



U.S. Department
of Transportation

Federal Highway
Administration

YAKO- M
Memorandum

Final Rule - 23 CFR 635, Subpart A,
Contract Procedures

Date AUG 14 1991

Director, Office of Engineering

Reply to
Attn of HNG-22

Regional Federal Highway Administrators
Division Administrators
Federal Lands Highway Program Administrator

Attached for your information and appropriate action, is a copy of the subject final rule which was published in the Federal Register on August 2, 1991. The final rule revises 23 CFR 635, Subpart A, to accommodate current program delivery policy, and to clarify and simplify the regulatory requirements pertaining to the contracting for Federal-aid highway construction.

Some of the more significant changes contained in the regulation are as follows:

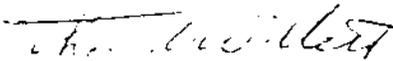
1. Definitions for mathematically unbalanced bids and materially unbalanced bids have been incorporated in 23 CFR 635.102. A bid found to be mathematically unbalanced, but not materially unbalanced may be awarded (23 CFR 635.114(d)). When a low bid is determined to be both mathematically and materially unbalanced, the Division Administrator will take appropriate steps to protect the Federal interest (23 CFR 635.114(e)).
2. To clarify the applicability of the provisions of this regulation relative to States' certification acceptance projects, the applicability section (23 CFR 635.103) has been written to indicate that 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 or secondary road plan, in accordance with 23 U.S.C. 117.
3. When a State highway agency (SHA) employs a consultant to provide construction engineering services, a full-time employed State engineer shall be in responsible charge of the project (23 CFR 635.105(b)).

However, when a project is being administered by a local public agency and that agency elects to use a consultant 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 (23 CFR 635.105(c)(4)).

4. Previously, 23 CFR 635.111, "Award of contract and concurrence in award," required States to justify not waiving a bidder's noncompliance with bid requirements unless the noncompliance involved one of the items listed. The new regulation indicates in 23 CFR 635.112(h) that the SHA shall clearly identify in the bidding documents those requirements which the bidder must assure are complied with to make the bid responsive. Failure by a bidder to comply with these identified bidding requirements shall make his/her bid nonresponsive and not eligible for award consideration. If the SHA rejects or declines to read or consider a low bid on the grounds that it is nonresponsive because of noncompliance with a requirement which was not clearly identified in the bidding documents, it shall submit justification for its action (23 CFR 635.114(g)).
5. The regulation now provides that SHAs should have adequate written procedures for the determination of contract time. These procedures should be submitted for approval to the Division Administrator within 6 months of the effective date of this final rule (23 CFR 635.121(a)).
6. Relative to participation in contract claim awards and settlements, Federal funds will now not participate if it has been determined that the SHA acted with gross negligence, fraud, or participated in intentional acts or omissions which are not consistent with usual State practices in project design, plan preparation, contract administration, or other activities which gave rise to the claim (23 CFR 635.124(e)(1)).
7. Previously, 23 CFR 126, "Termination and default of contract," limited the construction amount eligible for Federal participation for completion of a defaulted or previously terminated Federal-aid contract. This has been revised to place such a limitation only on contracts which have been defaulted (23 CFR 635.125(d)). As indicated in 23 CFR 635.125(b) the extent of Federal-aid participation in contract termination costs, including final settlement, will depend on the merits of the individual case.

In order to expedite the distribution and dissemination of this information, we have transmitted a copy of the final rule directly to the division offices by copy of this memorandum.

Should you have any questions regarding this final rule, please contact Mr. David R. Geiger at FTS 366-0355.


Thomas O. Willett

Attachment