

other specific tasks identified in the contract.

(2) Performance warranties for specific products on NHS projects may be used at the STD's discretion. If performance warranties are used, detailed performance criteria must be provided in the Request for Proposal document.

(3) The STD may follow its own procedures regarding the inclusion of warranty provisions on non-NHS Federal-aid design-build contracts.

(4) For best value selections, the STD may allow proposers to submit alternate warranty proposals that improve upon the warranty terms in the RFP document. Such alternate warranty proposals must be in addition to the base proposal that responds to the RFP requirements.

[60 FR 44274, Aug. 25, 1995, as amended at 67 FR 75926, Dec. 10, 2002]

**§ 635.417 Convict produced materials.**

(a) Materials produced after July 1, 1991, by convict labor may only be incorporated in a Federal-aid highway construction project if such materials have been:

(1) Produced by convicts who are on parole, supervised release, or probation from a prison or

(2) Produced in a qualified prison facility and the cumulative annual production amount of such materials for use in Federal-aid highway construction does not exceed the amount of such materials produced in such facility for use in Federal-aid highway construction during the 12-month period ending July 1, 1987.

(b) *Qualified prison facility* means any prison facility in which convicts, during the 12-month period ending July 1, 1987, produced materials for use in Federal-aid highway construction projects.

[53 FR 1923, Jan. 25, 1988, as amended at 58 FR 38975, July 21, 1993]

APPENDIX A TO SUBPART D OF PART 635—SUMMARY OF ACCEPTABLE CRITERIA FOR SPECIFYING TYPES OF CULVERT PIPES

Type of drainage installation	Alternatives required			AASHTO designations to be included with alternatives	Application	Remarks
	Yes	No	Number			
Cross drains under high-type pavement. <sup>1</sup>	.....	X .....	.....	.....	Statewide .....	Any AASHTO-approved material. <sup>2</sup>
Other cross-drain installations.	X .....	.....	3 minimum	M-170 and M-190.	.....do .....	Do. <sup>2</sup>
Side-drain installations .....	X .....	.....	.....do .....	M-36 .....	.....do .....	Do. <sup>2</sup>
Special installation conditions.	.....	X .....	.....	.....	Individual installation.	Specified to meet special conditions.
Special drainage systems (storm sewers, inverted siphons, etc.).	.....	X .....	.....	.....	.....do .....	Specified to meet site requirements.

<sup>1</sup> High-type pavement is generally described as FHWA construction type codes I, J, K, L, and plant mix and penetration macadam segments, respectively shown in the right-hand columns of type codes G and H having a combined thickness of surface and base of 7 in or more (or equivalent) or that are constructed on rigid bases.

<sup>2</sup> Types not included in currently approved AASHTO specifications may be specified if recommended by the State with adequate justification and approved by FHWA.

**PART 636—DESIGN-BUILD CONTRACTING**

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AUTHORITY: 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 1.48(b).

SOURCE: 67 FR 75926, Dec. 10, 2002, unless otherwise noted.

### Subpart A—General

#### § 636.101 What does this part do?

This part describes the FHWA's policies and procedures for approving design-build projects financed under title 23, United States Code (U.S.C.). This part satisfies the requirement of section 1307(c) of the Transportation Equity Act for the 21st Century (TEA-21), enacted on June 9, 1998. The contracting procedures of this part apply to all design-build project funded under title 23, U.S.C.

#### § 636.102 Does this part apply to me?

(a) This part uses a plain language format to make the rule easier for the general public and business community to use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Unless otherwise noted, the pronoun "you" means the primary recipient of Federal-aid highway funds, the State Transportation Department (STD). Where the STD has an agreement with a local public agency (or other governmental agency) to administer a Federal-aid design-build project, the term "you" will also apply to that contracting agency.

#### § 636.103 What are the definitions of terms used in this part?

Unless otherwise specified in this part, the definitions in 23 U.S.C. 101(a) are applicable to this part. Also, the following definitions are used:

*Adjusted low bid* means a form of best value selection in which qualitative aspects are scored on a 0 to 100 scale expressed as a decimal; price is then divided by qualitative score to yield an "adjusted bid" or "price per quality point." Award is made to offeror with the lowest adjusted bid.

*Best value selection* means any selection process in which proposals contain both price and qualitative components and award is based upon a combination of price and qualitative considerations.

*Clarifications* means a written or oral exchange of information which takes place after the receipt of proposals when award without discussions is contemplated. The purpose of clarifications is to address minor or clerical revisions in a proposal.

*Communications* are exchanges, between the contracting agency and offerors, after receipt of proposals, which lead to the establishment of the competitive range.

*Competitive acquisition* means an acquisition process which is designed to foster an impartial and comprehensive evaluation of offerors' proposals, leading to the selection of the proposal representing the best value to the contracting agency.

*Competitive range* means a list of the most highly rated proposals based on the initial proposal rankings. It is based on the rating of each proposal against all evaluation criteria.

*Contracting agency* means the public agency awarding and administering a design-build contract. The contracting agency may be the STD or another State or local public agency.

*Deficiency* means a material failure of a proposal to meet a contracting agency requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.

*Design-bid-build* means the traditional project delivery method where design and construction are sequential steps in the project development process.

*Design-build contract* means an agreement that provides for design and construction of improvements by a contractor or private developer. The term encompasses design-build-maintain, design-build-operate, design-build-finance and other contracts that include services in addition to design and construction. Franchise and concession agreements are included in the term if they provide for the franchisee or concessionaire to develop the project which is the subject of the agreement.

*Design-builder* means the entity contractually responsible for delivering the project design and construction.