



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**23 CFR Part 635**

**[FHWA Docket No. FHWA-2018-0017]**

**RIN 2125–AF83**

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

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

**ACTION:** Interim Final Rule (IFR); request for comments.

**SUMMARY:** This action allows States to use the Indefinite Delivery and Indefinite Quantity (ID/IQ) method of contracting, including job order contracting (JOC), on Federal-aid highway projects, under certain circumstances, on a permanent basis.

**DATES:** This interim final rule is effective as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Late-filed comments will be considered to the extent practicable.

**FOR FURTHER INFORMATION CONTACT:** Mr. James DeSanto, Office of Preconstruction, Construction, and Pavements, (614) 357-8515, or Mr. Patrick Smith, Office of the Chief Counsel, (202) 366-1345, Federal Highway Administration, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590. Office hours are from 8 a.m. to 4:30 p.m., EST, Monday through Friday, except Federal holidays.

## **SUPPLEMENTARY INFORMATION:**

### **Electronic Access and Filing**

This document, as well as the advance notice of proposed rulemaking (ANPRM), supporting materials, and all comments received may be viewed online through the Federal eRulemaking portal at: <http://www.regulations.gov>. An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: <http://www.archives.gov/federal-register> and the Government Publishing Office's Web page at: <http://www.gpo.gov/fdsys>.

### **Executive Summary**

The FHWA is adding a new subpart F under 23 CFR part 635 to allow States to use the ID/IQ method of contracting, including JOC, on Federal-aid highway projects, under certain circumstances, on a permanent basis. Currently, this contracting technique is only authorized on an experimental basis under FHWA's Special Experimental Project No. 14 (SEP-14). Allowing ID/IQ contracting on a permanent basis provides benefits to State departments of transportation (State DOT) and other contracting agencies, including expediting project delivery, increasing administrative efficiency, reducing project costs, and increasing flexibility for State DOTs to use Federal-aid funds on certain projects.

The FHWA is issuing this IFR pursuant to 5 U.S.C. 553(b)(3)(B) to allow States to realize immediately the benefits and cost savings associated with the ID/IQ method of contracting. The FHWA has conducted a preliminary cost-benefit analysis on this rulemaking and anticipates a cost savings of \$3.4 million per year at a 7 percent discount rate.

## **Background**

The ID/IQ method of contracting allows an IQ of supplies or services for a fixed time. The Federal Government uses this method 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 work 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 JOC contracts, master contracts, on-call contracts, area-wide contracts, continuing contracts, design-build push-button contracts, push-button contracts, stand-by contracts, and task order contracts. The JOC method is a form of ID/IQ contracting that uses a unit price book with pre-priced work item descriptions in the solicitation. Contract awards under this method use the bidder's adjustment factors or multipliers to establish contract prices. The contract is awarded to the lowest responsive bidder determined by their rates.

Although ID/IQ contracts are specifically authorized in the Federal procurement process (48 CFR subpart 16.5) and for the contracting of architecture and engineering services in the Federal-aid highway program (FAHP) (23 CFR part 172), 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). Typically, 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 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 authority of 23 U.S.C. 502(b)(2). Under the SEP-14 Program, contracting agencies interested in testing an innovative contracting technique submit project-specific (or programmatic) work plans to FHWA for 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. More information on SEP-14 can be found at <https://www.fhwa.dot.gov/construction/cqit/sep14.cfm>.

From 2007 to the present, FHWA, State DOTs, and Local Public Agencies (LPA) through the State DOTs, have experimented with the use of ID/IQ and JOC contracts for construction. The FHWA has approved the use of this contracting method under SEP-14 for 19 different State DOTs and 6 LPAs. Evaluation reports indicate that ID/IQ and JOC contracts allow for cost-effective contracting for small value contracts and preventive maintenance programs. 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.

