminent domain) and, therefore, the acquisition of right-of-way should generally rest with the contracting agency. Sundt Construction, Inc. indicated that right-of-way acquisitions should be the responsibility of the party that can best control this risk and that is normally the owner except in very unique circumstances. The FHWA agrees, but there may be certain circumstances, where it is reasonable to assign certain right-of-way related responsibilities to the design-builder. We believe the provisions in this section adequately address these circumstances.

The TCA recommended a specific revision to paragraph (c) to provide additional flexibility to the contracting agency. This commenter believed that in some cases, it may be desirable to allow the design-builder to start construction on parcels for which rights of access have been obtained pursuant to condemnation authority or negotiations, with the formal transfer of title occurring at a later date. We do not agree with this comment and believe that the final rule provides sufficient flexibility.

A private individual suggested that the FHWA perform a complete review for consistency, as there are a variety of references to right-of-way acquisition.

This commenter also suggested that, in general, the FHWA should allow the contracting agencies to advance the projects as long as there is a plan for the acquisition of right-of-way consistent with the schedule, State and Federal law and good business practice. We generally agree with this comment and believe that the final rule provides sufficient flexibility for this purpose.

The Florida DOT provided detailed comments and recommended revisions for several paragraphs as noted below. This commenter:

• Suggested that clarifications be provided for the submittal of right-of-way certifications and right-of-way availability statements. As previously indicated, we revised § 635.309(p)(1)(v) to allow contracting agencies to provide a right-of-way certification at the time of project authorization to certify that either all right-of-way work has been completed or that all necessary arrangements will be made for the completion of the necessary right-of-way related work. This certification is a necessary requirement for the FHWA's authorization of the project. On the other hand, not all STDs use right-of-way availability statements. The STDs must ensure that right-of-way is available prior to the design-builder entering onto the property and the start of physical construction. In the final rule, we have provided a modification to § 710.313(a) to require compliance with the right-of-way certification requirements of § 635.309(p) and a sentence to ensure that right-of-way is available prior to the start of physical construction.

• Disagreed with the provisions of paragraph (d)(1)(i) which require the design-builder to submit written acquisition and relocation procedures for the STD's approval. This commenter believed that this requirement is not necessary and compliance could be achieved through proper oversight of the contract. We agree that a revision is appropriate in this case. We have added a sentence to paragraph (d)(1)(i) that reads as follows: ''STD's which have an FHWA approved procedures manual, in accordance with 23 CFR 710.201(c), may comply with this section by requiring the design-builder to execute a certification in its proposals that it has received the approved right-of-way manual and will comply with the procedures.''

• Recommended that paragraph (d)(1)(ii) should explicitly reference 49 CFR 24.205 and its requirements. We agree with this comment and an appropriate reference is provided in paragraph (d)(1)(ii). The commenter further suggested that the additional detailed schedule related requirements should be removed as it may be more appropriate to provide for compliance through the contracting agency's oversight of the contract. We disagree with this comment. This language is appropriate and necessary to ensure compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act) as many contracting agencies do not have sufficient experience with the design-build contracting method.

• Believed that the requirement of paragraph (d)(2)(i) for a quality control system would be a good management tool. However, this commenter questioned the need for a regulation on this subject. We disagree. Paragraph (d)(2)(ii) provides great latitude to the STDs in complying with the requirement for a quality control system for right-of-way activities. This section is permissive to allow a consultant to perform the activity desired by the STD.

• Questioned the necessity for, and recommended that the deletion of paragraphs (d)(3) through (d)(6). We disagree with this comment. Although not a requirement, the establishment of a hold off zone around occupied properties is encouraged in paragraph (d)(3). While regulations of the U.S. Department of Labor's Occupational Safety and Health Administration may provide policy concerning the safety of construction workers, the FHWA believes that it is important to address this issue specifically for the instance where there are occupied properties adjacent to construction activities. Therefore, no changes were made in the final rule.

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

The FHWA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866, and within the meaning of the U.S. Department of Transportation's regulatory policies and procedures because of the substantial State and industry interest in the design-build contracting technique. The Office of Management and Budget has reviewed this document under E.O. 12866. The FHWA anticipates that the economic impact of this rulemaking would be minimal. However, this rule is considered to be significant because of the substantial State and industry interest in the design-build contracting technique.

None of the commenters provided evidence to indicate that there would be a material or adverse economic impact. The FHWA hereby certifies that the final rule would not adversely affect, in a material way, any sector of the economy.

In addition, this rule will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. This rule allows the STDs to use the design-build contracting technique—a contracting method that has been used only on an experimental basis to date in the Federal-aid highway program. The rule will not affect the total Federal funding available to the STDs under the Federal-aid highway program. Therefore, it is anticipated that an increased use of design-build delivery method will not yield significant economic impacts to the Federal-aid highway program. Consequently, a full regulatory evaluation is not required. The increased usage of the design-build contracting method may result in certain efficiencies in the cost and/or time it normally takes to deliver a transportation project.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the FHWA has evaluated the effects of this action on small entities and has determined that the final rule will not have a significant economic impact on a substantial number of small entities.

Several commenters expressed a concern that this rule may have an adverse impact on small disadvantaged business enterprises and other small firms; however, one commenter recommended that the FHWA not give preferential treatment to a firm based on its size during the selection process because such a limitation may limit the ability of engineering firms from leading the design-build team.

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

Design-build contracts will present subcontracting opportunities that are similar to or greater than those available under design-bid-build contracts. In many cases, design-build contractors will subcontract for design services. Under the traditional design-bid-build system, owners typically prepare a

design with their own staff or will contract with a design consultant for this work. Based on 2001 data provided by the Pennsylvania Department of Transportation (PennDOT), the average subcontracting amount for design-build contracts compares favorably with the average subcontracting amount for design-bid-build projects in the same contract size range. While the number of PennDOT completed design-build projects is small, this data (shown in Table 1) shows that there are comparable subcontracting opportunities for relatively small design-build projects.

