

## § 636.106

build contracting technique is optional.

### § 636.106 What type of projects may be used with design-build contracting?

You may use the design-build contracting technique for any qualified or non-qualified project which you deem to be appropriate on the basis of project delivery time, cost, construction schedule and/or quality.

### § 636.107 Does the definition of a qualified project limit the use of design-build contracting?

(a) No, the use of the term “qualified project” does not limit the use of design-build contracting. It merely determines the FHWA’s procedures for approval. The FHWA Division Administrator may approve the design-build method for “qualified projects” which meet the requirements of this part.

(b) The FHWA Division Administrator may also approve other design-build projects (which do not meet the “qualified projects” definition) by using Special Experimental Projects No. 14 (SEP-14), “Innovative Contracting Practices,”<sup>1</sup> provided the project meets the requirements of this part. Projects which do not meet the requirements of this part (either “qualified or non-qualified” projects) must be submitted to the FHWA Headquarters for concept approval.

### § 636.108 How does the definition of a qualified project apply to ITS projects?

For the purpose of this part, a Federal-aid ITS design-build project meets the criteria of a “qualified project” if:

(a) A majority of the scope of services provides ITS services (at least 50 percent of the scope of work is related to ITS services); and

(b) The estimated contract value exceeds \$5 million.

<sup>1</sup>Information concerning Special Experimental Project No. 14 (SEP-14), “Innovative Contracting Practices,” is available on FHWA’s home page: <http://www.fhwa.dot.gov>. Additional information may be obtained from the FHWA Division Administrator in each State.

## 23 CFR Ch. I (4–1–03 Edition)

### § 636.109 How does the NEPA review process relate to the design-build procurement process?

In terms of the design-build procurement process:

(a) The RFQ solicitation may be released prior to the conclusion of the NEPA review process as long as the RFQ solicitation informs proposers of the general status of the NEPA process.

(b) The RFP must not be released prior to the conclusion of the NEPA process. The NEPA review process is concluded with either a Categorical Exclusion classification, an approved Finding of No Significant Impact, or an approved Record of Decision as defined in 23 CFR 771.113(a).

(c) The RFP must address how environmental commitments and mitigation measures identified during the NEPA process will be implemented.

### § 636.110 What procedures may be used for solicitations and receipt of proposals?

You may use your own procedures for the solicitation and receipt of proposals and information including the following:

(a) Exchanges with industry before receipt of proposals;

(b) RFQ, RFP and contract format;

(c) Solicitation schedules;

(d) Lists of forms, documents, exhibits, and other attachments;

(e) Representations and instructions;

(f) Advertisement and amendments;

(g) Handling proposals and information; and

(h) Submission, modification, revisions and withdrawal of proposals.

### § 636.111 Can oral presentations be used during the procurement process?

(a) Yes, the use of oral presentations as a substitute for portions of a written proposal can be effective in streamlining the source selection process. Oral presentations may occur at any time in the acquisition process, however, you must comply with the appropriate State procurement integrity standards.

(b) Oral presentations may substitute for, or augment, written information. You must maintain a record of oral

presentations to document what information you relied upon in making the source selection decision. You may decide the appropriate method and level of detail for the record (*e.g.*, videotaping, audio tape recording, written record, contracting agency notes, copies of offeror briefing slides or presentation notes). A copy of the record should be placed in the contract file and may be provided to offerors upon request.

**§ 636.112 May stipends be used?**

At your discretion, you may elect to pay a stipend to unsuccessful offerors who have submitted responsive proposals. The decision to do so should be based on your analysis of the estimated proposal development costs and the anticipated degree of competition during the procurement process.

**§ 636.113 Is the stipend amount eligible for Federal participation?**

(a) Yes, stipends are eligible for Federal-aid participation. Stipends are recommended on large projects where there is substantial opportunity for innovation and the cost of submitting a proposal is significant. On such projects, stipends are used to:

- (1) Encourage competition;
- (2) Compensate unsuccessful offerors for a portion of their costs (usually one-third to one-half of the estimated proposal development cost); and
- (3) Ensure that smaller companies are not put at a competitive disadvantage.

(b) Unless prohibited by State law, you may retain the right to use ideas from unsuccessful offerors if they accept stipends. If stipends are used, the RFP should describe the process for distributing the stipend to qualifying offerors.

**§ 636.114 What factors should be considered in risk allocation?**

(a) You may consider, identify, and allocate the risks in the RFP document and define these risks in the contract. Risk should be allocated with consideration given to the party who is in the best position to manage and control a given risk or the impact of a given risk.

(b) Risk allocation will vary according to the type of project and location, however, the following factors should be considered:

(1) Governmental risks, including the potential for delays, modifications, withdrawal, scope changes, or additions that result from multi-level Federal, State, and local participation and sponsorship;

(2) Regulatory compliance risks, including environmental and third-party issues, such as permitting, railroad, and utility company risks;

(3) Construction phase risks, including differing site conditions, traffic control, interim drainage, public access, weather issues, and schedule;

(4) Post-construction risks, including public liability and meeting stipulated performance standards; and

(5) Right-of-way risks including acquisition costs, appraisals, relocation delays, condemnation proceedings, including court costs and others.

**§ 636.115 May I meet with industry to gather information concerning the appropriate risk allocation strategies?**

(a) Yes, information exchange at an early project stage is encouraged if it facilitates your understanding of the capabilities of potential offerors. However, any exchange of information must be consistent with State procurement integrity requirements. Interested parties include potential offerors, end users, acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.

(b) The purpose of exchanging information is to improve the understanding of your requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy your requirements, and enhancing your ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.

(c) An early exchange of information can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules. This also includes the