

**§ 636.117**

**23 CFR Ch. I (4–1–04 Edition)**

(i) The role of the consultant or sub-consultant was limited to provision of preliminary design, reports, or similar “low-level” documents that will be incorporated into the RFP, and did not include assistance in development of instructions to offerors or evaluation criteria, or

(ii) Where all documents and reports delivered to the agency by the consultant or sub-consultant are made available to all offerors.

(2) All solicitations for design-build contracts, including related contracts for inspection, administration or auditing services, must include a provision which:

(i) Directs offerors attention to this subpart;

(ii) States the nature of the potential conflict as seen by the owner;

(iii) States the nature of the proposed restraint or restrictions (and duration) upon future contracting activities, if appropriate;

(iv) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation; and

(v) Requires offerors to provide information concerning potential organizational conflicts of interest in their proposals. The apparent successful offerors must disclose all relevant facts concerning any past, present or currently planned interests which may present an organizational conflict of interest. Such firms must state how their interests, or those of their chief executives, directors, key project personnel, or any proposed consultant, contractor or sub-contractor may result, or could be viewed as, an organizational conflict of interest. The information may be in the form of a disclosure statement or a certification.

(3) Based upon a review of the information submitted, the owner should make a written determination of whether the offeror’s interests create an actual or potential organizational conflict of interest and identify any actions that must be taken to avoid, neutralize, or mitigate such conflict. The owner should award the contract to the apparent successful offeror unless an organizational conflict of interest is

determined to exist that cannot be avoided, neutralized, or mitigated.

(b) The organizational conflict of interest provisions in this subpart provide minimum standards for STDs to identify, mitigate or eliminate apparent or actual organizational conflicts of interest. To the extent that State-developed organizational conflict of interest standards are more stringent than that contained in this subpart, the State standards prevail.

**§ 636.117 What conflict of interest standards apply to individuals who serve as selection team members for the owner?**

State laws and procedures governing improper business practices and personal conflicts of interest will apply to the owner’s selection team members. In the absence of such State provisions, the requirements of 48 CFR Part 3, Improper Business Practices and Personal Conflicts of Interest, will apply to selection team members.

**§ 636.118 Is team switching allowed after contract award?**

Where the offeror’s qualifications are a major factor in the selection of the successful design-builder, team member switching (adding or switching team members) is discouraged after contract award. However, the owner may use its discretion in reviewing team changes or team enhancement requests on a case-by-case basis. Specific project rules related to changes in team members or changes in personnel within teams should be explicitly stated by the STD in all project solicitations.

**§ 636.119 How does this part apply to a project developed under a public-private partnership?**

(a) In order for a project being developed under a public-private agreement to be eligible for Federal-aid funding (including traditional Federal-aid funds, direct loans, loan guarantees, lines of credit, or some other form of credit assistance), the contracting agency must have awarded the contract to the public-private entity through a competitive process that complies with applicable State and local laws.

(b) If a contracting agency wishes to utilize traditional Federal-aid funds in a project under a public-private agreement, the applicability of Federal-aid procurement procedures will depend on the nature of the public-private agreement.

(1) If the public-private agreement establishes price and an assignment of risk, then all subsequent contracts executed by the developer are considered to be subcontracts and are not subject to Federal-aid procurement requirements.

(2) If the public-private agreement does not establish price and an assignment of risk, the developer is considered to be an agent of the owner, and the developer must follow the appropriate Federal-aid procurement requirements (23 CFR part 172 for engineering service contracts, 23 CFR part 635 for construction contracts and the requirements of this part for design-build contracts) for all prime contracts (not subcontracts).

(c) The STD must ensure such public-private projects comply with all non-procurement requirements of 23 U. S. Code, regardless of the form of the FHWA funding (traditional Federal-aid funding or credit assistance). This includes compliance with all FHWA policies such as environmental and right-of-way requirements and compliance with such construction contracting requirements as Buy America, Davis-Bacon minimum wage rate requirements, for federally funded construction or design-build contracts under the public-private agreement.

**Subpart B—Selection Procedures, Award Criteria**

**§ 636.201 What selection procedures and award criteria may be used?**

You should consider using two-phase selection procedures for all design-build projects. However, if you do not believe two-phase selection procedures are appropriate for your project (based on the criteria in §636.202), you may use a single phase selection procedure or the modified-design-build contracting method. The following procedures are available:

Selection procedure	Criteria for using a selection procedure	Award criteria options
(a) Two-Phase Selection Procedures (RFQ followed by RFP).	§ 636.202 .....	Lowest price, Adjusted low-bid (price per quality point), meets criteria/low bid, weighted criteria process, fixed price/best design, best value.
(b) Single Phase (RFP).	Project not meeting the criteria in § 636.202.	All of the award criteria in item (a) of this table.
(c) Modified Design-Build (may be one or two phases).	Any project .....	Lowest price technically acceptable.

**§ 636.202 When are two-phase design-build selection procedures appropriate?**

You may consider the following criteria in deciding whether two-phase selection procedures are appropriate. A negative response may indicate that two-phase selection procedures are not appropriate.

- (a) Are three or more offers anticipated?
- (b) Will offerors be expected to perform substantial design work before developing price proposals?
- (c) Will offerors incur a substantial expense in preparing proposals?
- (d) Have you identified and analyzed other contributing factors, including:
  - (1) The extent to which you have defined the project requirements?
  - (2) The time constraints for delivery of the project?
  - (3) The capability and experience of potential contractors?
  - (4) Your capability to manage the two-phase selection process?
  - (5) Other criteria that you may consider appropriate?

**§ 636.203 What are the elements of two-phase selection procedures for competitive proposals?**

The first phase consists of short listing based on a RFQ. The second phase consists of the receipt and evaluation of price and technical proposals in response to a RFP.