TABLE 1

PennDOT projects contract size	Design-build		Design-bid-build	
	No. of projects	Subcontracting percentage	No. of projects	Subcontracting percentage
$0–5 million	3	19	517	18
$5–10 million	2	33	25	29
$10–20 million	0		13	30
> $20 million	0		15	38

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

TABLE 2

Project	Owner	Contract size (million)	Subcontracting percentages
Eastern Toll Road	Transportation Corridors Agency, CA	$767	39
San Joaquin Hills Toll Road	Transportation Corridors Agency, CA	799.7	41
I–15 Reconstruction	Utah DOT	1,318	54
I–17 Reconstruction	Arizona DOT	79.7	33
E–470 Segments I and II	E–470 Public Highway Authority	323.6	90
Southern Connector	South Carolina DOT	106.4	87
Conway Bypass	South Carolina DOT	386.0	89

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

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

Unfunded Mandates Reform Act of 1995

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

Executive Order 13132 (Federalism)

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

Executive Order 13175 (Tribal Consultation)

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

Executive Order 12372 (Intergovernmental Review)

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

Federal programs and activities apply to this program.

Executive Order 12988 (Civil Justice Reform)

This final rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

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

Executive Order 12630 (Taking of Private Property)

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

Executive Order 13211 (Energy Effects)

We have analyzed this final rule under Executive Order 13211, Action Concerning Regulation That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a significant energy action under that order because, although it is a significant regulatory action under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

Paperwork Reduction Act

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

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

Under the final rule, the STDs will no longer be required to develop work plans or evaluation reports for ''qualified projects.'' However, because of the ''qualified project'' definition in section 1307 of TEA–21, the FHWA will continue to approve ''non-qualified'' design-build projects under SEP–14. Therefore, a SEP–14 work plan and evaluation will continue to be necessary for these projects. The evaluation reports will document the lessons learned through design-build contracting and this information will be shared with others in the highway industry. The collection of SEP–14 information does not entail the reporting of information in response to identical questions. The SEP–14 design-build evaluation reports do not involve answering specific questions; they address issues relating to competitive acquisition. Each is a one of a kind document that relates to the lessons learned on a particular project.

National Environmental Policy Act

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

Regulation Identification Number

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

List of Subjects

23 CFR Part 627

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

23 CFR Part 635

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

23 CFR Part 636

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

23 CFR Part 637

Construction inspection and approval; Highways and roads.

23 CFR 710

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

Issued on: November 22, 2002.

Mary E. Peters,

Federal Highway Administrator.

For reasons set forth in the preamble, the FHWA amends Chapter I of title 23, Code of Federal Regulations, as set forth below:

PART 627—VALUE ENGINEERING

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

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

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

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

§ 627.5 General principles and procedures.

* * * * *

(e) In the case of a Federal-aid design-build project meeting the project criteria in 23 CFR 627.1(a), the STDs shall fulfill the value engineering analysis requirement by performing a value engineering analysis prior to the release of the Request for Proposals document.

PART 635—CONSTRUCTION AND MAINTENANCE

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

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

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

6. Amend § 635.102 by removing the definition of ''certification acceptance,'' and by adding the definition of ''design-build project'' to read as follows:

§ 635.102 Definitions.

* * * * *

Design-build project means a project to be developed using one or more design-build contracts.

* * * * *

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

§ 635.104 Method of construction.

* * * * *

(c) In the case of a design-build project, the requirements of 23 CFR part 636 and the appropriate provisions pertaining to design-build contracting in this part will apply. However, no justification of cost effectiveness is necessary in selecting projects for the design-build delivery method.

8. Revise § 635.107 to read as follows:

§ 635.107 Participation by disadvantaged business enterprises.

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

(b) In the case of a design-build project funded with title 23 funds, the requirements of 49 CFR part 26 and the State's approved DBE plan apply. If DBE goals are set, DBE commitments above the goal must not be used as a proposal evaluation factor in determining the successful offeror.

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

§ 635.109 Standardized changed condition clauses.

* * * * *

(c) In the case of a design-build project, STDs are strongly encouraged to use ''suspensions of work ordered by the engineer'' clauses, and may consider ''differing site condition'' clauses and ''significant changes in the character of work'' clauses which are appropriate for the risk and responsibilities that are shared with the design-builder.

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

§ 635.110 Licensing and qualification of contractors.

* * * * *

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

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

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

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

§ 635.112 Advertising for bids and proposals.

* * * * *

(i) In the case of a design-build project, the following requirements apply:

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

(2) The STD may decide the appropriate solicitation schedule for all design-build requests. This includes all project advertising, the release of the Request for Qualifications document, the release of the Request for Proposals document and all deadlines for the receipt of qualification statements and proposals. Typical advertising periods range from six to ten weeks and can be longer for large, complicated projects.

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

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

§ 635.113 Bid opening and bid tabulations.

* * * * *

(c) In the case of a design-build project, the following requirements apply:

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

(i) The process of handling proposals and information;

(ii) The review and evaluation of proposals;

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

(iv) The announcement of the successful offeror.

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

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

§ 635.114 Award of contract and concurrence in award.

* * * * *

(k) In the case of a design-build project, the following requirements apply: Design-build contracts shall be awarded in accordance with the Request for Proposals document. *See* 23 CFR Part 636, Design-build Contracting, for details.

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

§ 635.116 Subcontracting and contractor responsibilities.

* * * * *

(d) In the case of a design-build project, the following requirements apply:

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

(2) At their discretion, the STDs may establish a minimum percentage of work that must be done by the design-builder. For the purpose of this section, the term design-builder may include any firms that are equity participants in the design-builder, their sister and parent companies, and their wholly owned subsidiaries;

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

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

§ 635.122 Participation in progress payments.

* * * * *

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

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

§ 635.309 Authorization.

* * * * *

(p) In the case of a design-build project, the following certification requirements apply:

(1) The FHWA's project authorization (authorization to advertise or release the Request for Proposals document) will not be issued until the following conditions have been met:

(i) All projects must conform with the statewide and metropolitan transportation planning requirements (23 CFR part 450).

(ii) All projects in air quality nonattainment and maintenance areas must meet all transportation conformity requirements (40 CFR parts 51 and 93).

(iii) The NEPA review process has been concluded. (*See* 23 CFR 636.109).