Having evaluated the use of ID/IQ and JOC contracts for construction in the FAHP for over a decade, FHWA determined that they were suitable for operationalization. This is consistent with Senate report language accompanying fiscal years 2017 and 2018 appropriations to operationalize JOC. *See* S. Rept. No. 114-243, 43 (April 21, 2016); S. Rept. No. 115-138, 52 (July 27, 2017). The approach is also consistent with the U.S. Department of Justice Office of Legal Counsel opinion regarding competition and contracting requirements, which found that “FHWA may reasonably conclude, consistent with 23 U.S.C. 112, that certain state or local requirements [that may have the effect of reducing the number of potential bidders for a particular contract still] promote the efficient and effective use of federal funds or protect the integrity of the competitive bidding process.” *See* Competitive Bidding Requirements Under the Federal-Aid Highway Program, 23 U.S.C. 112 (Aug. 23, 2013), at 24.<sup>1</sup> As discussed further below, including in relation to provisions on securing competition and selection of contractors, ID/IQ and JOC contracts are consistent with the opinion because they promote “the efficient and effective use of federal funds.”

## **B. Steps for Operationalizing ID/IQ Contracting and JOC for Construction in the FAHP**

The FHWA is proceeding with two phases to operationalize ID/IQ contracting and JOC for construction in the FAHP. The first phase was the issuance of an FHWA

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<sup>1</sup> See <https://www.justice.gov/file/21816/download>.

Notice<sup>2</sup> on how FHWA will allow ID/IQ and JOC contracts for low-cost construction contracts in the FAHP without the need for project-specific work plans from contracting agencies. The second phase was the initiation of this rulemaking.

Under the first phase, FHWA published a *Federal Register* Notice requesting public comment on allowing contracting agencies to establish ID/IQ contracting and JOC for low-cost construction contracts at 83 FR 19393 on May 2, 2018, and subsequently published FHWA Notice N5060.2, titled “Indefinite Delivery/Indefinite Quantity Contracting for Low-Cost Federal-Aid Construction Contracts,” on January 18, 2019.<sup>3</sup> Notice N5060.2 set forth FHWA’s policy for the use of ID/IQ contracting for low-cost FAHP construction contracts and clarified under what conditions ID/IQ contracts are allowed for Federal-aid construction.

Under Notice N5060.2, an ID/IQ contract not requiring advance approval under the SEP-14 Program should satisfy certain conditions, including that the contract be: low-cost (the total value of task or work orders may not exceed \$2,000,000 per year on average over the contract term); short-term (a base contract of 1 to 2 years); awarded by competitive bidding to the lowest responsive bidder; a single-award contract; qualified for a National Environmental Policy Act (NEPA) categorical exclusion listed under 23 CFR 771.117; awarded and performed in compliance with applicable Disadvantaged Business Enterprise (DBE) provisions of 49 CFR part 26; and compliant with certain other laws and regulations related to Federal-aid construction. Additional details can be found in FHWA Notice N5060.2. Although Notice N5060.2 allows ID/IQ contracting without advance SEP-14 Program approval on a project-by-project basis, the contracts

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<sup>2</sup> 83 FR 19393 (May 2, 2018).

<sup>3</sup> See <https://www.fhwa.dot.gov/legsregs/directives/notices/n5060-2.cfm>.

continue to be administered under the SEP-14 Program on an experimental basis. The ID/IQ contracts not meeting the conditions of Notice N5060.2, such as multiple-award contracts, continue to require advance approval under the SEP-14 Program.

After the publication of this Interim Final Rule, Notice N5060.2, Indefinite Delivery/Indefinite Quantity Contracting for Low-Cost Federal-aid Construction Contracts, January 18, 2019, will expire effective November 16, 2021.

Under the second phase of operationalizing ID/IQ contracting and JOC for construction in the FAHP, FHWA published the ANPRM titled, “Indefinite Delivery and Indefinite Quantity Contracts for Federal-Aid Construction,” at 83 FR 29713 on June 26, 2018. The ANPRM sought comment on how to expand ID/IQ contracting and allow it on a permanent basis. The FHWA received 11 comments to the docket, 9 of which were responsive to the questions posed in the ANPRM. Comments were provided by six State DOTs, two municipalities, one business, and two individuals who responded to the wrong Federal Register notice. The comments are available for examination in the docket (FHWA-2018-0017) at <http://www.regulations.gov>.

