§ 1300.01 Definitions relating to controlled substances.

* * * * *

(b) * * *

(21)(i) The term *isomer* means the optical isomer, except as used in § 1308.11(d) and § 1308.12(b)(4) of this chapter. As used in § 1308.11(d) of this chapter, the term ''isomer'' means any optical, positional, or geometric isomer. As used in § 1308.12(b)(4) of this chapter, the term ''isomer'' means any optical or geometric isomer.

(ii) As used in § 1308.11(d) of this chapter, the term ''positional isomer'' means any substance possessing the same molecular formula and core structure and having the same functional group(s) and/or substituent(s) as those found in the respective Schedule I hallucinogen, attached at any position(s) on the core structure, but in such manner that no new chemical functionalities are created and no existing chemical functionalities are destroyed relative to the respective Schedule I hallucinogen. Rearrangements of alkyl moieties within or between functional group(s) or substituent(s), or divisions or combinations of alkyl moieties, that do not create new chemical functionalities or destroy existing chemical functionalities, are allowed i.e., result in compounds which are positional isomers. For purposes of this definition, the ''core structure'' is the parent molecule that is the common basis for the class; for example, tryptamine, phenethylamine, or ergoline. Examples of rearrangements resulting in creation and/or destruction of chemical functionalities (and therefore resulting in compounds which are not positional isomers) include, but are not limited to: ethoxy to *alpha*-hydroxyethyl, hydroxy and methyl to methoxy, or the repositioning of a phenolic or alcoholic hydroxy group to create a hydroxyamine. Examples of rearrangements resulting in compounds which would be positional isomers include: *tert*-butyl to *sec*-butyl, methoxy and ethyl to isopropoxy, N,N-diethyl to N-methyl-N-propyl, or *alpha*-methylamino to N-methylamino.

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Dated: May 17, 2006.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E6–7979 Filed 5–24–06; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 630, 635 and 636

[FHWA Docket No. FHWA–2005–22477]

RIN 2125–AF12

Design-Build Contracting

AGENCY: Federal Highway Administration (FHWA), DOT.

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

SUMMARY: The FHWA proposes to revise its regulations for design-build contracting as mandated by section 1503 of the ''Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users'' (SAFETEA–LU). The primary revision would involve a statutory requirement that FHWA not preclude State transportation departments or local transportation agencies from issuing request-for-proposal documents, awarding contracts, and issuing notices-to-proceed for preliminary design work prior to the conclusion of the National Environmental Policy Act (NEPA) process. The FHWA also proposes to revise certain provisions in 23 CFR part 636 to facilitate the use of public-private partnerships.

DATES: Comments must be received on or before July 24, 2006.

ADDRESSES: Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001, or submit electronically at *http://dmses.dot.gov/submit* or fax comments to (202) 493–2251.

Alternatively, comments may be submitted via the eRulemaking Portal at *http://www.regulations.gov.* All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form on all documents received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477–78) or you may visit http://dms.dot.gov.

FOR FURTHER INFORMATION CONTACT: Mr. Gerald Yakowenko, Office of Program Administration, (202) 366–1562, or Mr. Michael Harkins, Office of the Chief Counsel, (202) 366–4928, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may submit or retrieve comments online through the Document Management System (DMS) at: *http://dmses.dot.gov/submit.* The DMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site. An electronic copy of this document may also be downloaded by using the internet to reach the Office of the Federal Register's home page at: *http://www.archives.gov* or the Government Printing Office's Web page at: *http://www.access.gpo.gov/nara.*

Background

Section 1503 of the SAFETEA–LU (Pub. L. 109–59; August 10, 2005, 119 Stat. 1144) revises the definition of a design-build ''qualified project'' in 23 U.S.C. 112(b)(3). Formerly, ''qualified projects'' included design-build projects approved by FHWA with total costs estimated to exceed $50,000,000 or intelligent transportation system projects exceeding $5,000,000. This statutory definition limited Federal-aid participation to design-build projects that met this monetary threshold. The revision required by Section 1503 removes the monetary threshold and defines a qualified project as ''* * * a project under this chapter (including intermodal projects) for which the Secretary has approved the use of design-build contracting under criteria specified in regulations issued by the Secretary.'' These regulations are found in 23 CFR part 636. Thus, it is no longer necessary for the FHWA to approve design-build projects exceeding certain dollar thresholds under Special Experimental Project No. 14 (SEP–14).[1] When appropriate, the FHWA will continue to make SEP–14 available for

[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.

projects that do not conform to the requirements of 23 CFR part 636.