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

(v) A statement is received from the STD that either all right-of-way, utility, and railroad work has been completed or that all necessary arrangements will be made for the completion of right of way, utility, and railroad work.

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

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

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

(2) During a conformity lapse, a design-build project (including right-of-way acquisition activities) may continue if, prior to the conformity lapse, the NEPA process was completed and the project has not changed significantly in design scope, the FHWA authorized the design-build project and the project met transportation conformity requirements (40 CFR parts 51 and 93).

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

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

§ 635.411 Material or product selection.

* * * * *

(f) In the case of a design-build project, the following requirements apply: Federal funds shall not participate, directly or indirectly, in payment for any premium or royalty on any patented or proprietary material, specification, or process specifically set forth in the Request for Proposals document unless the conditions of paragraph (a) of this section are applicable.

18. Amend § 635.413 by revising the section heading and adding paragraph (e) to read as follows:

§ 635.413 Guaranty and warranty clauses.

* * * * *

(e) In the case of a design-build project, the following requirements will apply instead of paragraphs (a) through (d) of this section.

(1) General project warranties may be used on NHS projects, provided:

(i) The term of the warranty is short (generally one to two years);

(ii) The warranty is not the sole means of acceptance;

(iii) The warranty must not include items of routine maintenance which are not eligible for Federal participation; and,

(iv) The warranty may include the quality of workmanship, materials and other specific tasks identified in the contract.

(2) Performance warranties for specific products on NHS projects may be used at the STD's discretion. If performance warranties are used, detailed performance criteria must be provided in the Request for Proposal document.

(3) The STD may follow its own procedures regarding the inclusion of warranty provisions on non-NHS Federal-aid design-build contracts.

(4) For best value selections, the STD may allow proposers to submit alternate warranty proposals that improve upon the warranty terms in the RFP document. Such alternate warranty proposals must be in addition to the base proposal that responds to the RFP requirements.

19. Add Part 636 to read as follows:

PART 636—DESIGN-BUILD CONTRACTING

Subpart A—General

Sec.

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636.103 What are the definitions of terms used in this part?
636.104 Does this part apply to all Federal-aid design-build projects?
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636.110 What procedures may be used for solicitations and receipt of proposals?
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636.503 Must I notify offerors of my intent to use/not use discussions?
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636.505 Must a contracting agency establish a competitive range if it intends to have discussions with offerors?
636.506 What issues must be covered in discussions?
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636.508 Can price be an issue in discussions?
636.509 Can offerors revise their proposals as a result of discussions?
636.510 Can the competitive range be further defined once discussions have begun?
636.511 Can there be more than one round of discussions?
636.512 What is the basis for the source selection decision?
636.513 Are limited negotiations allowed prior to contract execution?
636.514 How may I provide notifications and debriefings?

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

Subpart A—General

§ 636.101 What does this part do?

This part describes the FHWA's policies and procedures for approving design-build projects financed under title 23, United States Code (U.S.C.). This part satisfies the requirement of section 1307(c) of the Transportation Equity Act for the 21st Century (TEA–21), enacted on June 9, 1998. The contracting procedures of this part apply to all design-build project funded under title 23, U.S.C.

§ 636.102 Does this part apply to me?

(a) This part uses a plain language format to make the rule easier for the general public and business community to use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Unless otherwise noted, the pronoun ''you'' means the primary recipient of Federal-aid highway funds, the State Transportation Department (STD). Where the STD has an agreement with a local public agency (or other governmental agency) to administer a Federal-aid design-build project, the term ''you'' will also apply to that contracting agency.

§ 636.103 What are the definitions of terms used in this part?

Unless otherwise specified in this part, the definitions in 23 U.S.C. 101(a) are applicable to this part. Also, the following definitions are used:

Adjusted low bid means a form of best value selection in which qualitative aspects are scored on a 0 to 100 scale expressed as a decimal; price is then divided by qualitative score to yield an ''adjusted bid'' or ''price per quality point.'' Award is made to offeror with the lowest adjusted bid.

Best value selection means any selection process in which proposals contain both price and qualitative components and award is based upon a combination of price and qualitative considerations.

Clarifications means a written or oral exchange of information which takes place after the receipt of proposals when award without discussions is contemplated. The purpose of clarifications is to address minor or clerical revisions in a proposal.

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

Competitive acquisition means an acquisition process which is designed to foster an impartial and comprehensive evaluation of offerors' proposals, leading to the selection of the proposal representing the best value to the contracting agency.

Competitive range means a list of the most highly rated proposals based on the initial proposal rankings. It is based on the rating of each proposal against all evaluation criteria.

Contracting agency means the public agency awarding and administering a design-build contract. The contracting agency may be the STD or another State or local public agency.

Deficiency means a material failure of a proposal to meet a contracting agency requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.

Design-bid-build means the traditional project delivery method where design and construction are sequential steps in the project development process.

Design-build contract means an agreement that provides for design and construction of improvements by a contractor or private developer. The term encompasses design-build-maintain, design-build-operate, design-build-finance and other contracts that include services in addition to design and construction. Franchise and concession agreements are included in the term if they provide for the franchisee or concessionaire to develop the project which is the subject of the agreement.

Design-builder means the entity contractually responsible for delivering the project design and construction.

Discussions mean written or oral exchanges that take place after the establishment of the competitive range with the intent of allowing the offerors to revise their proposals.

Fixed price/best design means a form of best value selection in which contract price is established by the owner and stated in the Request for Proposals document. Design solutions and other qualitative factors are evaluated and rated, with award going to the firm offering the best qualitative proposal for the established price.

Intelligent Transportation System (ITS) services—means services which provide for the acquisition of technologies or systems of technologies (*e.g.*, computer hardware or software, traffic control devices, communications link, fare payment system, automatic vehicle location system, *etc.*) that provide or contribute to the provision of one or more ITS user services as defined in the National ITS Architecture.

Modified design-build means a variation of design-build in which the

contracting agency furnishes offerors with partially complete plans. The design-builders role is generally limited to the completion of the design and construction of the project.

Organizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the owner, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

Prequalification means the contracting agency's process for determining whether a firm is fundamentally qualified to compete for a certain project or class of projects. The prequalification process may be based on financial, management and other types of qualitative data. Prequalification should be distinguished from short listing.

Price proposal means the price submitted by the offeror to provide the required design and construction services.

Proposal modification means a change made to a proposal before the solicitation closing date and time, or made in response to an amendment, or made to correct a mistake at any time before award.

Proposal revision means a change to a proposal made after the solicitation closing date, at the request of or as allowed by a contracting officer, as the result of negotiations.

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

Request for Proposals (RFP) means the document that describes the procurement process, forms the basis for the final proposals and may potentially become an element in the contract.

Request for Qualification (RFQ) means the document issued by the owner in Phase I of the two-phased selection process. It typically describes the project in enough detail to let potential offerors determine if they wish to compete and forms the basis for requesting qualifications submissions from which the most highly qualified offerors can be identified.

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

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

Solicitation means a public notification of an owner's need for information, qualifications, or proposals related to identified services.

Stipend means a monetary amount sometimes paid to unsuccessful offerors.

Technical proposal means that portion of a design-build proposal which contains design solutions and other qualitative factors that are provided in response to the RFP document.

Tradeoff means an analysis technique involving a comparison of price and non-price factors to determine the best value when considering the selection of other than the lowest priced proposal.

Two-phase selection process means a procurement process in which the first phase consists of short listing (based on qualifications submitted in response to an RFQ) and the second phase consists of the submission of price and technical proposals in response to an RFP.

Weakness means a flaw in the proposal that increases the risk of unsuccessful contract performance. A significant weakness in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.

Weighted criteria process means a form of best value selection in which maximum point values are pre-established for qualitative and price components, and award is based upon high total points earned by the offerors.

§ 636.104 Does this part apply to all Federal-aid design-build projects?

The provisions of this part apply to all Federal-aid design-build projects within the highway right-of-way or linked to a Federal-aid highway project (*i.e.*, the project would not exist without another Federal-aid highway project). Projects that are not located within the highway right-of-way, and not linked to a Federal-aid highway project may utilize State-approved procedures.

§ 636.105 Is the FHWA requiring the use of design-build?

No, the FHWA is neither requiring nor promoting the use of the design-build contracting method. The design-build contracting technique is optional.

§ 636.106 What type of projects may be used with design-build contracting?

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

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

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

(b) The FHWA Division Administrator may also approve other design-build projects (which do not meet the ''qualified projects'' definition) by using Special Experimental Projects No. 14 (SEP–14), ''Innovative Contracting Practices,'' [1] provided the project meets the requirements of this part. Projects which do not meet the requirements of this part (either ''qualified or non-qualified'' projects) must be submitted to the FHWA Headquarters for concept approval.

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

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

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

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

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

In terms of the design-build procurement process:

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

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

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

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

§ 636.110 What procedures may be used for solicitations and receipt of proposals?

You may use your own procedures for the solicitation and receipt of proposals and information including the following:

(a) Exchanges with industry before receipt of proposals;

(b) RFQ, RFP and contract format;

(c) Solicitation schedules;

(d) Lists of forms, documents, exhibits, and other attachments;

(e) Representations and instructions;

(f) Advertisement and amendments;

(g) Handling proposals and information; and

(h) Submission, modification, revisions and withdrawal of proposals.

§ 636.111 Can oral presentations be used during the procurement process?

(a) Yes, the use of oral presentations as a substitute for portions of a written proposal can be effective in streamlining the source selection process. Oral presentations may occur at any time in the acquisition process, however, you must comply with the appropriate State procurement integrity standards.

(b) Oral presentations may substitute for, or augment, written information. You must maintain a record of oral presentations to document what information you relied upon in making the source selection decision. You may decide the appropriate method and level of detail for the record (*e.g.*, videotaping, audio tape recording, written record, contracting agency notes, copies of offeror briefing slides or presentation notes). A copy of the record should be placed in the contract file and may be provided to offerors upon request.

§ 636.112 May stipends be used?

At your discretion, you may elect to pay a stipend to unsuccessful offerors who have submitted responsive proposals. The decision to do so should be based on your analysis of the estimated proposal development costs and the anticipated degree of competition during the procurement process.

§ 636.113 Is the stipend amount eligible for Federal participation?

(a) Yes, stipends are eligible for Federal-aid participation. Stipends are recommended on large projects where there is substantial opportunity for innovation and the cost of submitting a proposal is significant. On such projects, stipends are used to:

(1) Encourage competition;

(2) Compensate unsuccessful offerors for a portion of their costs (usually one-third to one-half of the estimated proposal development cost); and

(3) Ensure that smaller companies are not put at a competitive disadvantage.

(b) Unless prohibited by State law, you may retain the right to use ideas from unsuccessful offerors if they accept stipends. If stipends are used, the RFP should describe the process for distributing the stipend to qualifying offerors.

§ 636.114 What factors should be considered in risk allocation?

(a) You may consider, identify, and allocate the risks in the RFP document and define these risks in the contract. Risk should be allocated with consideration given to the party who is in the best position to manage and control a given risk or the impact of a given risk.

(b) Risk allocation will vary according to the type of project and location, however, the following factors should be considered:

(1) Governmental risks, including the potential for delays, modifications, withdrawal, scope changes, or additions that result from multi-level Federal, State, and local participation and sponsorship;

(2) Regulatory compliance risks, including environmental and third-party issues, such as permitting, railroad, and utility company risks;

(3) Construction phase risks, including differing site conditions, traffic control, interim drainage, public access, weather issues, and schedule;

(4) Post-construction risks, including public liability and meeting stipulated performance standards; and

(5) Right-of-way risks including acquisition costs, appraisals, relocation delays, condemnation proceedings, including court costs and others.

§ 636.115 May I meet with industry to gather information concerning the appropriate risk allocation strategies?

(a) Yes, information exchange at an early project stage is encouraged if it facilitates your understanding of the capabilities of potential offerors. However, any exchange of information must be consistent with State procurement integrity requirements. Interested parties include potential offerors, end users, acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.

