

§ 112. Letting of contracts

(a) In all cases where the construction is to be performed by the State transportation department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.

(b) BIDDING REQUIREMENTS.—

(1) IN GENERAL.—Subject to paragraphs (2) and (3), construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

(2) CONTRACTING FOR ENGINEERING AND DESIGN SERVICES.—

(A) GENERAL RULE.—Subject to paragraph (3), each contract for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services with respect to a project subject to the provisions of subsection (a) of this section shall be awarded in the same manner as a contract for architectural and engineering services is negotiated under chapter 11 of title 40.

(B) PERFORMANCE AND AUDITS.—Any contract or subcontract awarded in accordance with subparagraph (A), whether funded in whole or in part with Federal-aid highway funds, shall be performed and audited in compliance with cost principles contained in the Federal Acquisition Regulations of part 31 of title 48, Code of Federal Regulations.

(C) INDIRECT COST RATES.—Instead of performing its own audits, a recipient of funds under a contract or subcontract awarded in accordance with subparagraph (A) shall accept indirect cost rates established in accordance with the Federal Acquisition Regulations for 1-year applicable accounting periods by a cognizant Federal or State government agency, if such rates are not currently under dispute.

(D) APPLICATION OF RATES.—Once a firm's indirect cost rates are accepted under this paragraph, the recipient of the funds shall apply such rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment and shall not be limited by administrative or de facto ceilings of any kind.

(E) PRENOTIFICATION; CONFIDENTIALITY OF DATA.—A recipient of funds requesting or using the cost and rate data described in subparagraph (D) shall notify any affected firm before such request or use. Such data shall be confidential and shall not be accessible or provided, in whole or in part, to another firm or to any government agency which is not part of the group of agencies sharing cost data under this paragraph, except by written permission of the audited firm. If prohibited by law, such cost and rate data shall not be disclosed under any circumstances.

(F)(F)¹ Subparagraphs (B), (C), (D) and (E) herein shall not apply to the States of West Virginia or Minnesota.

(3) DESIGN-BUILD CONTRACTING.—

(A) IN GENERAL.—A State transportation department or local transportation agency 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.

(B) LIMITATION ON FINAL DESIGN.—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).

(C) QUALIFIED PROJECTS.—A qualified project referred to in subparagraph (A) is 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.

(D) REGULATORY PROCESS.—Not later than 90 days after the date of enactment of the SAFETEA-LU, the Secretary shall issue revised regulations under section 1307(c) of the Transportation Equity Act for 21st Century (23 U.S.C. 112 note; 112 Stat. 230) that—

(i) do not preclude a State transportation department or local transportation agency, prior to compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332), from—

(I) issuing requests for proposals;

(II) proceeding with awards of design-build contracts; or

(III) issuing notices to proceed with preliminary design work under design-build contracts;

(ii) require that the State transportation department or local transportation agency receive concurrence from the Secretary before carrying out an activity under clause (i); and

(iii) preclude the design-build contractor from proceeding with final design or construction of any permanent improvement prior to completion of the process under such section 102.

(E) DESIGN-BUILD CONTRACT DEFINED.—In this paragraph, the term “design-build contract” means an agreement that provides for design and construction of a project by a

¹ So in original.

contractor, regardless of whether the agreement is in the form of a design-build contract, a franchise agreement, or any other form of contract approved by the Secretary.

(c) The Secretary shall require as a condition precedent to his approval of each contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement, executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract.

(d) No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State transportation department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

(e) STANDARDIZED CONTRACT CLAUSE CONCERNING SITE CONDITIONS.—

(1) GENERAL RULE.—The Secretary shall issue regulations establishing and requiring, for inclusion in each contract entered into with respect to any project approved under section 106 of this title a contract clause, developed in accordance with guidelines established by the Secretary, which equitably addresses each of the following:

(A) Site conditions.

(B) Suspensions of work ordered by the State (other than a suspension of work caused by the fault of the contractor or by weather).

(C) Material changes in the scope of work specified in the contract.

The guidelines established by the Secretary shall not require arbitration.