Section 1503 also requires the Secretary of Transportation (hereinafter the Federal Highway Administrator for the purpose of this rule) to issue revised design-build regulations 90 days after the enactment of SAFETEA–LU. This NPRM proposes to make changes required by SAFETEA–LU. Section 1503 specifically states that the revised regulations must not preclude a State transportation department (or local transportation agency) from: (a) Issuing requests for proposals; (b) proceeding with awards of design-build contracts; or (c) issuing notices to proceed with preliminary design work under design-build contracts prior to the completion of section 102 of NEPA.[2] However, the State or local transportation agency must receive concurrence from the FHWA before carrying out any of the activities outlined in (a)–(c) above. Moreover, the design-build contractor must not proceed with final design activities or construction activities prior to completion of the NEPA process.

The FHWA also proposes to revise certain sections of 23 CFR part 636 to clarify its policies concerning the FHWA's approval of projects developed under public-private partnerships. In December 2002 when the FHWA issued the final rule for design-build contracting,[3] there was little experience with public-private partnerships. Since that time, several State DOTs have initiated public-private partnership programs. In addition, on October 6, 2004, the FHWA established a new Special Experimental Project (SEP–15) to encourage tests and experimentation with the use of public-private partnerships in developing transportation projects.[4] SEP–15 was initiated to evaluate the issues associated with increased project management flexibility, innovation, improved efficiency, timely project implementation, and new revenue streams.

Proposed Changes

The FHWA proposes to revise its regulation for design-build contracting in 23 CFR 636 as well as related regulations in 23 CFR 630.106(a) and 23 CFR 635.112(i).

For 23 CFR 630.106(a), we propose to include a provision for design-build projects such that the execution of the project agreement and the authorization to proceed will not occur until after the completion of the NEPA process.

For 23 CFR 635.112(i), we propose to revise our policy for advertising for bids and proposals to indicate that where the request for proposals document is issued prior to the completion of the NEPA process, the FHWA's approval will only constitute the FHWA's approval of the contracting agency's request to release the document.

For 23 CFR 636.103, we propose to revise the definition of a qualified project to be consistent with section 1503 and define several new terms to clearly indicate how the FHWA will implement the section 1503 requirements concerning the Request for Proposals (RFP) release, contract award and notice-to-proceed with preliminary design.

We propose to define the term ''preliminary design'' as ''all design activities necessary to complete the NEPA alternatives analysis and review process as outlined in 23 CFR 771.105, 771.111, and 771.113.'' We specifically request comment on this proposed definition.

We propose to define the term ''final design'' as ''any design activities following preliminary design as outlined in 23 CFR part 771.'' Final design activities are not necessary to complete the NEPA process.

We also propose to add new definitions for the terms ''developer'' and ''public-private agreement'' to clarify the eligibility of projects developed under a public-private partnership as described in 23 CFR 636.119.

In 23 CFR 636.106, we propose to add a sentence to indicate that there is no longer a monetary threshold that invokes Special Experimental Project No. 14—''Innovative Contracting,'' however, SEP–14 is still available for the experimental evaluation of contracting techniques that do not meet the requirement of part 636. When appropriate, the FHWA will consider submittals for approval under SEP–14.

In 23 CFR 636.107, we propose to amend this section as it is no longer necessary as a result of the statutory revision of the definition of a ''qualified project.'' We propose to substitute a new section to clarify the FHWA policy of not allowing local or geographic preferences on design-build projects. This is consistent with the FHWA's traditional policy for construction contracts administered under 23 CFR part 635.[5] We propose to prohibit geographic preferences (including contractual provisions, preferences or incentives for hiring, contracting, proposing or bidding) except where mandated by Federal statutes.

In 23 CFR 636.108, we propose to revise and reserve this section as it is no longer necessary as a result of the statutory revision of the definition of a ''qualified project.''

In 23 CFR 636.109(a), we propose to implement the section 1503 requirements that allow contracting agencies to issue request-for-proposal documents, award design-build contracts, and issue notices-to-proceed for preliminary design work prior to the conclusion of the NEPA process. Contracting agencies would be required to receive the FHWA's concurrence prior to proceeding with any of the above activities. Consistent with the requirements of section 1503, final design activities or construction activities are prohibited prior to the completion of the NEPA process.