(b) The purpose of exchanging information is to improve the understanding of your requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy your requirements, and enhancing your ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.

(c) An early exchange of information can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules. This also includes the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions. Some techniques to promote early exchanges of information are as follows:

(1) Industry or small business conferences;

(2) Public hearings;

(3) Market research;

(4) One-on-one meetings with potential offerors (any meetings that are substantially involved with potential contract terms and conditions should include the contracting officer; also see paragraph (e) of this section regarding restrictions on disclosure of information);

(5) Presolicitation notices;

(6) Draft RFPs;

(7) Request for Information (RFI) ;

(8) Presolicitation or preproposal conferences; and

(9) Site visits.

(d) RFIs may be used when you do not intend to award a contract, but want to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these notices are not offers and cannot be accepted to form a binding contract. There is no required format for an RFI.

(e) When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information shall be made available to all potential offerors as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. Information provided to a particular offeror in response to that offeror's request must not be disclosed if doing so would reveal the potential offeror's confidential business strategy. When a presolicitation or preproposal conference is conducted, materials distributed at the conference should be made available to all potential offerors, upon request.

§ 636.116 What organizational conflict of interest requirements apply to design-build projects?

(a) State statutes or policies concerning organizational conflict of interest should be specified or referenced in the design-build RFQ or RFP document as well as any contract for engineering services, inspection or technical support in the administration of the design-build contract. All design-build solicitations should address the following situations as appropriate:

(1) Consultants and/or sub-consultants who assist the owner in the preparation of a RFP document will not be allowed to participate as an offeror or join a team submitting a proposal in response to the RFP. However, a contracting agency may determine there is not an organizational conflict of interest for a consultant or sub-consultant where:

(i) The role of the consultant or sub-consultant was limited to provision of preliminary design, reports, or similar ''low-level'' documents that will be incorporated into the RFP, and did not include assistance in development of instructions to offerors or evaluation criteria, or

(ii) Where all documents and reports delivered to the agency by the consultant or sub-consultant are made available to all offerors.

(2) All solicitations for design-build contracts, including related contracts for inspection, administration or auditing services, must include a provision which:

(i) Directs offerors attention to this subpart;

(ii) States the nature of the potential conflict as seen by the owner;

(iii) States the nature of the proposed restraint or restrictions (and duration) upon future contracting activities, if appropriate;

(iv) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation; and

(v) Requires offerors to provide information concerning potential organizational conflicts of interest in their proposals. The apparent successful offerors must disclose all relevant facts concerning any past, present or currently planned interests which may present an organizational conflict of interest. Such firms must state how their interests, or those of their chief executives, directors, key project personnel, or any proposed consultant, contractor or subcontractor may result, or could be viewed as, an organizational conflict of interest. The information may be in the form of a disclosure statement or a certification.

(3) Based upon a review of the information submitted, the owner should make a written determination of whether the offeror's interests create an actual or potential organizational conflict of interest and identify any actions that must be taken to avoid, neutralize, or mitigate such conflict. The owner should award the contract to the apparent successful offeror unless an organizational conflict of interest is determined to exist that cannot be avoided, neutralized, or mitigated.

(b) The organizational conflict of interest provisions in this subpart provide minimum standards for STDs to identify, mitigate or eliminate apparent or actual organizational conflicts of interest. To the extent that State-developed organizational conflict of interest standards are more stringent than that contained in this subpart, the State standards prevail.

§ 636.117 What conflict of interest standards apply to individuals who serve as selection team members for the owner?

State laws and procedures governing improper business practices and personal conflicts of interest will apply to the owner's selection team members. In the absence of such State provisions, the requirements of 48 CFR Part 3, Improper Business Practices and Personal Conflicts of Interest, will apply to selection team members.

§ 636.118 Is team switching allowed after contract award?

Where the offeror's qualifications are a major factor in the selection of the successful design-builder, team member switching (adding or switching team members) is discouraged after contract award. However, the owner may use its discretion in reviewing team changes or team enhancement requests on a case-by-case basis. Specific project rules related to changes in team members or changes in personnel within teams should be explicitly stated by the STD in all project solicitations.

§ 636.119 How does this part apply to a project developed under a public-private partnership?

(a) In order for a project being developed under a public-private agreement to be eligible for Federal-aid funding (including traditional Federal-aid funds, direct loans, loan guarantees, lines of credit, or some other form of credit assistance), the contracting agency must have awarded the contract to the public-private entity through a competitive process that complies with applicable State and local laws.

(b) If a contracting agency wishes to utilize traditional Federal-aid funds in a project under a public-private agreement, the applicability of Federal-aid procurement procedures will depend on the nature of the public-private agreement.

(1) If the public-private agreement establishes price and an assignment of risk, then all subsequent contracts executed by the developer are considered to be subcontracts and are not subject to Federal-aid procurement requirements.

(2) If the public-private agreement does not establish price and an assignment of risk, the developer is considered to be an agent of the owner, and the developer must follow the appropriate Federal-aid procurement requirements (23 CFR part 172 for engineering service contracts, 23 CFR part 635 for construction contracts and the requirements of this part for design-build contracts) for all prime contracts (not subcontracts).

(c) The STD must ensure such public-private projects comply with all non-procurement requirements of 23 U. S. Code, regardless of the form of the FHWA funding (traditional Federal-aid funding or credit assistance). This includes compliance with all FHWA policies such as environmental and right-of-way requirements and compliance with such construction contracting requirements as Buy America, Davis-Bacon minimum wage rate requirements, for federally funded construction or design-build contracts under the public-private agreement.

Subpart B—Selection Procedures, Award Criteria

§ 636.201 What selection procedures and award criteria may be used?

You should consider using two-phase selection procedures for all design-build projects. However, if you do not believe two-phase selection procedures are appropriate for your project (based on the criteria in § 636.202), you may use a single phase selection procedure or the modified-design-build contracting method. The following procedures are available:

Selection procedure	Criteria for using a selection procedure	Award criteria options
(a) Two-Phase Selection Procedures (RFQ followed by RFP).	§ 636.202	Lowest price, Adjusted low-bid (price per quality point), meets criteria/low bid, weighted criteria process, fixed price/best design, best value.
(b) Single Phase (RFP)	Project not meeting the criteria in § 636.202	All of the award criteria in item (a) of this table.
(c) Modified Design-Build (may be one or two phases).	Any project	Lowest price technically acceptable.