### **General Discussion of Comments**

After consideration of the responsive comments, and based on its ongoing experience with ID/IQ contracting under the SEP-14 Program, FHWA is authorizing ID/IQ contracting on Federal-aid highway projects on a permanent basis as set forth in this IFR. The FHWA believes that this approach will benefit State DOTs by expediting project delivery, increasing administrative efficiency, reducing project costs, and increasing flexibility for State DOTs to use Federal-aid funds on certain projects. The

FHWA considered responsive comments related to the benefits of ID/IQ contracting and other topics in developing the regulation set forth in this IFR.

#### A. Expedited Project Delivery/Administrative Efficiency

Commenters argued ID/IQ contracting expedites the delivery of highway construction projects and increases administrative efficiency. In making this argument, commenters cited as reasons the reduced time necessary to prepare, advertise, and procure highway construction projects; the ability to consolidate design assignments; the reduced time and resources necessary to administer highway construction projects; and the reduced administrative burden in working with fewer contractors and on fewer contracts.

For example, one State DOT indicated that, based on its experience under the SEP-14 Program, ID/IQ contracting reduces the time necessary to prepare projects for construction and reduces the administrative burden associated with advertising projects. Another State DOT indicated that ID/IQ contracting allows States to quickly obligate Federal funds for needed work, consolidate design assignments, and reduce their administrative burden in administering projects by working with fewer contractors. This commenter indicated that ID/IQ contracts reduce procurement time for each work order by approximately 8 weeks. Another State DOT argued that ID/IQ contracting reduces the time and resources necessary to administer individual work orders. This commenter also explained that ID/IQ contracts reduce the administrative burden associated with pre-qualification procedures because quality is accounted for in the initial award. Another State DOT noted that certain tasks can be completed more quickly using ID/IQ contracting compared to its traditional reliance on in-house resources.

The FHWA agrees with the commenters and believes that ID/IQ contracting is likely to expedite project delivery of certain highway projects and increase administrative efficiency.

#### B. Reduced Project Costs

Commenters also said that ID/IQ contracting reduces the overall costs of certain highway projects and work orders. Commenters cited as reasons reduced costs associated with expedited project delivery; reduced costs associated with gains in administrative efficiency; the reduced time and resources that contactors must spend on bid preparation, which results in reduced costs for States; increased competition for larger contracts, which can reduce overall cost; and reduced costs on emergency maintenance contracts because prices are established in advance.

For example, one State DOT stated that ID/IQ contracting reduces overall construction costs. This commenter said that because ID/IQ contracting reduces the time and resources that contactors must spend on bid preparation, it also reduces contract prices and the overall costs incurred by States. Another State DOT indicated that under the SEP-14 Program it received twice as many bids for tasks relative to traditional design-bid-build contracting. The increased competition resulted in lower prices. This commenter also reported that its contractors are highly satisfied with ID/IQ contracting under the SEP-14 Program. Another State DOT stated that it anticipates cost savings on emergency maintenance contracts because predetermined prices will be in place.

The only business that commented provided several examples of the efficiency and effectiveness of JOC contracts used by States, municipalities, and other government

agencies, mostly at educational facilities. The examples indicated that JOC can reduce overall project costs by 5 to 10 percent.

The FHWA agrees with the commenters and believes that ID/IQ contracting is likely to reduce the overall cost of certain highway projects.

### C. Increased Flexibility

Commenters also argued that operationalizing ID/IQ contracting will increase flexibility for State DOTs by allowing them to use ID/IQ contracting on a broader range of projects and on a permanent basis. As discussed above, the added flexibility provided to States by operationalizing ID/IQ through rulemaking may also provide associated gains in expedited project delivery, administrative efficiency, and reduced project costs. One State DOT indicated that experimenting with ID/IQ contracts under the SEP-14 Program allowed for competitive bidding on projects that otherwise would have been awarded non-competitively under State emergency procedures.

Considering the comments, FHWA believes that ID/IQ contracting increases flexibility for State DOTs and that expanding ID/IQ contracting and allowing it on a permanent basis provides needed flexibility to the States to manage Federal financial assistance under 23 U.S.C. 145.