In 23 CFR 636.109(b), we propose to state the Federal-aid requirements associated with a decision by the contracting agency to award a design-build contract prior to the conclusion of the NEPA process. If a contracting agency elects to do this, it would be required to implement project development procedures and incorporate design-build contract provisions that: (a) Prevent the design-builder (or developer) from proceeding with final design activities and physical construction prior to the completion of the NEPA process; (b) ensure that no commitment is made to any alternative under evaluation in the NEPA process; (c) ensure that the comparative merits of all alternatives presented in the NEPA document, including the no-build alternative, will be evaluated; (d) ensure that all environmental and mitigation measures identified in the NEPA decision document will be implemented; and (e) include contract termination provisions in the event that the no-build alternative is selected.

It is noted that the provisions of revised 23 U.S.C. 112 (b)(3)(D)(iii) preclude the design-builder from proceeding with final design or construction prior to the conclusion of the NEPA process. Thus, it is unacceptable to allow the design-builder to proceed with final design

[2] Section 102 of the NEPA established a mandate for Federal agencies to consider the potential environmental consequences of their proposals, document the analysis, and make this information available to the public for comment prior to implementation.

[3] The FHWA published the final rule on design-build contracting in the **Federal Register** on December 10, 2002, at 67 FR 75902.

[4] The notice announcing this new SEP–15 program was published in the **Federal Register** on October 6, 2004, at 69 FR 59983. For more information on SEP–15, go to *http://www.fhwa.dot.gov/ppp/sep15.htm.*

[5] See 23 CFR 635.117(b) and the FHWA's Chief Counsel's April 20, 1994, memorandum titled: ''Local Hiring Preferences,'' which is available on the FHWA's home page: *http://www.fhwa.dot.gov/programadmin/contracts/042094.htm.*

activities for a specific alternative, even on an ''at-risk/non-participating basis.''

In this section, we also propose to prohibit the design-builder from preparing the NEPA document or from having any decisionmaking responsibility with respect to the NEPA process. However, preliminary design work performed by the design-builder may be used in the NEPA analysis. This is consistent with the Council on Environmental Quality's conflict of interest policies found at 40 CFR 1506.5(c). This regulation requires the contactor preparing the NEPA document to execute a disclosure statement specifying that it has no financial or other interest in the outcome of the project. However, as explained below, a proposer is not precluded from submitting a proposal for a design-build contract when NEPA has been completed before the issuance of the RFP, even though that proposer may have prepared or assisted in the preparation of the NEPA document.

In 23 CFR 636.109(c), we propose to implement the section 1503 requirement that contracting agencies receive the FHWA's concurrence prior to issuing the RFP, proceeding with preliminary design, and awarding a design-build contract.

In 23 CFR 636.109(d), we propose to clarify that the FHWA's authorization and obligation of preliminary engineering funds prior to the conclusion of the NEPA process is limited to preliminary design activities. This includes the preliminary design work performed by the contracting agency in preparing the NEPA document or the work necessary to prepare the Request for Qualifications (RFQ) and RFP solicitations.

In 23 CFR 636.116 we propose to add 116(c) to clarify that in those situations where the NEPA document has been completed prior to the issuance of the RFP, the contracting agency may allow a consultant and/or subconsultant who assisted them in the preparation of the NEPA document to participate as an offeror or join a team submitting a proposal in response to the RFP. This is consistent with guidance issued by the Council on Environmental Quality (CEQ).[6] We propose to revise 23 CFR 636.119 in its entirety. Over the past three years, several State DOTs and the FHWA have gained experience with public-private partnerships. The FHWA has approved several waivers of our contracting requirements under SEP–15 for each of the public-private partnership projects that we have reviewed. At this point in time, we propose to revise our current contracting policies to reflect the experiences learned under the SEP–15.

For all of the SEP–15 projects approved to date, the contracting agency and the FHWA have determined that it is appropriate to initiate the procurement of the developer for a public-private partnership prior to the conclusion of the NEPA process. The developer is available to assist with the definition of the project scope and to provide preliminary design information. The benefits associated with having a developer on-board during the early stages of project development also include: value engineering assistance, constructability expertise and price information concerning various project alternatives.

Based on our recent experience with SEP–15, it is apparent that many of the Part 636 requirements are not appropriate for the procurement of the developer under a public-private partnership. In most cases, the developer acts as an ''agent-of-the-owner.'' In such cases, it is more appropriate to allow contracting agencies to use State-approved procurement procedures (or State-approved local procedures) for the selection of the developer than to continue to approve waivers of part 636 requirements under SEP–15.