§ 636.202 When are two-phase design-build selection procedures appropriate?

You may consider the following criteria in deciding whether two-phase selection procedures are appropriate. A negative response may indicate that two-phase selection procedures are not appropriate.

(a) Are three or more offers anticipated?

(b) Will offerors be expected to perform substantial design work before developing price proposals?

(c) Will offerors incur a substantial expense in preparing proposals?

(d) Have you identified and analyzed other contributing factors, including:

(1) The extent to which you have defined the project requirements?

(2) The time constraints for delivery of the project?

(3) The capability and experience of potential contractors?

(4) Your capability to manage the two-phase selection process?

(5) Other criteria that you may consider appropriate?

§ 636.203 What are the elements of two-phase selection procedures for competitive proposals?

The first phase consists of short listing based on a RFQ. The second phase consists of the receipt and evaluation of price and technical proposals in response to a RFP.

§ 636.204 What items may be included in a phase-one solicitation?

You may consider including the following items in any phase-one solicitation:

(a) The scope of work;

(b) The phase-one evaluation factors and their relative weights, including:

(1) Technical approach (but not detailed design or technical information);

(2) Technical qualifications, such as—

(i) Specialized experience and technical competence;

(ii) Capability to perform (including key personnel); and

(iii) Past performance of the members of the offeror's team (including the architect-engineer and construction members);

(3) Other appropriate factors (excluding cost or price related factors, which are not permitted in phase-one);

(c) Phase-two evaluation factors; and

(d) A statement of the maximum number of offerors that will be short listed to submit phase-two proposals.

§ 636.205 Can past performance be used as an evaluation criteria?

(a) Yes, past performance information is one indicator of an offeror's ability to perform the contract successfully. Past performance information may be used as an evaluation criteria in either phase-one or phase-two solicitations. If you elect to use past performance criteria, the currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance may be considered.

(b) Describe your approach for evaluating past performance in the solicitation, including your policy for evaluating offerors with no relevant performance history. You should provide offerors an opportunity to identify past or current contracts (including Federal, State, and local government and private) for efforts similar to the current solicitation.

(c) If you elect to request past performance information, the solicitation should also authorize offerors to provide information on problems encountered on the identified contracts and the offeror's corrective actions. You may consider this information, as well as information obtained from any other sources, when evaluating the offeror's past performance. You may use your discretion in determining the relevance of similar past performance information.

(d) The evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the current acquisition.

§ 636.206 How do I evaluate offerors who do not have a record of relevant past performance?

In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance.

§ 636.207 Is there a limit on short listed firms?

Normally, three to five firms are short listed, however, the maximum number specified shall not exceed five unless you determine, for that particular solicitation, that a number greater than five is in your interest and is consistent with the purposes and objectives of two-phase design-build contracting.

§ 636.208 May I use my existing prequalification procedures with design-build contracts?

Yes, you may use your existing prequalification procedures for either construction or engineering design firms as a supplement to the procedures in this part.

§ 636.209 What items must be included in a phase-two solicitation?

(a) You must include the requirements for technical proposals and price proposals in the phase-two solicitation. All factors and significant subfactors that will affect contract award and their relative importance must be stated clearly in the solicitation. Use your own procedures for the solicitation as long as it complies the requirements of this part.

(b) At your discretion, you may allow proposers to submit alternate technical concepts in their proposals as long as these alternate concepts do not conflict with criteria agreed upon in the environmental decision making process. Alternate technical concept proposals may supplement, but not substitute for base proposals that respond to the RFP requirements.

§ 636.210 What requirements apply to projects which use the modified design-build procedure?

(a) Modified design-build selection procedures (lowest price technically

acceptable source selection process) may be used for any project.

(b) The solicitation must clearly state the following:

(1) The identification of evaluation factors and significant subfactors that establish the requirements of acceptability.

(2) That award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors.

(c) The contracting agency may forgo a short listing process and advertise for the receipt of proposals from all responsible offerors. The contract is then awarded to the lowest responsive bidder.

(d) Tradeoffs are not permitted, however, you may incorporate cost-plus-time bidding procedures (A+B bidding), lane rental, or other cost-based provisions in such contracts.

(e) Proposals are evaluated for acceptability but not ranked using the non-cost/price factors.

(f) Exchanges may occur (see subpart D of this part).

§ 636.211 When and how should tradeoffs be used?

(a) At your discretion, you may consider the tradeoff technique when it is desirable to award to other than the lowest priced offeror or other than the highest technically rated offeror.

(b) If you use a tradeoff technique, the following apply:

(1) All evaluation factors and significant subfactors that will affect contract award and their relative importance must be clearly stated in the solicitation; and

(2) The solicitation must also state, at a minimum, whether all evaluation factors other than cost or price, when combined, are—

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

(ii) Approximately equal to cost or price; or

(iii) Significantly less important than cost or price.

§ 636.212 To what extent must tradeoff decisions be documented?

When tradeoffs are performed, the source selection records must include the following:

(a) An assessment of each offeror's ability to accomplish the technical requirements; and

(b) A summary, matrix, or quantitative ranking, along with appropriate supporting narrative, of each technical proposal using the evaluation factors.

Subpart C—Proposal Evaluation Factors

§ 636.301 How should proposal evaluation factors be selected?

(a) The proposal evaluation factors and significant subfactors should be tailored to the acquisition.

(b) Evaluation factors and significant subfactors should:

(1) Represent the key areas of importance and emphasis to be considered in the source selection decision; and

(2) Support meaningful comparison and discrimination between and among competing proposals.

§ 636.302 Are there any limitations on the selection and use of proposal evaluation factors?

(a) The selection of the evaluation factors, significant subfactors and their relative importance are within your broad discretion subject to the following requirements:

(1) You must evaluate price in every source selection where construction is a significant component of the scope of work.