(2) LIMITATION ON APPLICABILITY.—

(A) STATE LAW.—Paragraph (1) shall apply in a State except to the extent that such State adopts or has adopted by statute a formal procedure for the development of a contract clause described in paragraph (1) or adopts or has adopted a statute which does not permit inclusion of such a contract clause.

(B) DESIGN-BUILD CONTRACTS.—Paragraph (1) shall not apply to any design-build contract approved under subsection (b)(3).

(f) SELECTION PROCESS.—A State may procure, under a single contract, the services of a consultant to prepare any environmental impact assessments or analyses required for a project, including environmental impact statements, as well as subsequent engineering and design work on the project if the State conducts a review that assesses the objectivity of the environmental assessment, environmental analysis, or environmental impact statement prior to its submission to the Secretary.

(g) TEMPORARY TRAFFIC CONTROL DEVICES.—

(1) ISSUANCE OF REGULATIONS.—The Secretary, after consultation with appropriate

Federal and State officials, shall issue regulations establishing the conditions for the appropriate use of, and expenditure of funds for, uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations.

(2) EFFECTS OF REGULATIONS.—Based on regulations issued under paragraph (1), a State shall—

(A) develop separate pay items for the use of uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations; and

(B) incorporate such pay items into contract provisions to be included in each contract entered into by the State with respect to a highway project to ensure compliance with section 109(e)(2).

(3) LIMITATION.—Nothing in the regulations shall prohibit a State from implementing standards that are more stringent than those required under the regulations.

(4) POSITIVE PROTECTIVE MEASURES DEFINED.—In this subsection, the term “positive protective measures” means temporary traffic barriers, crash cushions, and other strategies to avoid traffic accidents in work zones, including full road closures.

(Pub. L. 85-767, Aug. 27, 1958, 72 Stat. 895; Pub. L. 90-495, §22(c), Aug. 23, 1968, 82 Stat. 827; Pub. L. 96-470, title I, §112(b)(1), Oct. 19, 1980, 94 Stat. 2239; Pub. L. 97-424, title I, §112, Jan. 6, 1983, 96 Stat. 2106; Pub. L. 100-17, title I, §111, Apr. 2, 1987, 101 Stat. 147; Pub. L. 104-59, title III, §307(a), Nov. 28, 1995, 109 Stat. 581; Pub. L. 105-178, title I, §§1205, 1212(a)(2)(A)(i), 1307(a), (b), June 9, 1998, 112 Stat. 184, 193, 229, 230; Pub. L. 107-217, §3(e)(1), Aug. 21, 2002, 116 Stat. 1299; Pub. L. 109-59, title I, §§1110(b), 1503, Aug. 10, 2005, 119 Stat. 1170, 1238; Pub. L. 109-115, div. A, title I, §174, Nov. 30, 2005, 119 Stat. 2426.)

REFERENCES IN TEXT

The date of enactment of the SAFETEA-LU, referred to in subsec. (b)(3)(D), is the date of enactment of Pub. L. 109-59, which was approved Aug. 10, 2005.

Section 1307(c) of the Transportation Equity Act for 21st Century, referred to in subsec. (b)(3)(D), is section 1307(c) of Pub. L. 105-178, which is set out as a note below.

AMENDMENTS

2005—Subsec. (b)(2)(A). Pub. L. 109-115, §174(1), substituted “title 40” for “title 40 or equivalent State qualifications-based requirements”.

Subsec. (b)(2)(B) to (D). Pub. L. 109-115, §174(2), (3), redesignated subpars. (C) to (E) as (B) to (D), respectively, and struck out heading and text of former subpar. (B). Text read as follows:

“(i) IN A COMPLYING STATE.—If, on the date of the enactment of this paragraph, the services described in subparagraph (A) may be awarded in a State in the manner described in subparagraph (A), subparagraph (A) shall apply in such State beginning on such date of enactment.

“(ii) IN A NONCOMPLYING STATE.—In the case of any other State, subparagraph (A) shall apply in such State

beginning on the earlier of (I) August 1, 1989, or (II) the 10th day following the close of the 1st regular session of the legislature of a State which begins after the date of the enactment of this paragraph.”