In 23 CFR 636.119(a), we propose to allow contracting agencies to use State-approved procurement procedures to procure the services of the developer under a public private agreement (*i.e.*, the requirements of 23 CFR 636.201 through 23 CFR 636.514 would not apply). However, the use of State-approved procedures will be subject to the FHWA's review and approval of procurement procedures including the RFQ and RFP documents and the public-private agreement. All solicitation and procurement procedures must be fair and transparent to all proposers.

In 23 CFR 636.119(b) we propose to implement a procedure that provides for a determination of price reasonableness for any Federal-aid project that the developer proposes to accomplish with its own forces. If the contracting agency and the FHWA cannot concur in a determination of price reasonableness, the contracting agency must comply with the procurement procedures of 23 CFR Part 172, 635 or 636.

In 23 CFR 636.202(a)(1) we propose to revise the evaluation and award criteria that may be used for design-build contracts that are awarded prior to the conclusion of the NEPA process. The scope of work for such projects is usually in a very preliminary stage of development, and therefore, it would not be appropriate to use total contract price as a proposal evaluation factor. The evaluation and award criteria for such contracts may be based on qualitative considerations. The subsequent approval of final design and construction activities will be contingent upon a determination of price reasonableness by the contracting agency and the FHWA.

Conclusion

In conclusion, the FHWA is proposing to revise its regulations for design-build contracting as mandated by section 1503 of the SAFETEA–LU. The primary revision would allow contracting agencies to issue request-for-proposal documents, award design-build contracts, and issue notices-to-proceed for preliminary design work prior to the conclusion of NEPA. The FHWA also proposes to revise certain provisions in 23 CFR part 636 to facilitate the use of public-private partnerships.

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable, but the FHWA may issue a final rule at any time after the close of the comment period. In addition to the late comments, the FHWA will also continue to file in the docket relevant information that becomes available after the comment closing date, and interested persons should continue to examine the docket for new material.

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

The FHWA has determined preliminarily that this action would be 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. 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, environmental and industry interest in the design-build contracting technique. The FHWA anticipates that the proposed rule would

[6] See CEQ's ''NEPA's 40 Most Asked Questions'', specifically question #17 available at the following URL: *http://ceq.eh.doe.gov/nepa/regs/40/40p3.htm.*

not adversely affect, in a material way, any sector of the economy. This rulemaking merely revises the FHWA's policies concerning the design-build contracting technique. The proposed rule would not affect the total Federal funding available to the State DOTs 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. However, the FHWA does not have sufficient data to make a conclusive statement regarding the economic impacts. Interested parties are invited to comment on the anticipated economic impact. In addition, these proposed changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), we have evaluated the effects of this action on small entities and have determined that the action would not have a significant economic impact on a substantial number of small entities. The proposed amendment addresses the obligation of Federal funds to States for Federal-aid highway projects. As such, it affects only States and States are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, the Regulatory Flexibility Act does not apply, and the FHWA certifies that the proposed action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48, March 22, 1995) as it will not result in the expenditure by State, local, tribal governments, or by the private sector, of $100 million or more in any one year (2 U.S.C. 1532 *et seq.*). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the FHWA will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the affects on State, local, and tribal governments and the private sector.

Additionally, the definition of ''Federal Mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

Executive Order 13132 (Federalism)

This proposed 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 proposed action would not have a substantial direct effect or sufficient federalism implications on the States. The FHWA has also determined that this proposed action would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. Accordingly, the FHWA solicits comments on this issue.

Paperwork Reduction Act

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

National Environmental Policy Act

The FHWA has analyzed this proposed action for the purpose of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and has determined that this proposed action would not have any effect on the quality of the environment.

Executive Order 12630 (Taking of Private Property)

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

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

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this proposed action under Executive Order 13175, dated November 6, 2000, and believes that the proposed action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal laws. The proposed rulemaking addresses obligations of Federal funds to States for Federal-aid highway projects and would not impose any direct compliance requirements on Indian tribal governments. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use dated May 18, 2001. We have determined that it is not a significant energy action under that order 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 is not required.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes

the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects

23 CFR Part 630

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

23 CFR Part 635

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

23 CFR Part 636

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

Issued on: May 19, 2006.

J. Richard Capka,

Acting Federal Highway Administrator.