(2) You must evaluate the quality of the product or service through consideration of one or more non-price evaluation factors. These factors may include (but are not limited to) such criteria as:

(i) Compliance with solicitation requirements;

(ii) Completion schedule (contractual incentives and disincentives for early completion may be used where appropriate); or

(iii) Technical solutions.

(3) At your discretion, you may evaluate past performance, technical experience and management experience (subject to § 636.303(b)).

(b) All factors and significant subfactors that will affect contract award and their relative importance must be stated clearly in the solicitation.

§ 636.303 May pre-qualification standards be used as proposal evaluation criteria in the RFP?

(a) If you use a prequalification procedure or a two-phase selection procedure to develop a short list of qualified offerors, then pre-qualification criteria should not be included as proposal evaluation criteria.

(b) The proposal evaluation criteria should be limited to the quality, quantity, value and timeliness of the product or service being proposed. However, there may be circumstances where it is appropriate to include prequalification standards as proposal evaluation criteria. Such instances include situations where:

(1) The scope of work involves very specialized technical expertise or specialized financial qualifications; or

(2) Where prequalification procedures or two-phase selection procedures are not used (short listing is not performed).

§ 636.304 What process may be used to rate and score proposals?

(a) Proposal evaluation is an assessment of the offeror's proposal and ability to perform the prospective contract successfully. You must evaluate proposals solely on the factors and subfactors specified in the solicitation.

(b) You may conduct evaluations using any rating method or combination of methods including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation must be documented in the contract file.

§ 636.305 Can price information be provided to analysts who are reviewing technical proposals?

Normally, technical and price proposals are reviewed independently by separate evaluation teams. However, there may be occasions where the same experts needed to review the technical proposals are also needed in the review of the price proposals. This may occur where a limited amount of technical expertise is available to review proposals. Price information may be provided to such technical experts in accordance with your procedures.

Subpart D—Exchanges

§ 636.401 What types of information exchange may take place prior to the release of the RFP document?

Verbal or written information exchanges (such as in the first-phase of a two-phase selection procedure) must be consistent with State and/or local procurement integrity requirements. See § 636.115(a) for additional details.

§ 636.402 What types of information exchange may take place after the release of the RFP document?

Certain types of information exchange may be desirable at different points after the release of the RFP document. The following table summarizes the types of communications that will be discussed in this subpart. These communication methods are optional.

Type of information exchange	When	Purpose	Parties involved
(a) Clarifications	After receipt of proposals	Used when award without discussions is contemplated. Used to clarify certain aspects of a proposal (resolve minor errors, clerical errors, obtain additional past performance information, etc.).	Any offeror whose proposal is not clear to the contracting agency.
(b) Communications	After receipt of proposals, prior to the establishment of the competitive range.	Used to address issues which might prevent a proposal from being placed in the competitive range.	Only those offerors whose exclusion from, or inclusion in, the competitive range is uncertain. All offerors whose past performance information is the determining factor preventing them from being placed in the competitive range.
(c) Discussions (see Subpart E of this part).	After receipt of proposals and after the determination of the competitive range.	Enhance contracting agency understanding of proposals and offerors understanding of scope of work. Facilitate the evaluation process.	Must be held with all offerors in the competitive range.

§ 636.403 What information may be exchanged with a clarification?

(a) You may wish to clarify any aspect of proposals which would enhance your understanding of an offeror's proposal. This includes such information as an offeror's past performance or information regarding adverse past performance to which the offeror has not previously had an opportunity to respond. Clarification exchanges are discretionary. They do not have to be held with any specific number of offerors and do not have to address specific issues.

(b) You may wish to clarify and revise the RFP document through an addenda process in response to questions from potential offerors.

§ 636.404 Can a competitive range be used to limit competition?

If the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, you may limit the number of proposals to the greatest number that will permit an efficient competition. However, you must provide written notice to any offeror whose proposal is no longer considered to be included in the competitive range. Offerors excluded or otherwise eliminated from the competitive range may request a debriefing. Debriefings may be conducted in accordance with your procedures as long as you comply with § 636.514.

§ 636.405 After developing a short list, can I still establish a competitive range?

Yes, if you have developed a short list of firms, you may still establish a competitive range. The short list is based on qualifications criteria. The competitive range is based on the rating of technical and price proposals.

§ 636.406 Are communications allowed prior to establishing the competitive range?

Yes, prior to establishing the competitive range, you may conduct communications to:

(a) Enhance your understanding of proposals;

(b) Allow reasonable interpretation of the proposal; or

(c) Facilitate your evaluation process.

§ 636.407 Am I limited in holding communications with certain firms?

Yes, if you establish a competitive range, you must do the following:

(a) Hold communications with offerors whose past performance information is the determining factor preventing them from being placed within the competitive range;

(b) Address adverse past performance information to which an offeror has not had a prior opportunity to respond; and

(c) Hold communications only with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain.

§ 636.408 Can communications be used to cure proposal deficiencies?

(a) No, communications must not be used to:

(1) Cure proposal deficiencies or material omissions;

(2) Materially alter the technical or cost elements of the proposal; and/or

(3) Otherwise revise the proposal.

(b) Communications may be considered in rating proposals for the purpose of establishing the competitive range.

§ 636.409 Can offerors revise their proposals during communications?

(a) No, communications shall not provide an opportunity for an offeror to revise its proposal, but may address the following:

(1) Ambiguities in the proposal or other concerns (*e.g.*, perceived deficiencies, weaknesses, errors, omissions, or mistakes); and

(2) Information relating to relevant past performance.

(b) Communications must address adverse past performance information to which the offeror has not previously had an opportunity to comment.

Subpart E—Discussions, Proposal Revisions and Source Selection

§ 636.501 What issues may be addressed in discussions?

In a competitive acquisition, discussions may include bargaining. The term bargaining may include: persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.

§ 636.502 Why should I use discussions?

You should use discussions to maximize your ability to obtain the best value, based on the requirements and the evaluation factors set forth in the solicitation.

§ 636.503 Must I notify offerors of my intent to use/not use discussions?

