



Memorandum

Subject: **ACTION:** Approval Under Special Experimental Project No. 14 Date: March 25, 2005
Innovative Contracting Practices (SEP-14)

/Signed By:/

From: Dwight A. Horne
Director, Office of Program Administration

In Reply Refer To:
HIPA-30

To: Mr. Ray McCormick
Division Administration
Dover, Delaware

This is reference to Mr. Lance Wilgus's March 18, 2005 e-mail message, which forwarded a SEP-14 work plan from the Delaware Department of Transportation (DelDOT). The work plan describes the proposed evaluation of various alternative contracting techniques under a comprehensive development agreement for the design and construction – and potentially financing, maintenance and/or operation – of the Delaware Turnpike (I-95) Improvements.

We have reviewed the work plan and find that it is acceptable for approval under SEP-14. DelDOT noted the following concepts as proposed deviations from the FHWA's policies for design-build contracts:

1) “The ability to enter into negotiations with the selected firm prior to award.”

Comment: The provisions in 23 CFR 636.513 were intended to allow contracting agencies to hold discussions and negotiations with proposers to clarify and finalize any issues regarding scope, financing and information provided by that proposer. They did not envision discussing other firm's ideas and concepts or discussions that could be viewed as a form of technical transfusion, thus giving one firm an apparent unfair advantage over others. However, if this process is adequately documented in the RFP documents and all proposers are aware of DelDOT's intentions, then this is acceptable for use on an experimental basis.

2) “Including a general warranty in the CDA that exceeds the period specified in 23 CFR 635.413(e)(1)(i), and requiring the developer to undertake responsibility for routine maintenance services.”

Comment: FHWA policy prohibits Federal-aid participation in routine maintenance activities (snow removal, litter pick-up, graffiti removal, etc.). However, we understand that the successful proposer may have responsibility for the long-term operation of the constructed facility. In such cases, it makes sense to have one contractor responsible for operations, preventive maintenance and routine maintenance.

Therefore, we have no objection to a SEP-14 experimental approval for DelDOT's proposal to require the developer to perform routine maintenance services through a general warranty requirement.

3) Modification of Form 1273, Required Contract Provisions For Construction Projects, to strike out the portion of Section VII that requires a specified percentage of work to be self-performed.

Comment: Title 23 CFR 635.116(d) indicates that the 30% self-performance requirements of paragraph (a) are not applicable to design-build contracts. Therefore, a waiver of this section is not required. The FHWA will revise Form FHWA-1273 at some future point. Until then, DelDOT may include a contract provision that indicates the provisions of 23 CFR 635.116(d) have superseded the 30% self-performance requirements of Section VII of form FHWA-1273.

Should you have any questions concerning the above, please contact Jerry Yakowenko at (202) 366-1562.