

*Formal approval* means approval in writing or the electronic transmission of such approval.

*Incentive/disincentive for early completion* as used in this subpart, describes a contract provision which compensates the contractor a certain amount of money for each day identified critical work is completed ahead of schedule and assesses a deduction for each day the contractor overruns the incentive/disincentive time. Its use is primarily intended for those critical projects where traffic inconvenience and delays are to be held to a minimum. The amounts are based upon estimates of such items as traffic safety, traffic maintenance, and road user delay costs.

*Liquidated damages* means the daily amount set forth in the contract to be deducted from the contract price to cover additional costs incurred by a State highway agency because of the contractor's failure to complete the contract work within the number of calendar days or workdays specified. The term may also mean the total of all daily amounts deducted under the terms of a particular contract.

*Local public agency* means any city, county, township, municipality, or other political subdivision that may be empowered to cooperate with the State highway agency in highway matters.

*Major change or major extra work* means a change which will significantly affect the cost of the project to the Federal Government or alter the termini, character or scope of the work.

*Materially unbalanced bid* means a bid which generates a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the Federal Government.

*Mathematically unbalanced bid* means a bid containing lump sum or unit bid items which do not reflect reasonable actual costs plus a reasonable proportionate share of the bidder's anticipated profit, overhead costs, and other indirect costs.

*Public agency* means any organization with administrative or functional responsibilities which are directly or indirectly affiliated with a governmental

body of any nation, State, or local jurisdiction.

*Publicly owned equipment* means equipment previously purchased or otherwise acquired by the public agency involved primarily for use in its own operations.

*Specialty items* means work items identified in the contract which are not normally associated with highway construction and require highly specialized knowledge, abilities or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid on the contract; in general, these items are to be limited to minor components of the overall contract.

*State highway agency (SHA)* means that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction. The term "State" should be considered equivalent to "State highway agency" if the context so implies.

*Workday* means a calendar day during which construction operations could proceed for a major part of a shift, normally excluding Saturdays, Sundays, and State-recognized legal holidays.

[62 FR 6873, Feb. 14, 1997]

### § 635.103 Applicability.

The policies, requirements, and procedures prescribed in this subpart shall apply to all Federal-aid highway projects except for those title 23 requirements specifically discharged in an approved certification acceptance plan, in accordance with 23 U.S.C. 117.

[56 FR 37004, Aug. 2, 1991, as amended at 62 FR 6873, Feb. 14, 1997]

### § 635.104 Method of construction.

(a) Actual construction work shall be performed by contract awarded by competitive bidding; unless, as provided in §635.104(b), the SHA demonstrates to the satisfaction of the Division Administrator that some other method is more cost effective or that an emergency exists. The SHA shall assure opportunity for free, open, and competitive bidding, including adequate publicity of the advertisements or calls for bids. The advertising or

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calling for bids and the award of contracts shall comply with the procedures and requirements set forth in §§ 635.112 and 635.114.

(b) Approval by the Division Administrator for construction by a method other than competitive bidding shall be requested by the State in accordance with subpart B of part 635 of this chapter. Before such finding is made, the SHA shall determine that the organization to undertake the work is so staffed and equipped as to perform such work satisfactorily and cost effectively.

**§ 635.105 Supervising agency.**

(a) The SHA has responsibility for the construction of all Federal-aid projects, and is not relieved of such responsibility by authorizing performance of the work by a local public agency or other Federal agency. The SHA shall be responsible for insuring that such projects receive adequate supervision and inspection to insure that projects are completed in conformance with approved plans and specifications.

(b) Although the SHA may employ a consultant to provide construction engineering services, such as inspection or survey work on a project, the SHA shall provide a full-time employed State engineer to be in responsible charge of the project.

(c) When a project is located on a street or highway over which the SHA does not have legal jurisdiction, or when special conditions warrant, the SHA, while not relieved of overall project responsibility, may arrange for the local public agency having jurisdiction over such street or highway to perform the work with its own forces or by contract; provided the following conditions are met and the Division Administrator approves the arrangements in advance.

(1) In the case of force account work, there is full compliance with subpart B of this part.

(2) When the work is to be performed under a contract awarded by a local public agency, all Federal requirements including those prescribed in this subpart shall be met.

(3) The local public agency is adequately staffed and suitably equipped

to undertake and satisfactorily complete the work; and

(4) In those instances where a local public agency elects to use consultants for construction engineering services, the local public agency shall provide a full-time employee of the agency to be in responsible charge of the project.

**§ 635.106 Use of publicly owned equipment.**

(a) Publicly owned equipment should not normally compete with privately owned equipment on a project to be let to contract. There may be exceptional cases, however, in which the use of equipment of the State or local public agency for highway construction purposes may be warranted or justified. A proposal by any SHA for the use of publicly owned equipment on such a project must be supported by a showing that it would clearly be cost effective to do so under the conditions peculiar to the individual project or locality.

(b) Where publicly owned equipment is to be made available in connection with construction work to be let to contract, Federal funds may participate in the cost of such work provided the following conditions are met:

(1) The proposed use of such equipment is clearly set forth in the Plans, Specifications and Estimate (PS&E) submitted to the Division Administrator for approval.

(2) The advertised specifications specify the items of publicly owned equipment available for use by the successful bidder, the rates to be charged, and the points of availability or delivery of the equipment; and

(3) The advertised specifications include a notification that the successful bidder has the option either of renting part or all of such equipment from the State or local public agency or otherwise providing the equipment necessary for the performance of the contract work.

(c) In the rental of publicly owned equipment to contractors, the State or local public agency shall not profit at the expense of Federal funds.

(d) Unforeseeable conditions may make it necessary to provide publicly owned equipment to the contractor at rental rates agreed to between the contractor and the State or local public