Yes, in competitive acquisitions, the solicitation must notify offerors of your intent. You should either:

(a) Notify offerors that discussions may or may not be held depending on the quality of the proposals received (except clarifications may be used as described in § 636.401). Therefore, the offeror's initial proposal should contain the offeror's best terms from a cost or price and technical standpoint; or

(b) Notify offerors of your intent to establish a competitive range and hold discussions.

§ 636.504 If the solicitation indicated my intent was to award contract without discussions, but circumstances change, may I still hold discussions?

Yes, you may still elect to hold discussions when circumstances dictate, as long as the rationale for doing so is documented in the contract file. Such circumstances might include situations where all proposals received have deficiencies, when fair and reasonable prices are not offered, or when the cost or price offered is not affordable.

§ 636.505 Must a contracting agency establish a competitive range if it intends to have discussions with offerors?

Yes, if discussions are held, they must be conducted with all offerors in the competitive range. If you wish to hold discussions and do not formally establish a competitive range, then you must hold discussions with all responsive offerors.

§ 636.506 What issues must be covered in discussions?

(a) Discussions should be tailored to each offeror's proposal. Discussions must cover significant weaknesses, deficiencies, and other aspects of a proposal (such as cost or price, technical approach, past performance, and terms and conditions) that could be altered or explained to enhance materially the proposal's potential for award. You may use your judgment in setting limits for the scope and extent of discussions.

(b) In situations where the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, you may hold discussions regarding increased performance beyond any mandatory minimums, and you may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the offered price decreased.

§ 636.507 What subjects are prohibited in discussions, communications and clarifications with offerors?

You may not engage in conduct that:

(a) Favors one offeror over another;

(b) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;

(c) Reveals an offerors price without that offeror's permission;

(d) Reveals the names of individuals providing reference information about an offeror's past performance; or

(e) Knowingly furnish source selection information which could be in violation of State procurement integrity standards.

§ 636.508 Can price or cost be an issue in discussions?

You may inform an offeror that its price is considered to be too high, or too low, and reveal the results of the analysis supporting that conclusion. At your discretion, you may indicate to all offerors your estimated cost for the project.

§ 636.509 Can offerors revise their proposals as a result of discussions?

(a) Yes, you may request or allow proposal revisions to clarify and document understandings reached during discussions. At the conclusion of discussions, each offeror shall be given an opportunity to submit a final proposal revision.

(b) You must establish a common cut-off date only for receipt of final proposal revisions. Requests for final proposal revisions shall advise offerors that the final proposal revisions shall be in writing and that the contracting agency intends to make award without obtaining further revisions.

§ 636.510 Can the competitive range be further defined once discussions have begun?

Yes, you may further narrow the competitive range if an offeror originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award. That offeror may be eliminated from the competitive range whether or not all material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision. You must provide an offeror excluded from the competitive range with a written determination and notice that proposal revisions will not be considered.

§ 636.511 Can there be more than one round of discussions?

Yes, but only at the conclusion of discussions will the offerors be requested to submit a final proposal revision, also called best and final offer (BAFO). Thus, regardless of the length or number of discussions, there will be only one request for a revised proposal (*i.e.*, only one BAFO).

§ 636.512 What is the basis for the source selection decision?

(a) You must base the source selection decision on a comparative assessment of proposals against all selection criteria in the solicitation. While you may use reports and analyses prepared by others, the source selection decision shall represent your independent judgment.

(b) The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision.

§ 636.513 Are limited negotiations allowed prior to contract execution?

Yes, after the source selection but prior to contract execution, you may conduct limited negotiations with the selected design-builder to clarify any remaining issues regarding scope, schedule, financing or any other information provided by that offeror. You must comply with the provisions of § 636.507 in the exchange of this information.

§ 636.514 How may I provide notifications and debriefings?

You may provide pre-award or post-award notifications in accordance with State approved procedures. If an offeror requests a debriefing, you may provide pre-award or post-award debriefings in accordance with State approved procedures.

PART 637—CONSTRUCTION INSPECTION AND APPROVAL

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

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

PART 637—[AMENDED]

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

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

§ 637.207 Quality assurance program.

(a) * * *

(1) * * *

(iv) In the case of a design-build project on the National Highway

System, warranties may be used where appropriate. See 23 CFR 635.413(e) for specific requirements.

* * * * *

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

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

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

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

PART 710—RIGHT-OF-WAY AND REAL ESTATE

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

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

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

§ 710.313 Design-build projects.

(a) In the case of a design-build project, right-of-way must be acquired and cleared in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and STD right-of-way procedures. The STD shall submit a right-of-way certification in accordance with 23 CFR 635.309(p) when requesting FHWA's authorization. If the right-of-way services are included in the Request for Proposal document, the STD shall ensure that right-of-way is available prior to the start of physical construction on individual properties.

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

(c) Certain right-of-way acquisition and clearance services may be incorporated into the design-build contract if allowed under State law. The contract may include language that provides that construction will not commence until all property is acquired and relocations have been completed; or, the construction could be phased or segmented to allow right-of-way activities to be completed on individual properties or a group of properties, thereby allowing certification in a manner satisfactory to the STD for each phase or segment.

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

(1)(i) The design-builder must submit written acquisition and relocation procedures to the STD for approval prior to commencing right-of-way activities. These procedures should contain a prioritized appraisal, acquisition, and relocation strategy as well as check points for STD approval, such as approval of just compensation, replacement housing payment calculations, replacement housing payment and moving cost claims, appraisals, administrative and stipulated settlements that exceed determined thresholds based on a risk management analysis, etc. STD's which have an FHWA approved procedures manual, in accordance with 23 CFR 710.201(c), may comply with this section by requiring the design-builder to execute a certification in its proposal that it has received the approved right-of-way manual and will comply with the procedures.

(ii) The written relocation plan must provide reasonable time frames for the orderly relocation of residents and businesses on the project as provided at 49 CFR 24.205. It should be understood that these time frames will be based on best estimates of the time it will take to acquire the right-of-way and relocate families in accordance with certain legal requirements and time frames which may not be violated. Accordingly, the time frames estimated for right-of-way acquisition will not be compressed in the event other necessary actions preceding right-of-way acquisition miss their assigned due dates.

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

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

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

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

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

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

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

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

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