### D. Annual Expenditure Cap

A common theme in several comments was that FHWA should raise or eliminate the annual expenditure cap of \$2 million existing under Notice N5060.2.

Commenters in favor of eliminating the cap, including multiple State DOTs, argued that a \$2 million cap would limit their flexibility and reduce the benefits of ID/IQ contracting. For example, one State DOT argued that a \$2 million cap would limit the

usability of ID/IQ contracting. Eliminating the cap, it argued, would expand opportunity to use this method and realize its benefits on a broader scale. Another State DOT argued that a \$2 million cap would quickly limit the ability of State DOTs to use the best contractors, which would create inefficiency and result in awards to less competitive contractors. Another State DOT argued that eliminating the cap or making it significantly higher would maximize flexibility for State DOTs to use and realize the benefits of ID/IQ contracting. Another commenter argued that States should be allowed the flexibility to set their own caps. This commenter also argued that setting a cap in this context would be inconsistent with the practices and regulations of certain other Federal agencies.

No commenters supported retaining the annual expenditure cap of \$2 million existing under Notice N5060.2. The FHWA agrees with the arguments put forth by the commenters opposing a cap and is not establishing an annual expenditure cap for contracts authorized under this regulation. Section G below discusses a 12-month phase-out period for authorizing low-cost ID/IQ contracts under Notice N5060.2, as well as ID/IQ contracts authorized under an approved SEP-14 work plan.

#### E. On-Ramp and Off-Ramp Procedures

Commenters also addressed whether “on-ramp” procedures should be used to allow new contractors to be considered for the award pool after the initial award of an ID/IQ and “off-ramp” procedures be used to discontinue the use of contractors who are not performing satisfactorily.

One State DOT agreed that such procedures should be used. It further stated that it already uses on-ramp procedures under the SEP-14 Program. The commenter argued

that these procedures give contracting agencies flexibility to expand the pool of contractors when necessary as well as the ability to remove unresponsive, non-competitive contractors. This tool motivates contractors to be and remain competitive. This commenter is in the process of developing off-ramp criteria for its State.

A municipality opposed on-ramp procedures outside of a competitive process and recommends new contractors be added via new procurements. This commenter recommended using termination clauses for convenience or default to remove contractors. Another commenter opposed on-ramp procedures because, it argued, they undermine the initial competitive process. This commenter recommended using existing processes to address non-performing contractors.

Contracting agencies may use appropriate methods to address contractor performance by removing contractors through State DOT “off-ramp” or contract termination procedures. The FHWA believes that procedures introducing new contractors into an existing ID/IQ contract after the initial solicitation and award could undermine the competitive process required by statute and the regulation. Accordingly, FHWA has not established “on-ramp” procedures in this rulemaking, nor is FHWA establishing additional contract termination procedures.

#### F. Clarification of Terms

Two commenters also recommended clarifying some of the language that FHWA uses in referring to ID/IQ contracts in this rulemaking. As discussed above, one commenter suggested that FHWA align its terminology about contract extensions with the industry standard, using “contract extension” or “contract renewal” instead of “time extension.” The same commenter recommended using terminology consistent with

industry standards for contractor “adjustment factors” in JOC. In the ANPRM, FHWA referred to “mark-up rates.” Relative to the meaning of a unit price book or construction task catalog used by JOC, the same commenter recommended changing the phrase “with pre-priced work item descriptions” from the ANPRM to “which includes a list of defined construction tasks, and for each task, includes a unit of measure and a preset unit price.”

Another commenter observed that it is unclear how time limits for contract length are defined—calendar year, Federal fiscal year, or start of work. The same commenter also observed that it is unclear how \$2 million annual contract limit applies—estimated work, scheduled or planned work, or invoiced work. Another State DOT recommended clarifying whether the maximum contract limit is total contract value or Federal funds only.

The FHWA has attempted to address these comments in this regulation. The comments regarding the annual contract value limit no longer apply because such a limit is not provided in the regulation.