In consideration of the foregoing, the FHWA proposes to amend parts 630, 635, and 636 of title 23, Code of Federal Regulations, as follows:

PART 630—PRECONSTRUCTION PROCEDURES

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

Authority: Sec. 1503 of Public Law 109–59, 119 Stat. 1144; 23 U.S.C. 106, 109, 115, 315, 320, and 402(a); 23 CFR 1.32 and 49 CFR 1.48(b).

2. Amend 23 CFR 630.106 by adding paragraph (a)(7) to read as follows:

§ 630.106 Authorization to proceed.

(a) * * *

(7) For design-build projects, the execution of the project agreement and authorization to proceed shall not occur until after the completion of the NEPA process. However, preliminary engineering activities may be authorized in accordance with this section.

* * * * *

PART 635—CONSTRUCTION AND MAINTENANCE

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

Authority: Sec. 1503 of Public Law 109–59, 119 Stat. 1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.*; Sec. 1041(a), Public Law 102–240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.48(b).

4. Amend 23 CFR 635.112(i) by revising paragraph (i)(1); by redesignating paragraphs (i)(2) and (i)(3) as (i)(3) and (i)(4), respectively; and by adding a new paragraph (i)(2) to read as follows:

§ 635.112 Advertising for bids and proposals.

* * * * *

(i) * * *

(1) When a Request for Proposals document is issued after the NEPA process is complete, 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) Where a Request for Proposals document is issued prior to the completion of the NEPA process, the FHWA's approval of the document will only constitute the FHWA's approval of the STD's request to release the document.

* * * * *

5. Revise § 635.413(e)(1)(i) to read as follows:

§ 635.413 Guaranty and warranty clauses.

* * * * *

(e) * * *

(1) * * *

(i) The term of the warranty is short (generally one to two years); however, projects developed under a public-private agreement may include warranties that are appropriate for the term of the contract or agreement.

* * * * *

PART 636—DESIGN-BUILD CONTRACTING

6. Revise the authority citation for part 636 to read as follows:

Authority: Sec. 1503 of Public Law 109–59, 119 Stat. 1144; Sec. 1307 of Public Law 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

7. Amend § 636.103 by placing all definitions in alphabetical order, by adding the definitions of ''developer,'' ''final design,'' ''preliminary design,'' ''price reasonableness,'' and ''public-private agreement,'' and by revising the definition of ''qualified project'' as follows:

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

* * * * *

Developer means each entity with whom the contracting agency has executed a public-private agreement for the development, design, construction, financing, operation, and maintenance of one or more projects under a public-private partnership. Depending on the context of the public-private agreement, the term ''developer'' may include affiliated entities of the developer.

* * * * *

Final design means any design activities following preliminary design. Final design activities are not necessary to complete the NEPA process as outlined in 23 CFR 771.

* * * * *

Preliminary design means all design activities necessary to complete the NEPA alternatives analysis and review process as outlined in 23 CFR 771.105, 771.111, and 771.113.

* * * * *

Price reasonableness means the determination that the price of the work for any project or series of projects is not excessive and is a fair and reasonable price for the services to be performed.

* * * * *

Public-private agreement means an agreement between a public agency and a private party under which the private party shares in the responsibilities, risks and benefits of constructing a project. Such agreement may involve an at-risk equity investment by the private party in the project.

Qualified project means any design-build project (including intermodal projects) funded under Title 23 U.S.C. which meets the requirements of this Part and for which the contracting agency deems to be appropriate on the basis of project delivery time, cost, construction schedule and/or quality.

* * * * *

8. Revise § 636.106 to read as follows:

§ 636.106 Is the FHWA's Special Experimental Project No. 14—''Innovative Contracting'' (SEP–14) approval necessary for a design-build project?

No, if a design-build project meets the requirements of this part, SEP–14 approval is not required. However, when the FHWA believes it is appropriate, SEP–14 is available for the experimental evaluation of techniques that do not meet the requirement of this part.

9. Revise § 636.107 to read as follows:

§ 636.107 May contracting agencies use geographic preference in Federal-aid design-build or public-private partnership projects?

No. Contracting agencies must not use geographic preferences (including contractual provisions, preferences or incentives for hiring, contracting, proposing or bidding) on Federal-aid highway projects. Contracting agencies

shall conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation and award of projects.

