



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

23 CFR Part 635

[FHWA Docket No. FHWA-2018-0017]

RIN 2125-AF83

Indefinite Delivery and Indefinite Quantity Contracts for Federal-aid Construction

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: The FHWA has announced that the Indefinite Delivery and Indefinite Quantity (ID/IQ) method of contracting, including job order contracts, for low-cost construction contracts will be allowed, without FHWA approval, under certain circumstances. This advance notice of proposed rulemaking seeks comment on how FHWA may further expand this contracting method on a permanent basis.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Late comments will be considered to the extent practicable.

ADDRESSES: You may submit comments, identified by the document number at the top of this document, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: 1-202-493-2251
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200

New Jersey Ave., SE, West Building Ground Floor Room W12-140, Washington, DC 20590.

- Hand Delivery/Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave., SE, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to www.regulations.gov, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: For questions about this ANPRM, please contact Mr. John Huyer, FHWA Office of Program Administration (651) 291-6111, or via e-mail at John.Huyer@dot.gov. For legal questions, please contact Mr. Jomar Maldonado, FHWA Office of the Chief Counsel, 202-366-1373, or via e-mail at Jomar.Maldonado@dot.gov. 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: On May 2, 2018,¹ FHWA announced that contracting agencies no longer need to submit individual requests and work plans pursuant to Special Experimental Project No. 14 (SEP-14) for low-cost ID/IQ contracts that are awarded to the lowest responsive bidder based on an invitation for bids. The FHWA considers “low-cost contracts” to be 1- or 2-year contracts awarded to the lowest

¹ 83 FR 19393, May 2, 2018.

responsive bidder for construction of projects that qualify for FHWA categorical exclusions under the National Environmental Policy Act of 1969 (23 CFR 771.117) and where the total value of task or work orders does not exceed \$2,000,000 per year. However, the ID/IQ contracting technique continues to be authorized on an experimental basis while FHWA explores rulemaking to revise FHWA's regulations to accommodate this contracting technique. This ANPRM seeks comment on how FHWA may operationalize this contracting technique on a permanent basis.

Background

The ID/IQ contracts are a method of contracting that allows an indefinite quantity of services for a fixed time. They are used in the Federal Government when agencies cannot determine, above a specified minimum, the precise quantities of supplies or services that the Government will require during the contract period. For construction ID/IQ contracts, contractors bid unit prices for estimated quantities of standard work items, and task orders are used to define the location and quantities for specific work. The ID/IQ contracts may be awarded to the lowest responsive bidder based on an invitation for bids or the best-value proposer based on responses to Requests for Proposals. Contracting agencies use other names for these types of contracts, including on-call contracts, area-wide contracts, continuing contracts, push-button contracts, and task order contracts. Job Order Contracts (JOCs) are a form of ID/IQ contracts that utilize a construction task catalogue with pre-priced work item descriptions and where contractors bid "mark-up rates." The contract is awarded to the lowest responsive bidder determined by their rates.

Although ID/IQ contracts have been specifically authorized in the Federal procurement process (48 CFR 16.5) and for the contracting of architecture and engineering (A/E) services in the Federal-aid highway program (FAHP) (23 CFR part 172), the FAHP authorization and procurement laws for construction do not address the possible use of ID/IQ contracts. The FAHP construction procurement statute, 23 U.S.C. 112(b)(1), requires contracts to be awarded by a competitive bidding process to the lowest responsive bidder (traditional design-bid-build project delivery method based upon the premise of a 100 percent-complete design and a well-defined scope of work). The ID/IQ contracts are awarded based upon a general, but not completely defined, scope of work for a geographic area and limited time period (but not specific locations, designs, or quantities) and are often awarded based upon specific evaluation criteria.

A. Experience under Special Experimental Project Number 14 (SEP-14)

The FHWA has used its authority in 23 U.S.C. 502(b)(1) to test the use of ID/IQ contracts for the construction of FAHP projects through the SEP-14 Program for innovative contracting techniques. Under the SEP-14 Program, contracting agencies interested in testing an innovative contracting technique submit project-specific (or programmatic) work plans to FHWA for their implementation. The FHWA Division Office evaluates the work plan, coordinates with FHWA Headquarters, and, if it finds the work plan to be acceptable, FHWA approves the use of the technique on a temporary basis for a project or group of pilot projects. Over time, FHWA Headquarters staff assess the initiative to determine if it is a technique that should be operationalized for the FAHP on a permanent basis without the need for individual requests, work plans, and evaluation reports. Operationalizing SEP-14 experiments has taken different paths in the past based

on the source of the policy warranting innovation and FHWA's risk assessment, such as FHWA-initiated memoranda (for example, cost plus time bidding and lane rental), FHWA-initiated rulemaking (for example, warranty clauses at 23 CFR 635.413), and congressionally initiated statutory amendments (for example, design-build and contractor manager/general contractor under 23 U.S.C. 112(b)(3)-(4)). More information on SEP-14 can be found at <https://www.fhwa.dot.gov/construction/cqit/sep14.cfm>.

