



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**FHWA Docket No. FHWA-2018-0003**

**Indefinite Delivery and Indefinite Quantity Contracts for Federal-aid Construction**

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Notice - Request for Comments

**SUMMARY:** The FHWA is announcing that the Indefinite Delivery and Indefinite Quantity (ID/IQ) method of contracting (including Job Order Contracts) for low-cost construction contracts in the Federal-aid highway program will be allowed, without prior FHWA approval, under certain circumstances.

**DATES:** Comments must be received on or before [Insert date 30 days after date of publication in the Federal Register]. Late comments will be considered to the extent practicable.

**ADDRESSES:** You may submit comments, identified by the document number at the top of this document, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: 1-202-493-2251
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE, West Building Ground Floor Room W12-140, Washington, DC 20590.
- Hand Delivery / Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave., SE, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to [www.regulations.gov](http://www.regulations.gov), including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** For questions about this notice, please contact Mr. John Hoyer, FHWA Office of Program Administration, (202) 366-1562, or via e-mail at [John.Hoyer@dot.gov](mailto:John.Hoyer@dot.gov). For legal questions, please contact Mr. Jomar Maldonado, FHWA Office of the Chief Counsel, 202-366-1373, or via e-mail at [Jomar.Maldonado@dot.gov](mailto:Jomar.Maldonado@dot.gov). Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

This notice announces that contracting agencies no longer need to submit individual requests and work plans pursuant to Special Experimental Project No. 14 (SEP-14) for low-cost contracts that are awarded to the lowest responsive bidder based on an invitation for bids. However, this contracting technique continues to be authorized on an experimental basis while FHWA explores rulemaking to revise FHWA's regulations to accommodate this contracting technique.

**Background**

The ID/IQ contracts are a method of contracting that allows an indefinite quantity of services for a fixed time. They are used in the Federal Government when agencies cannot determine, above a specified minimum, the precise quantities of supplies or services that the Government will require during the contract period. For construction ID/IQ contracts,

contractors bid unit prices for estimated quantities of standard work items and task orders are used to define the location and quantities for specific work. The ID/IQ contracts may be awarded to the lowest responsive bidder based on an invitation for bids or the best-value proposer based on responses to Requests for Proposals. Contracting agencies use other names for these types of contracts including on-call contracts, area-wide contracts, continuing contracts, push-button contracts, and task order contracts. Job Order Contracts (JOCs) are a form of ID/IQ contracts that utilize a construction task catalogue with pre-priced work item descriptions and where contractors bid “mark-up rates.” The contract is awarded to the lowest responsive bidder determined by their rates.

Although ID/IQ contracts have been specifically authorized in the Federal procurement process (48 CFR 16.5) and for the contracting of architecture and engineering (A/E) services in the Federal-aid highway program (FAHP) (23 CFR Part 172), the FAHP authorization and procurement laws for construction do not address the possible use of ID/IQ contracts. The FAHP construction procurement statute, 23 U.S.C. 112(b)(1), requires contracts to be awarded by a competitive bidding process to the lowest responsive bidder (traditional design-bid-build project delivery method based upon the premise of a 100 percent-complete design and a well-defined scope of work). The ID/IQ contracts are awarded based upon a general, but not completely defined, scope of work for a geographic area and limited time period (but not specific locations, designs, or quantities) and are often awarded based upon specific evaluation criteria.

#### **A. Experience under Special Experimental Project Number 14 (SEP-14)**

The FHWA has used its authority in 23 U.S.C. 502(b)(1) to test the use of ID/IQ contracts for the construction of FAHP projects through the SEP-14 Program for innovative contracting techniques. Under the SEP-14 Program, contracting agencies interested in testing an

innovative contracting technique submit project-specific (or programmatic) work plans for their implementation. The FHWA Division Office evaluates the work plan, coordinates with FHWA Headquarters, and, if it finds the work plan to be acceptable, FHWA approves the use of the technique on a temporary basis for a project or group of pilot projects. Over time, FHWA Headquarters staff assess the initiative to determine if it is a technique that should be operationalized for the FAHP on a permanent basis without the need for individual requests, work plans, and evaluation reports. Operationalizing SEP-14 experiments has taken different paths in the past based on the source of the policy warranting innovation and FHWA's risk assessment, such as FHWA-initiated memoranda (for example, cost plus time bidding and lane rental), FHWA-initiated rulemaking (for example, warranty clauses at 23 CFR 635.413), and congressionally initiated statutory amendments (for example, design-build and contractor manager/general contractor under 23 U.S.C. 112(b)(3)-(4)). More information on SEP-14 can be found at <https://www.fhwa.dot.gov/construction/cqit/sep14.cfm>.