§ 636.108 [Removed and Reserved]

10. Remove and reserve § 636.108.

11. Revise § 636.109 to read as follows:

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

The purpose of this section is to ensure that there is an objective NEPA process, that public officials and citizens have the necessary environmental impact information for federally funded actions before actions are taken, and that design-build proposers do not assume an unnecessary amount of risk in the event the NEPA process results in a significant change in the proposal. Therefore, with respect to the design-build procurement process:

(a) The contracting agency may:

(1) Issue an RFQ solicitation prior to the conclusion of the NEPA process as long as the RFQ solicitation informs proposers of the general status of NEPA review;

(2) Issue an RFP after the conclusion of the NEPA process;

(3) Issue an RFP prior to the conclusion of the NEPA process as long as the RFP informs proposers of the general status of the NEPA process and that no commitment will be made as to any alternative under evaluation in the NEPA process, including the no-build alternative;

(4) Proceed with the award of a design-build contract prior to the conclusion of the NEPA process; and

(5) Issue notice to proceed with preliminary design pursuant to a design-build contract that has been awarded prior to the completion of the NEPA process.

(b) If the contracting agency proceeds to award a design-build contract prior to the conclusion of the NEPA process, then:

(1) The design-build contract must include appropriate provisions preventing the design-builder (or developer) from proceeding with final design activities and physical construction prior to the completion of the NEPA process (contract hold points or another method of issuing multi-step approvals must be used);

(2) The design-build contract must include appropriate provisions ensuring that no commitment is made to any alternative being evaluated in the NEPA process and that the comparative merits of all alternatives presented in the NEPA document, including the no-build alternative, will be evaluated;

(3) The design-build contract must include appropriate provisions ensuring that all environmental and mitigation measures identified in the NEPA decision document will be implemented;

(4) The design-builder (or developer) must not prepare the NEPA decision document or have any decisionmaking responsibility with respect to the NEPA process;

(5) Any consultant who prepares the NEPA decision document must be selected by and subject to the exclusive direction and control of the contracting agency;

(6) Preliminary design work performed by the design-builder (or developer) may be used in the NEPA analysis; and

(7) The design-build contract must include termination provisions in the event that the no-build alternative is selected.

(c) The contracting agency must receive prior FHWA concurrence before issuing the RFP, awarding a design-build contract and proceeding with preliminary design work under the design-build contract. Should the contracting agency proceed with any of the activities specified in this section before the completion of the NEPA process (with the exception of preliminary design, as provided in paragraph (d) of this section), the FHWA's concurrence merely constitutes the FHWA acquiescence that any such activities complies with Federal requirements and does not constitute project authorization or obligate Federal funds.

(d) The FHWA's authorization and obligation of preliminary engineering funds prior to the completion of the NEPA process is limited to preliminary design activities. After the completion of the NEPA process, the FHWA may issue an authorization to proceed with final design and construction and obligate Federal funds for such purposes.

12. Amend § 636.116 by adding paragraph (c) to read as follows:

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

* * * * *

(c) If the NEPA process has been completed prior to issuing the RFP, the contracting agency may allow a consultant and/or subconsultant who prepared the NEPA document to submit a proposal in response to the RFP.

13. Revise § 636.119 to read as follows:

§ 636.119 How does this Part apply to public-private agreements?

(a)(1) For public-private agreements, the contracting agency may use State-approved procurement procedures to procure the services of the developer and the requirements of 23 CFR 636.201 through 23 CFR 636.514 are optional. The use of State-approved procedures for the procurement of the developer is contingent upon the following:

(i) The State's procedures are approved by the FHWA,

(ii) The RFQ or RFP solicitations must be submitted to the FHWA for review and approval,

(iii) The procedures must be fair and transparent to all proposers,

(iv) If an unsolicited proposal is received, the contracting agency must offer adequate public notice and advertisement for competing proposals before considering an individual proposal for award,

(v) The appropriate RFQ or RFP document must clearly describe the contracting agency's conditions and procedures for sharing any proposer's ideas with other proposers during any phase of the negotiation process and whether a proposer's ideas may be incorporated into the project, even though that proposer was unsuccessful in obtaining the contract;

(vi) The selection of a developer is made on the basis of a best value selection, except that price does not have to be a consideration. Evaluation and selection criteria may include, but are not limited to, the degree and scope of work to be performed, services to be provided, ability to perform such work or services, responsibilities or risks that are to be shared, and the equity or total investment that may be contributed; and

(vii) The contracting agency submits the public-private agreement to FHWA for concurrence along with a timetable showing the major steps in the procurement process, a summary of the rationale for the selection, and a description of any major changes made during any negotiations.