From 2007 to the present, FHWA, State departments of transportation (State DOTs), and Local Public Agencies (LPAs) through the State DOTs have experimented with the use of ID/IQ contracts and JOCs for construction. The FHWA has approved the use of this contracting method under SEP-14 for 16 different State DOTs and 6 LPAs. Evaluation reports indicate that JOCs and ID/IQ contracts allow for cost-effective contracting for small value contracts and preventive maintenance programs. Specifically, the reports indicate that these contracts eliminate the need for contracting agencies to advertise and award numerous small contracts and provide contracting agencies with wide flexibility in programming and addressing preventive maintenance needs.

Having evaluated the use of JOCs and ID/IQ contracts for construction in the FAHP for over a decade, FHWA has now determined that they are suitable for operationalization. This is consistent with Senate report language accompanying fiscal years 2017 and 2018 appropriations to operationalize JOCs. S. Rept. No. 114-243, 43 (April 21, 2016); S. Rept. No. 115-138, 52 (July 27, 2017). The approach is also consistent with the Department of Justice's Office of Legal Counsel (OLC) opinion regarding competition and contracting requirements. *See Competitive Bidding Requirements Under the Federal-Aid Highway Program*, 23 U.S.C. 112, (Aug. 23, 2013).

B. Steps for Operationalizing ID/IQs and JOCs for Construction in the FAHP

The FHWA is proceeding with two phases to operationalize ID/IQ contracts and JOCs for construction in the FAHP. The first phase is the issuance of an FHWA Notice on how FHWA will allow ID/IQ contracts and JOCs for construction without the need for project-specific work plans from contracting agencies. The FHWA published a Federal Register Notice requesting public comment on allowing contracting agencies to establish ID/IQ and JOCs for low-cost construction contracts at 83 FR 19393 (May 2, 2018). Please refer to that notice for details on the proposed implementation of phase one. The second phase is the initiation of this rulemaking.

Amendments to the construction and approval regulations are necessary in order to allow the contracting technique on a permanent basis. To assist the Agency in this effort, FHWA seeks public comments on the following questions:

1. Would it be appropriate to allow notice and award of the base ID/IQ contract or JOC prior to approval of plans, specifications and estimates, environmental review, and right-of-way clearances, but require these prior to the issuance of individual tasks?
2. Would the allowance of time extensions be appropriate? What should be the minimum time extension length? What should be the maximum time extension length?
3. Is the \$2,000,000 per year limitation appropriate? Should this figure be indexed? If so, how?

4. Should FHWA consider allowing ID/IQ contracts using best value considerations? What criteria (for example, past performance, quality, timeliness) should be considered for best value determinations?
5. Should multiple award ID/IQ contracts be allowed? If so, what conditions or criteria should be used for awarding work orders?
6. What contract term/extension limits should be allowed? Should “on-ramp” procedures be used to allow new contractors to be considered for the award pool after the initial award and “off-ramp” procedures be used to discontinue the use of contractors who are not performing satisfactorily?
7. What procedures should be in place to ensure fairness and transparency in the selection and implementation of multiple-award ID/IQ contracts?
8. What change conditions clause would be appropriate for ID/IQ contracts and JOCs? What would be an appropriate clause for significant changes in the character of work?
9. How should the contracting agencies address the estimates required under 23 CFR 635.115? Would the estimate quantities be the minimum value provided under the contract, the estimate for the base contract, or the estimated maximum value under the contract including contract extensions?
10. How would the 30 percent self-performance requirement in 23 CFR 635.116(a) apply to ID/IQ contracts and JOCs? How would it be enforced given the nature of the task orders?

11. How should authorizations to proceed with work be given for individual task orders?
12. What costs, benefits, and cost-savings would result from allowing this contracting technique on a permanent basis? Please submit data that would help FHWA quantify cost-effectiveness, as well as quantifiable cost-savings associated with advertising and awarding small contracts and increasing flexibility in programming, and any other efficiencies that may result from the operationalization of this contracting method.
13. Are there any other aspects related to the use of ID/IQ contracts or JOC for construction in the FAHP that FHWA should consider?