Having evaluated the use of JOCs and ID/IQ contracts for construction in the FAHP for over a decade, FHWA has now determined that they are suitable for operationalization. For more than 10 years, FHWA and State departments of transportation (State DOTs) have experimented with the use of ID/IQ contracts and JOCs for construction. FHWA has approved the use of these contracts under SEP-14 for 16 different State DOTs and 6 local public agencies. Evaluation reports indicate that JOCs and ID/IQ contracts allow for cost-effective contracting for small value contracts and preventive maintenance programs. These evaluation reports can be found at <https://www.fhwa.dot.gov/programadmin/contracts/sep14list.cfm>. Specifically, the reports indicate that these contracts eliminate the need for contracting agencies to advertise and

award numerous small contracts and provide contracting agencies with wide flexibility in programming and addressing preventive maintenance needs.

The FHWA's determination that this contracting technique is suitable for operationalization is consistent with requests in Senate reports for fiscal year 2017 and 2018 appropriations to operationalize JOCs. S. Rept. No. 114-243, 43 (April 21, 2016); S. Rept. No. 115-138, 52 (July 27, 2017).

### **B. Steps for Operationalizing ID/IQs and JOCs for Construction in the FAHP**

The FHWA is proceeding with two phases to operationalize ID/IQ contracts and JOCs for construction in the FAHP. The first phase is the issuance of this Notice, and the second phase is the initiation of a rulemaking.

#### **1. Notice to Allow ID/IQ and JOCs for Low-Cost Construction Contracts**

The first phase is the issuance of this Notice describing when contracting agencies may use ID/IQ contracts and JOCs for construction without the need for project-specific work plans from contracting agencies.

The FHWA considers "low-cost contracts" to be 1- or 2-year contracts awarded to the lowest responsive bidder for construction of projects that qualify for FHWA categorical exclusions (CE) under the National Environmental Policy Act (NEPA) of 1969 (23 CFR 771.117) and where the total value of task or work orders does not exceed \$2,000,000 per year. Contracting agencies should continue to following existing procedures for contract extensions. The FHWA may allow contract extensions, but the maximum length of the contract period with extensions may not exceed 5 years.

Contracting agencies interested in this contracting method should provide assurances to FHWA, including assurances that the total value of task or work orders will not exceed

\$2,000,000 per year, that the actions covered will be for projects that qualify for a CE, that the work will comply with applicable Title 23 requirements, and that the contracting agency will comply with applicable Disadvantaged Business Enterprise requirements.

Individual tasks must undergo a complete environmental review prior to their approval (23 CFR 771.113(a)). The FHWA Division Office should determine how individual task orders will be approved. In addition, there are requirements in 23 CFR Part 635 that may not apply to ID/IQs (for example, standard change conditions clauses in 23 CFR 635.109 and self-performance requirements in 23 CFR 635.113), but FHWA will encourage contracting agencies to use similar requirements consistent with State or local government policy.

This contracting technique will continue to be experimental under FHWA's SEP-14 authority because FHWA's regulations and procedures do not accommodate this type of contracting technique; however, contracting agencies will not need to submit individual SEP-14 requests and work plans for low-cost contracts under these conditions. The FHWA would expect contracting agencies to continue to request specific SEP-14 approval for best value awards, multiple-award ID/IQ contracts and JOCs, and contracts that exceed the low-cost threshold or are not otherwise within the limitations of this notice. The FHWA will request its division offices to report annually on different metrics to assess the contracting technique's impact on competition. The FHWA seeks public comments on this approach.

## 2. Step Two: Rulemaking Initiation

Under the second phase, FHWA intends to initiate rulemaking to address the construction and approval regulations that need amendments in order to allow the contracting technique on a

permanent basis. This rulemaking would be published in the Federal Register and provide an opportunity for the public to comment on the use of ID/IQ contracts or JOC for construction in the FAHP.

**Authority:** 23 U.S.C. 112 and 502; 23 CFR 635.

Issued on: April 25, 2018.

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Brandye L. Hendrickson  
Acting Administrator  
Federal Highway Administration

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