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(4) Required by governmental and appropriate regulatory commission requirements.

§ 140.916 Protection.

The cost of essential protective services which, in the opinion of a railroad company, are required to ensure safety to railroad operations during certain periods of the construction of a project, is reimbursable provided an item for such services is incorporated in the State-railroad agreement or in a work order issued by the State and approved by FHWA.

§ 140.918 Maintenance and extended construction.

The cost of maintenance and extended construction is reimbursable to the extent provided for in 23 CFR 646.216(f)(4), and where included in the State-Railroad Agreement or otherwise approved by the State and FHWA.

§ 140.920 Lump sum payments.

Where approved by FHWA, pursuant to 23 CFR 646.216(d)(3), reimbursement may be made as a lump sum payment, in lieu of actual costs.

§ 140.922 Billings.

(a) After the executed State-Railroad Agreement has been approved by FHWA, the company may be reimbursed on progress billings of incurred costs. Costs for materials stockpiled at the project site or specifically purchased and delivered to the company for use on the project may be reimbursed on progress billings following approval of the executed State-Railroad Agreement or the written agreement under 23 CFR 646.218(c).

(b) The company shall provide one final and complete billing of all incurred costs, or of the agreed-to lump sum, within one year following completion of the reimbursable railroad work. Otherwise, previous payments to the company may be considered final, except as agreed to between the SHA and the railroad.

(c) All company cost records and accounts relating to the project are subject to audit by representatives of the State and/or the Federal Government for a period of three years from the

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date final payment has been received by the company.

(d) A railroad company must advise the State promptly of any outstanding obligation of the State's contractor for services furnished by the company such as protective services.

[40 FR 16057, Apr. 9, 1975, as amended at 40 FR 29712, July 15, 1975; 62 FR 45328, Aug. 27, 1997]

PART 172—ADMINISTRATION OF ENGINEERING AND DESIGN RELATED SERVICE CONTRACTS

Subpart A—Procurement Procedures

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AUTHORITY: 23 U.S.C. 112(b), 114(a), 302, 315, and 402; 49 CFR 1.48(b) and 18; 48 CFR 12 and 31; 41 U.S.C. 253 and 259; and sec. 1060, Pub. L. 102-240, 105 Stat. 1914, 2003 (1991).

SOURCE: 56 FR 19802, Apr. 30, 1991, unless otherwise noted.

Subpart A—Procurement Procedures

§ 172.1 Purpose and applicability.

(a) To prescribe policies and procedures for contracting to ensure that a qualified consultant is obtained through an equitable selection process, and that prescribed work is properly accomplished in a timely manner, at a reasonable cost.

(b) This regulation applies to all engineering and design related service contracts financed with Federal-aid highway funds. Agencies with approved Certification Acceptance Plans (CA), Secondary Road Plans (SRP) and/or Combined Road Plans (CRP) shall submit for the Federal Highway Administration's (FHWA) approval, procedures

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consistent with this regulation if they intend to utilize Federal-aid highway funds for any of the above contract types. The use of procedures codified in State statutes to select consultant firms is also acceptable. Other types of negotiated contracts should be administered under the requirements of the common grant management rule, 49 CFR 18.

§ 172.3 Definitions.

As used in this part:

Competitive negotiation. Any form of negotiations that utilizes, (1) qualifications-based procedures complying with title IX of the Federal Property and Administrative Services Act of 1949 (Pub. L. 92-582, 86 Stat. 1278 (1972)), (2) equivalent State qualifications-based procedures or (3) a formal procedure permitted by State statute.

Consultant. The individual or firm providing engineering and design related services as a party to the contract.

Contract modification. An agreement modifying the existing contract, such as an agreement to accomplish work beyond the scope of the original contract.

Contracting agency. The State highway agency or local governmental agencies which have responsibility for the procurement.

Engineering and design services. Program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services.

Extra work. Any services or actions required of the consultant above and beyond the obligations of the original or modified contract.

Fixed fee. A dollar amount established to cover the consultant's profit and business expenses not allocable to overhead.

Pre negotiation audit. An examination of a consultant's records made in accordance with generally accepted auditing standards.

Private sector engineering and design firms. Any individual or private firm (including small business concerns and small businesses owned and controlled by socially and economically disadvantaged individuals as defined in 49 CFR

part 23) contracting with a State to provide engineering and design services.

Scope of work. All services and actions required of the consultant by the obligations of the contract.

[56 FR 19802, Apr. 30, 1991, as amended at 59 FR 64848, Dec. 16, 1994]

§ 172.5 General principles.

(a) *Need for consultant services in management roles.* When Federal-aid highway funds participate in the contract, the contracting agency shall receive approval from the FHWA before hiring a consultant to act in a "management" role for the contracting agency. This concept should be limited to situations where unique or unusual circumstances exist and where the contracting agency has provided adequate justification to explain its reason for using a consultant in this role and the reason it cannot perform the work.

(b) *Written procedures.* The contracting agency shall prepare written procedures for each method of procurement it proposes to utilize. These procedures and all revisions shall be approved by the FHWA and describe, as appropriate to the particular method of procurement, each step used:

(1) In preparing a scope of work, evaluation factors and cost estimate for selecting a consultant,

(2) In soliciting proposals from prospective consultants,

(3) In the evaluation of proposals and the ranking/selection of a consultant,

(4) In negotiation of the reimbursement to be paid to the selected consultant,

(5) In monitoring the consultant's work and in preparing a consultant's performance evaluation when completed, and

(6) In determining the extent to which the consultant, who is responsible for the professional quality, technical accuracy, and coordination of services, may be reasonably liable for costs resulting from errors or deficiencies in design furnished under its contract.

(c) *Pre negotiation audits.* The contracting agencies shall prepare pre negotiation audits to provide the necessary data to assure that the consultant has an acceptable accounting