Subsec. (b)(2)(E). Pub. L. 109-115, §174(3), (4), redesignated subpar. (F) as (E) and substituted “subparagraph (D)” for “subparagraph (E)”. Former subpar. (E) redesignated (D).

Subsec. (b)(2)(F). Pub. L. 109-115, §174(5), which directed that subpar. (F) be amended by substituting “(F) Subparagraphs (B), (C), (D) and (E) herein shall not apply to the States of West Virginia or Minnesota.” for “‘State Option’ and all that follows through the period”, was executed by making the substitution for “STATE OPTION.—Subparagraphs (C), (D), (E), and (F) shall take effect 1 year after the date of the enactment of this subparagraph; except that if a State, during such 1-year period, adopts by statute an alternative process intended to promote engineering and design quality and ensure maximum competition by professional companies of all sizes providing engineering and design services, such subparagraphs shall not apply with respect to the State. If the Secretary determines that the legislature of the State did not convene and adjourn a full regular session during such 1-year period, the Secretary may extend such 1-year period until the adjournment of the next regular session of the legislature.”, to reflect the probable intent of Congress.

Pub. L. 109-115, §174(3), redesignated subpar. (G) as (F). Former subpar. (F) redesignated (E).

Subsec. (b)(2)(G). Pub. L. 109-115, §174(3), redesignated subpar. (G) as (F).

Subsec. (b)(3)(C) to (E). Pub. L. 109-59, §1503, added subpars. (C) and (D), redesignated former subpar. (D) as (E), and struck out former subpar. (C), which described a qualified project as one for which the Secretary had approved the use of design-build contracting under criteria specified in regulations and for which total costs had been estimated to exceed specified amounts.

Subsecs. (f), (g). Pub. L. 109-59, §1110(b), added subsec. (g), redesignated former subsec. (g) as (f), and struck out former subsec. (f) which read as follows: “The provisions of this section shall not be applicable to contracts for projects on the Federal-aid secondary system in those States where the Secretary has discharged his responsibility pursuant to section 117 of this title, except where employees of a political subdivision of a State are working on a project outside of such political subdivision.”

2002—Subsec. (b)(2)(A). Pub. L. 107-217 substituted “chapter 11 of title 40” for “title IX of the Federal Property and Administrative Services Act of 1949”.

1998—Subsec. (a). Pub. L. 105-178, §1212(a)(2)(A)(i), substituted “State transportation department” for “State highway department”.

Subsec. (b)(1). Pub. L. 105-178, §1307(a)(1), substituted “paragraphs (2) and (3)” for “paragraph (2)”.

Pub. L. 105-178, §1212(a)(2)(A)(i), substituted “State transportation department” for “State highway department”.

Subsec. (b)(2)(A). Pub. L. 105-178, §1307(a)(2), substituted “Subject to paragraph (3), each contract” for “Each contract”.

Subsec. (b)(2)(B)(i). Pub. L. 105-178, §1205(a), struck out before period at end “, except to the extent that such State adopts by statute a formal procedure for the procurement of such services”.

Subsec. (b)(2)(B)(ii). Pub. L. 105-178, §1205(a), struck out before period at end “, except to the extent that such State adopts or has adopted by statute a formal procedure for the procurement of the services described in subparagraph (A)”.

Subsec. (b)(3). Pub. L. 105-178, §1307(a)(3), added par. (3).

Subsec. (d). Pub. L. 105-178, §1212(a)(2)(A)(i), substituted “State transportation department” for “State highway department”.

Subsec. (e)(2). Pub. L. 105-178, §1307(b), designated existing provisions as subpar. (A), inserted heading, realigned margins, and added subpar. (B).

Subsec. (g). Pub. L. 105-178, §1205(b), added subsec. (g). 1995—Subsec. (b)(2)(C) to (G). Pub. L. 104-59 added subpars. (C) to (G).

1987—Subsec. (b). Pub. L. 100-17, §111(a), (b), (d), inserted subsec. heading, designated existing provisions as par. (1), inserted par. (1) heading, substituted “Subject to paragraph (2), construction” for “Construction” and inserted “or that an emergency exists”, added par. (2), and realigned margins.

Subsecs. (e), (f). Pub. L. 100-17, §111(c), added subsec. (e) and redesignated former subsec. (e) as (f).

1983—Subsec. (b). Pub. L. 97-424, §112(1), substituted “unless the State highway department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective” for “unless the Secretary shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest” after “by competitive bidding”.

Subsec. (e). Pub. L. 97-424, §112(2), inserted exception relating to a situation where employees of a political subdivision of a State are working on a project outside of such political subdivision.

1980—Subsec. (b). Pub. L. 96-470 struck out provision that all findings by the Secretary that a method other than competitive bidding is in the public interest be reported in writing to the Committees on Public Works of the Senate and the House of Representatives.

1968—Subsec. (b). Pub. L. 90-495 required that contracts for the construction of each project be awarded only on the basis of the lowest responsive bid by a bidder meeting established criteria of responsibility and required that, to be imposed as a condition precedent, requirements and obligations have been specifically set forth in the advertised specifications.

EFFECTIVE DATE OF 1998 AMENDMENT

Pub. L. 105-178, title I, §1307(e), June 9, 1998, 112 Stat. 231, provided that:

“(1) IN GENERAL.—The amendments made by this section [amending this section] take effect 3 years after the date of enactment of this Act [June 9, 1998].

“(2) TRANSITION PROVISION.—

“(A) IN GENERAL.—During the period before issuance of the regulations under subsection (c) [set out below], the Secretary may approve, in accordance with an experimental program described in subsection (d) [set out below], design-build contracts to be awarded using any process permitted by applicable State and local law; except that final design under any such contract shall not commence before compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

“(B) PREVIOUSLY AWARDED CONTRACTS.—The Secretary may approve design-build contracts awarded before the date of enactment of this Act.

“(C) DESIGN-BUILD CONTRACT DEFINED.—In this paragraph, the term ‘design-build contract’ means an agreement that provides for design and construction of a project by a contractor, regardless of whether the agreement is in the form of a design-build contract, a franchise agreement, or any other form of contract approved by the Secretary.”

EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-495 effective Aug. 23, 1968, see section 37 of Pub. L. 90-495, set out as a note under section 101 of this title.

REGULATIONS

Pub. L. 105-178, title I, §1307(c), June 9, 1998, 112 Stat. 230, provided that:

“(1) IN GENERAL.—Not later than the effective date specified in subsection (e) [see Effective Date of 1998 Amendment note above], after consultation with the American Association of State Highway and Transportation Officials and representatives from affected industries, the Secretary shall issue regulations to carry out the amendments made by this section [amending this section].

“(2) CONTENTS.—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 transportation department or local transportation agency for obtaining the Secretary’s approval of the use of design-build contracting by the department or agency.”

EFFECT ON EXPERIMENTAL PROGRAM

Pub. L. 105-178, title I, §1307(d), June 9, 1998, 112 Stat. 231, provided that: “Nothing in this section [amending this section and enacting provisions set out as notes under this section] or the amendments made by this section affects the authority to carry out, or any project carried out under, any experimental program concerning design-build contracting that is being carried out by the Secretary as of the date of enactment of this Act [June 9, 1998].”

REPORT TO CONGRESS

Pub. L. 105-178, title I, §1307(f), June 9, 1998, 112 Stat. 231, provided that:

“(1) IN GENERAL.—Not later than 5 years after the date of enactment of this Act [June 9, 1998], the Secretary shall submit to Congress a report on the effectiveness of design-build contracting procedures.

“(2) CONTENTS.—The report shall contain—

“(A) an assessment of the effect of design-build contracting on project quality, project cost, and timeliness of project delivery;

“(B) recommendations on the appropriate level of design for design-build procurements;

“(C) an assessment of the impact of design-build contracting on small businesses;

“(D) assessment of the subjectivity used in design-build contracting; and

“(E) such recommendations concerning design-build contracting procedures as the Secretary determines to be appropriate.”

PRIVATE SECTOR INVOLVEMENT PROGRAM

Pub. L. 102-240, title I, §1060, Dec. 18, 1991, 105 Stat. 2003, provided that:

“(a) ESTABLISHMENT.—The Secretary shall establish a private sector involvement program to encourage States to contract with private firms for engineering and design services in carrying out Federal-aid highway projects when it would be cost effective.

“(b) GRANTS TO STATES.—

“(1) IN GENERAL.—In conducting the program under this section, the Secretary may make grants in each of fiscal years 1992, 1993, 1994, 1995, 1996, and 1997 to not less than 3 States which the Secretary determines have implemented in the fiscal year preceding the fiscal year of the grant the most effective programs for increasing the percentage of funds expended for contracting with private firms (including small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals) for engineering and design services in carrying out Federal-aid highway projects.

“(2) USE OF GRANTS.—A grant received by a State under this subsection may be used by the State only for awarding contracts for engineering and design services to carry out projects and activities for which Federal funds may be obligated under title 23, United States Code.

“(3) FUNDING.—There are authorized to be appropriated to carry out this section \$5,000,000 for each of fiscal years 1992 through 1997. Such sums shall remain available until expended.

“(c) REPORT BY FHWA.—Not later than 120 days after the date of the enactment of this Act [Dec. 18, 1991], the Administrator of the Federal Highway Administration shall submit to the Secretary a report on the amount

of funds expended by each State in fiscal years 1980 through 1990 on contracts with private sector engineering and design firms in carrying out Federal-aid highway projects. The Secretary shall use information in the report to evaluate State engineering and design programs for the purpose of awarding grants under subsection (b).

“(d) REPORT TO CONGRESS.—Not later than 2 years after the date of the enactment of this Act [Dec. 18, 1991], the Secretary shall transmit to Congress a report on implementation of the program established under this section.

“(e) ENGINEERING AND DESIGN SERVICES DEFINED.—The term ‘engineering and design services’ means any category of service described in section 112(b) of title 23, United States Code.

“(f) REGULATIONS.—Not later than 180 days after the date of the enactment of this Act [Dec. 18, 1991], the Secretary shall issue regulations to carry out this section.”

PILOT PROGRAM FOR UNIFORM AUDIT PROCEDURES

Pub. L. 102-240, title I, §1092, Dec. 18, 1991, 105 Stat. 2024, directed Secretary to establish pilot program to include no more than 10 States under which any contract or subcontract awarded in accordance with subsec. (b)(2)(A) of this section was to be performed and audited in compliance with cost principles contained in Federal acquisition regulations of part 41 of title 48 of Code of Federal Regulations, provided for indirect cost rates in lieu of performing audits, and required each State participating in pilot program to report to Secretary not later than 3 years after Dec. 18, 1991, on results of program, prior to repeal by Pub. L. 104-59, title III, §307(b), Nov. 28, 1995, 109 Stat. 582. See subsec. (b)(2)(C) to (F) of this section.

EVALUATION OF STATE PROCUREMENT PRACTICES

Pub. L. 102-240, title VI, §6014, Dec. 18, 1991, 105 Stat. 2181, directed Secretary to conduct a study to evaluate whether or not current procurement practices of State departments and agencies were adequate to ensure that highway and transit systems were designed, constructed, and maintained so as to achieve a high quality for such systems at the lowest overall cost and, not later than 2 years after Dec. 18, 1991, to transmit to Congress a report on the results of the study, together with an assessment of the need for establishing a national policy on transportation quality assurance and recommendations for appropriate legislative and administrative actions.

§ 113. Prevailing rate of wage

(a) The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the construction work performed on highway projects on the Federal-aid highways authorized under the highway laws providing for the expenditure of Federal funds upon the Federal-aid systems, shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with sections 3141-3144, 3146, and 3147 of title 40.

(b) In carrying out the duties of subsection (a) of this section, the Secretary of Labor shall consult with the highway department of the State in which a project on any of the Federal-aid systems is to be performed. After giving due regard to the information thus obtained, he shall make a predetermination of the minimum wages to be paid laborers and mechanics in accordance with the provisions of subsection (a) of this section which shall be set out in each project advertise-