#### G. Additional Comments

Some commenters also recommended clarifying certain elements of ID/IQ procedures. For example, one State DOT recommended minimizing reporting requirements and focusing on critical areas. Another commenter recommended clarifying what contracting agencies must do to use ID/IQ or JOC beyond providing assurances to FHWA regarding implementation and reporting. It suggested that FHWA align reporting requirements for ID/IQ with other standard contracting techniques. Regarding comments concerning reporting requirements, as this IFR operationalizes the

ID/IQ method, FHWA intends to cancel Notice N5060.2 and FHWA is not establishing reporting requirements for contracts authorized under this regulation.

To provide flexibility to State DOTs and ease of transition, during a period of no more than 12 months following publication of this IFR, FHWA Division Administrators may continue to concur in the use of ID/IQ for low-cost contracts per the terms of the Notice and other ID/IQ contracts authorized under an approved SEP-14 work plan. Division Administrators may continue to allow extensions of contracts authorized under the Notice or applicable SEP-14 work plan for the duration of these contracts. For low-cost contracts authorized under the Notice or ID/IQ contracts authorized under an approved SEP-14 work plan, State DOTs may continue to administer the contracts per the requirements of the Notice or applicable SEP-14 work plan for the duration of these contracts. However, the reporting requirements described in Question and Answer No. 9 of the Notice or applicable SEP-14 work plan would no longer apply to these projects after the effective date of this IFR. The FHWA may continue to use SEP-14 to authorize and evaluate contracting methods that are outside the scope of this regulation.

Another commenter proposed using “Fixed Price / Variable Scope or Fixed Budget / Best Value contracts,” an alternative contracting method. Another commenter referred to certain best practices including partnering, use of software to promote transparency, training, use of a task catalog tailored to the specific contracting agency, detailed scopes of work, and transparent proposal review process. As discussed above, FHWA believes that sufficient benefits will result if ID/IQ contracting is operationalized under this rulemaking on a permanent basis. The FHWA is not considering other alternative contracting methods in the context of this rulemaking.

## **Section-by-Section Discussion of the Changes**

### General Conforming Amendments in 23 CFR parts 630 and 635

The FHWA makes several amendments in 23 CFR parts 630 and 635 to address the application of various Federal requirements to ID/IQ projects. In addition, FHWA replaces the terms “State transportation department” and “STD” with the more commonly used terms “State department of transportation” and “State DOT” throughout 23 CFR part 630 and 635. Finally, FHWA also corrects certain outdated citations in 23 CFR parts 630 and 635.

#### Section 630.106

The FHWA amends 23 CFR 630.106(a)(9) to provide for the execution and modification of the project agreement for ID/IQ projects. This amendment is similar to the existing language for design-build projects at 23 CFR 630.106(a)(7) and Construction Manager/General Contractor projects at 23 CFR 630.106(a)(8) in that this amendment makes clear that FHWA execution or modification of a project agreement for final design or physical construction, and authorization to proceed, shall not occur until after the completion of the NEPA process. This language conforms with 23 CFR 771.113(a) regarding the relationship between the completion of required environmental reviews and the obligation of funds for final design and construction.

#### Section 630.112

The FHWA amends 23 CFR 630.112(c)(3) and (4) to correct outdated citations. The changes to 23 CFR 630.112(c)(3) are intended to update the drug-free workplace requirements to reflect the new DOT regulations. The changes to 23 CFR 630.112(c)(4) are intended to update the suspension and debarment requirements to reflect the new Office of Management and Budget regulations at 2 CFR part 180, as adopted by the DOT at 2 CFR part 1200. The requirements of the previous 49 CFR part 29 have been updated and moved to these new regulations. The updates to these cross references in 23 CFR 630.112(c)(3) and (4) do not impose any new requirements or burdens under this part.

#### Section 630.205

The FHWA amends 23 CFR 630.205(e) to provide an exception from the standard contracting approval process for contracts that conform to the requirements of the revised 23 CFR part 635 subpart F. In addition, FHWA amends 23 CFR 630.205(d) by revising the term “State Highway Agency” to conform with the more commonly used term, “State DOT.”

#### Section 635.102

The FHWA amends the definitions in 23 CFR 635.102 by adding a definition for “ID/IQ project” and “State DOT.”