(2) No procedure or requirement shall be approved under paragraph (a)(1) of this section which, in the judgment of the FHWA, may operate to unnecessarily restrict competition, is unfair, or may result in a process that is not transparent.

(b) For any public-private agreement that provides for the possibility of the physical construction of one or more projects by the developer, the public-private agreement must include a provision requiring the contracting agency to review the price reasonableness of the estimate provided by the developer to provide final design

services and/or physically construct any project involving Federal funds.

(1) The price reasonableness determination shall be made pursuant to a process provided for in the public-private agreement that includes a comparison of the developer's estimate to an estimate prepared by the contracting agency. Both parties may meet to discuss the differences in the estimates and make appropriate revisions. The estimates prepared under this paragraph shall be prepared on an open-book basis with respect to both the contracting agency and the developer.

(2) The contracting agency's determination of price reasonableness shall be submitted to the FHWA for concurrence.

(3) If the contracting agency cannot reach an agreement on price reasonableness with the developer, or if the FHWA does not concur, then the contracting agency shall proceed to procure the work with another firm pursuant to parts 172, 635, and 636 of this title, as appropriate.

(c) The contracting agency must ensure Federal-aid projects developed under a public-private partnership 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 and requirements, such as environmental and right-of-way requirements and compliance with all applicable construction contracting requirements such as Buy America, Davis-Bacon prevailing wage rate requirements, etc.

12. Revise § 636.302(a)(1) to read as follows:

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

(a) * * *

(1) You must evaluate price in every source selection where construction is a significant component of the scope of work. However, where the contracting agency elects to release the final RFP and award the design-build contract before the conclusion of the NEPA process (see § 636.109), then the following requirements apply:

(i) It is not necessary to evaluate total contract price;

(ii) The evaluation of proposals and award of the contract may be based on qualitative considerations;

(iii) The subsequent approval of final design and construction activities will be contingent upon a finding of price reasonableness by the contracting agency;

(iv) In determining price reasonableness, the contracting agency and design-builder may negotiate the price, which shall be done on an open-book basis by both the design-builder and contracting agency; and

(v) The contracting agency's finding of price reasonableness is subject to FHWA concurrence.

* * * * *

[FR Doc. E6–8002 Filed 5–24–06; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–06–002]

RIN 1625–AA09

Drawbridge Operation Regulations; Missouri River, Iowa, Kansas, Missouri

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to make revisions in Missouri River drawbridge regulations covering Iowa, Kansas, and Missouri. Under the proposed revisions, the bridges will open on signal, except during the winter season when 24 hours advance notice will be required. These proposed revisions to the regulations will reduce delays to the vessels transiting through these States on the Missouri River.

DATES: Comments and related material must reach the Coast Guard on or before July 24, 2006.

ADDRESSES: You may mail comments and related material to Commander, Eighth Coast Guard District, Bridge Branch, 1222 Spruce Street, St. Louis, MO 63103–2832. Commander (dwb), Eighth Coast Guard District, maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at room 2.107f in the Robert A. Young Federal Building, Eighth Coast Guard District, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Roger K. Wiebusch, Bridge Administrator, (314) 539–3900, extension 2378.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking [CGD08–06–002], indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the Eighth Coast Guard District, Bridge Branch, at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that a meeting would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The Coast Guard reviewed the history of civil penalty actions for failure of the Missouri River drawbridges to open for navigation. Meetings were held with the bridge owner and vessel operators to determine the cause for not opening the bridge draw on signal. A procedure was incorporated in the regulations to help reduce the number of vessel delays caused by failure to open the bridge on signal. Experience has shown the procedure was never implemented and vessel delays were not reduced. Thus, the Coast Guard is proposing these revisions to these regulations so vessels may pass the bridge without delay.

Discussion of Proposed Rule

The Coast Guard determined that changes were needed to correct inaccuracies in State-related drawbridge operation regulations for § 117.407 (Iowa), § 117.411 (Kansas), and § 117.687 (Missouri). In addition, § 117.411(b) and § 117.687(b), which describe the procedure for the operation of A–S–B Highway and Railroad Bridge at Mile 365.6, are to be eliminated. This drawbridge was never operated in the manner described. It will open on signal as described in § 117.411 and § 117.687.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs