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DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

23 CFR Part 636

[Docket No. FHWA-2013-0043]

RIN 2125-AF58

Design-Build Contracting

AGENCY: Federal Highway Administration (FHWA), DOT.

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

SUMMARY: This NPRM provides interested parties with the opportunity to comment on proposed changes to the FHWA requirements related to the use of alternative technical concepts (ATC) in design-build project delivery of highway construction. The revisions are intended to eliminate the requirement to submit a base proposal when a contracting agency allows design-build proposers to submit ATCs in their technical and price proposals. The FHWA seeks comments on the proposals contained in this notice.

DATES: Comments must be received on or before [insert date 60 days from the date of publication in the Federal Register]. Late comments will be considered to the extent practicable.

ADDRESSES: Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or fax comments to (202) 493-2251.

Alternatively, comments may be submitted via the Federal eRulemaking Portal at <http://www.regulations.gov> (follow the on-line instructions for submitting comments).

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. All comments received into any docket may be searched in electronic format by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Persons making comments 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 view the statement at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Mr. Gerald Yakowenko, Contract Administration Team Leader, Office of Program Administration, (202) 366-2221, or Mr. Michael Harkins, Office of the Chief Counsel, (202) 366-4928, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

You may submit or retrieve comments online through the Federal eRulemaking portal at: <http://www.regulations.gov>. The Web site is available 24 hours each day of the 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 from the Office of the Federal Register's home page at: http://www.archives.gov/federal_register and the Government Printing Office's Web page at: <http://www.gpoaccess.gov>.

Background

Over the past 20 years, contracting agencies have been gaining valuable experience with the design-build project delivery method for highway construction. In conjunction with this delivery method, some agencies have encouraged design-build proposers to submit ATCs as a way to encourage innovation, promote efficiency, reduce risk, accelerate project delivery schedules, and reduce project costs.

An ATC is a request by a proposer to modify a contract requirement, specifically for that proposer's use in the proposal process. The ATC must provide a solution that is equal or better to the requirements in the Request for Proposals (RFP) document. Proposers submit ATCs for the contracting agency's conceptual approval during the procurement process. The contracting agency may conduct confidential meetings with each proposer to review and discuss that proposer's ATCs. If the concept is approved by the contracting agency, the proposer may use the ATC in its technical and price proposal, thus providing the contracting agency with the potential for increased value at reduced costs.

The FHWA's current regulatory policy in 23 CFR Part 636 allows contracting agencies to use ATCs in their procurement process subject to two conditions: 1) the ATC must not conflict with the criteria agreed upon in the environmental decisionmaking process, and 2) the contracting agency must require proposers to submit a base proposal in addition to supplemental ATC-based proposals. Specifically, 23 CFR 636.209(b)

states: “At your discretion, you may allow proposers to submit alternative technical concepts in their proposals as long as these alternative concepts do not conflict with criteria agreed upon in the environmental decision making process. Alternative technical concept proposals may supplement, but not substitute for base proposals that respond to the RFP requirements.”

Thus the current policy allows proposers to submit proposals based on an approved ATC, but not as a substitute for the base proposal. The requirement for a base proposal and a supplemental ATC-based proposal was founded on the perception that this would allow for a fair comparison of proposals. In 2002, the FHWA believed that requiring every proposer to submit a base proposal would provide contracting agencies with quality and price information for each proposer for comparison purposes. In addition, contracting agencies could evaluate ATC-based proposals from firms desiring to submit innovative concepts. The underlying principle in existing policy is to ensure fairness and open competition by making certain that all proposers are competing for the same project.

Since 2002, the FHWA has authorized several Special Experimental Projects No. 14 (SEP-14) proposals involving 23 CFR 636.209(b). The SEP-14 Program permits States and the FHWA to evaluate promising non-traditional contracting techniques, which may otherwise deviate from established policy. The post-project evaluations received from agencies with SEP-14 authorization (which can be viewed at: <http://www.fhwa.dot.gov/programadmin/contracts/sep14list.cfm>) indicate that the procurement procedures that allowed for the submission and evaluation of ATCs were fair, transparent, and could be conducted in a manner that encouraged competition and

innovation. The fact that base proposals were not available from all proposers did not lead to a perception of unfairness or a situation where agencies were evaluating significantly different projects. In fact, all contracting agency evaluations indicated that the ATC process was a significant factor in encouraging innovation, cost savings, and increasing the overall value to the agency through the best-value selection process.

Under the authority of SEP-14, 23 CFR 636.209(b) project or program requirement waivers were requested and approved for the following contracting agencies:

- East End Crossing-Ohio River Bridge – the Indiana Finance Authority and the Indiana Department of Transportation;
- Gerald Desmond Bridge Replacement Project - the California Department of Transportation (Caltrans) and the city of Long Beach;
- I-10 widening – the Louisiana Department of Transportation and Development;
- I-15/I-215 Interchange Improvement Project - Caltrans;
- I-95 – Contee Road Interchange, US 113, Intercounty Connector, and programmatic approval by Maryland State Highway Administration;
- Longfellow, Whittier, and Braga Bridges - the Massachusetts Department of Transportation;
- Louisville-Southern Indiana Ohio River Bridges Project – the Kentucky Transportation Cabinet;
- Programmatic approval by the Colorado High Performance Transportation Enterprise and the Colorado Department of Transportation;
- Programmatic approval by the Idaho Transportation Department;

- SR-91 Corridor Improvement Project - the Riverside County Transportation Commission;
- Tappan Zee Bridge - the New York State Thruway Authority and the New York State Department of Transportation;
- Programmatic approval by the Michigan Department of Transportation;
- Programmatic approval by the South Carolina Department of Transportation; and
- Programmatic approval by the Texas Department of Transportation.

Evaluations provided by these agencies concluded that the use of ATCs in the procurement process provides the following benefits:

- a strong potential for increased value at a lower cost by allowing contractors to provide innovative cost effective solutions in a competitive procurement process,
- increased competition and innovative approaches early in the design process, giving contracting agencies the opportunity to select proven design and construction solutions,
- consideration and use of innovative solutions through early contractor involvement,
- further innovation and competition fostered through confidential meetings with proposers and contracting agencies, which provided proposers with a degree of comfort that their concepts would be accepted, and
- increased use of advanced technology, new materials, and innovative construction methods.

The evaluation reports provided by various contracting agencies through the SEP-14 process have been very positive regarding the use and implementation benefits of ATCs for design-build project delivery.

In the April 19, 2010, SEP-14 evaluation of the I-10 widening project, the LaDOTD stated:

“This ATC process gives the LaDOTD the ability to factor the proposers' technical solutions into the selection process and gives the LaDOTD access to solutions from all proposers. It also gives the successful proposer a head start on implementation of its ATCs, and avoids unnecessary costs for proposers to advance a base design that ultimately will not be used. . . . The opportunity to introduce innovative concepts resulted in greater competition among the proposers by allowing the LaDOTD to consider a broader spectrum of technical solutions for the Project. Overall, we feel that the ATC process utilized for the I-10 Widening Design-Build Project was a success.”

The December 21, 2011, SEP-14 evaluation submitted by MDSHA for the I-95/Contee Road interchange project included the following findings:

“The proposed ATC process gave the SHA the ability to factor each proposer's technical solutions into the selection process, allowing a true 'Best-Value' selection and gave the SHA access to solutions from all proposers. It also gave the successful proposer a head start on implementation of its ATCs and avoided unnecessary costs and risks for proposers to advance a base design that may not [be] used.

“As part of the ATC submittal and review process, the Proposer was required to provide details concerning how the ATC would impact vehicular traffic, environmental impacts (favorable or unfavorable) identified on appropriate environmental documents, community impacts, and safety and life-cycle project and infrastructure costs (including impacts on the cost of repair and maintenance). The ATC process, therefore, led to approved ATCs that minimized the impact on the environment, did not reduce the overall quality of the final product, and would provide the 'Best-Value' for the contract.”

The December 4, 2008, SEP-14 evaluation by the MDSHA for the Intercounty Connector Contracts A, B, and C stated:

“Over the past three years and procurement of approximately \$1.5 billion in design-build contracts, the Administration has received numerous benefits from using the ATC process. SHA believes that these compelling benefits included not only permitting flexibility and innovation from the design-build teams, but they have also allowed opportunities for cost saving measures in a very complex and expensive program, in addition to reductions in environmental impacts on a highly sensitive project. Seven short listed design build firms competed for three contracts and submitted 133 ATCs. We did not receive any complaints regarding the ATC process and specifications used on these three contracts from the seven short listed firms. The ATC process and specifications used by SHA allowed for fair

and open competition and ensured that all propose[r]s were competing for the same project.”

The 2011 Annual Report, titled “Alternate Technical Concepts in Design Build Contracting at WSDOT,” stated the following:

“The ATC process, as practiced at WSDOT, is a valuable and effective tool that helps to further refine our design build projects and obtain the best value for taxpayers. It is well established and accepted by industry as evidenced by the level of participation during procurement. The experience documented in this report confirms this success by both statistical and anecdotal data. This ATC process provides another avenue for application of the competitive market influence to the design build procurement method within the bounds of the level playing field and to the benefit of our taxpayers. Additionally, this process makes use of the FHWA waiver authorization to avoid extra, duplicative efforts by our proposers and evaluation teams associated with the preparation and review of a second, unaltered proposal.”

In consideration of the successful deployment of ATC by various contracting agencies, the FHWA is proposing to revise its requirements to eliminate the base proposal submittal requirement in 23CFR 636.209(b). The use of ATCs is acceptable so long as the RFP document clearly describes the contracting agency’s requirements for ATC content, submission, review procedures, confidential meetings procedures (if used), and how ATCs will be evaluated in the proposal review process.