The FHWA will consider all responses and comments and take them into account in the development of a notice of proposed rulemaking (NPRM) on this subject.

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. In addition to late comments, FHWA also will continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. An NPRM may be published at any time after close of the comment period.

Executive Order 13771 (Reducing Regulations and Controlling Regulatory Costs), Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The FHWA has preliminarily determined that this action would not be a significant regulatory action within the meaning of Executive Order (E.O.) 12866 and within the meaning of the DOT regulatory policies and procedures. This action complies with E.O.s 12866, 13563, and 13771 to improve regulation. The FHWA anticipates that this rulemaking would be a deregulatory action and result in cost-savings because it proposes to remove the traditional procurement requirements for Federal-aid highway construction work for small construction work that would result in expeditious project delivery of low-cost and/or repetitive work. The FHWA seeks data on the costs, benefits, and cost-savings associated with this action.

Based upon the information received in response to this ANPRM, FHWA intends to carefully consider the costs and benefits associated with this rulemaking. Accordingly, comments, information, and data are solicited on the economic impact of any proposed recommendation.

This ANPRM is not a regulatory action under Executive Order 13771.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Public Law 96-354, 5 U.S.C. 601-612), and based upon the information received in response to this ANPRM, FHWA will evaluate the effects of any action proposed on small entities. This action merely seeks information regarding the use of the ID/IQ method of contracting, including JOCs,

for low-cost construction contracts. Therefore, FHWA is unable to certify at this time whether or not it will have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

Because of the preliminary nature of this document and lack of necessary information on costs, FHWA is unable to evaluate the effects of the potential regulatory changes in regard to imposing a Federal mandate involving expenditure by State, local, and Indian Tribal governments, in the aggregate, or by the private sector, of \$151.1 million or more in any one year (2 U.S.C. 1532). Nevertheless, FHWA will evaluate any regulatory action that might be proposed in subsequent stages of this rulemaking to assess the effects on State, local, and Indian Tribal governments and the private sector.

Executive Order 12988 (Civil Justice Reform)

The FHWA will evaluate any rule that may be proposed in response to comments received to ensure that such action meets applicable standards in section 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

The FHWA will evaluate any rule that may be proposed in response to comments received to ensure that such action meets the requirements of E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks. The Agency does not, however, anticipate that any such rule would be economically significant or would present an environmental risk to health or safety that may disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

The FHWA will evaluate any rule that may be proposed in response to comments received to ensure that any such rule will not affect a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism)

The FHWA will analyze any action that might be proposed in accordance with the principles and criteria contained in E.O. 13132, and FHWA anticipates that any action contemplated will not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA also anticipates that any action taken will not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions. We encourage commenters to consider these issues.

Executive Order 13175 (Tribal Consultation)

The FHWA will analyze any proposal under E.O. 13175, dated November 6, 2000. The FHWA preliminarily believes that any proposal will not have substantial direct effects on one or more Indian Tribes, will not impose substantial direct compliance costs on Indian Tribal governments, and will not preempt Tribal law. Therefore, a Tribal summary impact statement may not be required.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. Any action that might be contemplated in subsequent phases of this proceeding will be analyzed for the purpose of the PRA for its impact upon information collection. The FHWA would be required to submit any proposed collections of information to OMB for review and approval at the time the NPRM is issued, and, accordingly, seeks public comments. Interested parties are invited to send comments regarding any aspect of any proposed information collection requirements, including, but not limited to: (1) whether the collection of information would be necessary for the performance of the functions of FHWA, including whether the information would have practical utility; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collection of information; and (4) ways to minimize the collection burden without reducing the quality of the information collected.

National Environmental Policy Act

The FHWA will analyze any action that might be proposed for the purposes of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321-4347) to assess whether there would be any effect on the quality of the environment.

Executive Order 13211 (Energy Effects)

The FHWA will analyze any proposed action under E.O. 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use, to assess whether there would be any adverse effect on the supply, distribution, or use of energy.

Regulation Identification Number

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

List of Subjects in 23 CFR Part 635

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

Authority: 23 U.S.C. 112 and 502; 23 CFR 635.

Issued on June 20, 2018 under authority delegated in 49 CFR 1.85:

Brandy L. Hendrickson,
Acting Administrator,
Federal Highway Administration.

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