Section-by-Section Discussion of the Proposed Changes

Part 636—DESIGN-BUILD CONTRACTING

The FHWA proposes to revise 23 CFR Part 636 – Design-Build Contracting as follows:

In relation to 23 CFR 636.209, the FHWA proposes to revise paragraph (b) to delete the submission requirement for base proposals, where a contracting agency is allowing the submission of ATC proposals. Contracting agencies may allow proposers to submit ATCs, as long as the RFP document clearly describes the contracting agency's requirements for ATC content, submission, review, confidential meeting procedures (if used), and how ATC will be evaluated in the proposal review process.

Additionally, a sentence is proposed to be added to paragraph (b) stating that the confidentiality of ATCs will be maintained, except to the extent disclosure is required in order for the contracting agency to maintain compliance with a Federal or State permit or other legal requirement necessary for the delivery of the project. Contracting agencies and design-build proposers need to be aware that, in certain instances, it may be necessary for the contracting agency to issue addenda to the RFP, to inform all proposers of a RFP revision that was prompted by another proposer's ATC submission. For instance, if an ATC submitted by a proposer demonstrates that a feasible and prudent 4(f) alternative exists on a project for which a 4(f) determination had already concluded that there was no feasible and prudent 4(f) alternative, the contracting agency and FHWA must disclose the alternative to maintain 4(f) compliance.

RULEMAKING ANALYSES AND NOTICES

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

The FHWA has determined that this action would not be a significant regulatory action within the meaning of Executive Order 12866, or within the meaning of DOT's regulatory policies and procedures. After the consideration of alternatives and analysis of impacts, the FHWA anticipates that the economic impact of this rulemaking would be minimal and would not adversely affect any sector of the economy in a material way. Additionally, this action complies with the principles of Executive Order 13563. Interested parties are invited to comment on the anticipated economic impact. In addition, these 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 (RFA), the FHWA has evaluated the effects of this NPRM on small entities and anticipates that this action will not have a significant economic impact on a substantial number of small entities. The proposed amendment provides procedures for use of ATCs in design-build project delivery of highway construction. As such, it primarily affects States, which are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, States do not meet the definition of a small entity and the RFA does not apply. The FHWA further 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

The FHWA has determined that this NPRM will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (UMRA). Section 202 of the UMRA, 2 U.S.C. 1531-1538, requires Federal agencies to prepare a written assessment of proposed Federal mandates likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year. The FHWA anticipates that this proposed rulemaking will not result in the expenditure by State, local, or tribal governments, or by the private sector, of more than \$100 million annually. Thus, the FHWA is not required to prepare a written assessment under the UMRA.

Executive Order 13132 (Federalism Assessment)

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. 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. Local entities should refer to the Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction, for further information. Accordingly, the FHWA solicits comments on this issue.

Paperwork Reduction Act

The FHWA has analyzed this proposed rule under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et seq.) and has determined preliminarily that this proposal does not contain collection of information requirements for the purposes of the PRA.

National Environmental Policy Act

The FHWA has analyzed this 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 action would not have any effect on the quality of the environment and meets the criteria for the categorical exclusion at 23 CFR 771.117(c)(20).

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this proposed rule under Executive Order 12630, Governmental Actions and Interference 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)

The FHWA has 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 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)

The FHWA analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The FHWA has determined that this rule is not a significant energy action because the rule is not a significant regulatory action under Executive Order 12866, and the rule 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.

Executive Order 12898 (Environmental Justice)

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. The FHWA has determined that this rule does not raise any environmental justice issues.

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 in 23 CFR Part 636

Construction, Construction manager, General contractor, Grant programs, Transportation, Highways, and Roads,

Issued on: July 16, 2013

Victor M. Mendez

Administrator

In consideration of the foregoing, the FHWA proposes to revise title 23, Code of Federal Regulations, part 636 as follows:

PART 636 – DESIGN-BUILD CONTRACTING

1. The authority citation for part 636 is revised to read as follows:

Authority: Sec. 1503 of Pub. L. 109-59, 119 Stat. 1144; 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 1.85(b).

2. Amend § 636.209 by revising paragraph (b) to read as follows:

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

* * * * *

(b)(1) At your discretion, you may allow proposers to submit alternative technical concepts (ATCs) in their proposals if:

- (i) The alternative concepts do not conflict with criteria agreed upon in the environmental decision making process, and
- (ii) The RFP document clearly describes the contracting agency’s requirements for ATC:
 - (A) Content,
 - (B) Submission,
 - (C) Review,
 - (D) Confidential meetings procedures (if used), and
 - (E) Evaluation in the proposal review process.

(2) The confidentiality of ATCs will be maintained, except to the extent disclosure is necessary to maintain compliance with Federal or State

permitting or other legal requirements necessary for the delivery of the project.

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