#### Section 635.104

The FHWA amends 23 CFR 635.104 to state that the applicable regulations pertaining to the ID/IQ contracting process found in this rule apply to ID/IQ projects. In addition, no justification of cost effectiveness is necessary in selecting projects for this method of construction.

## Section 635.107

The FHWA amends 23 CFR 635.107 to clarify that the disadvantaged business enterprise program requirement will also apply to ID/IQ projects.

## Section 635.109

The FHWA amends 23 CFR 635.109 to provide that State DOTs are strongly encouraged to use “suspensions of work ordered by the engineer” clauses, and may consider “differing site condition” clauses and “significant changes in the character of work” clauses, as appropriate, for contracts for ID/IQ projects.

Commenters addressed what changed conditions clause would be appropriate for ID/IQ and JOC contracts including for significant changes in the character of work.

One State DOT recommended that the content of this clause be left to the discretion of the State or local contracting agency. Another State DOT recommended standard specifications. Another State DOT stated that changes should be minimal due to nature of work. It supports use of existing standard changed conditions clauses with additional specificity left to the States. A municipality recommended that the nature of any extra work should relate to a specific work order. It recommended a 10 percent threshold for higher authority approval. Another municipality provided its local job order specification, which is tailored for ID/IQ. Another commenter supported use of the standard changed condition clause of 23 CFR 635.109 and issuing a supplemental job order with pre-established prices in the contract when changed conditions are encountered. Finally, another State DOT recommended adjustments related to geography and changes due to unknown utilities, design ambiguity, and other factors. This

commenter also suggested limiting the amount of changes in scope from the original contract, such as to 30 percent of the original contract.

Considering the comments, FHWA is not establishing specific requirements relating to standardized changed conditions clauses. The regulation amends 23 CFR 635.109 to allow contracting agencies a choice regarding the inclusion of clauses in that section or clauses developed locally, as may be appropriate for the ID/IQ method. Consistent with the design-build project delivery method, the regulation encourages contracting agencies to incorporate the “suspensions of work ordered by the engineer” clauses.

#### Section 635.110

The FHWA amends 23 CFR 635.110(f) to clarify that State DOTs may use their own bonding, insurance, licensing, qualification or prequalification procedure for any phase of ID/IQ procurement.

#### Section 635.112

The FHWA amends 23 CFR 635.112 to indicate that the FHWA Division Administrator’s approval of the solicitation document constitutes FHWA’s approval to use the ID/IQ contracting method and approval to release the solicitation document. The amendment also provides that the State DOT must obtain the approval of the FHWA Division Administrator before issuing addenda which result in major changes to the solicitation document.

#### Section 635.114

The FHWA amends 23 CFR 635.114 to clarify that the award of a contract for an ID/IQ project and FHWA's concurrence in such award are subject to the requirements in 23 CFR part 635 subpart F.

#### Section 635.309

The FHWA amends 23 CFR 635.309(q) to clarify what certification is required as a prerequisite to FHWA authorization of physical construction and final design activities. Since ID/IQ contracts may be awarded before the completion of the NEPA process, FHWA establishes specific certification requirements to apply to ID/IQ contracts.

#### **ID/IQ Procedures and Requirements**

The FHWA adds a new subpart F to 23 CFR part 635 to provide the policies, requirements, and procedures relating to the use of ID/IQ contracting. With the exception of approval of State DOT ID/IQ procedures, all FHWA approval requirements established in this new subpart would be subject to assumption by the State DOT in accordance with 23 U.S.C. 106(c).

#### Section 635.601—Purpose

In 23 CFR 635.601, FHWA adds a paragraph describing that the general purpose of subpart F is to prescribe the policies, requirements, and procedures for the use of the ID/IQ contracting method.

#### Section 635.602—Definitions

In 23 CFR 635.602, FHWA establishes definitions for certain terms used in subpart F. The FHWA has found that contracting agencies and practitioners use a variety of terms to describe the components of the ID/IQ contracting method.

For clarity and simplicity of use, FHWA establishes eight definitions associated with this regulation. *Best value selection* is used to describe a process using both price and qualitative components as a basis of award of contracts. *Contracting agency* means the State DOTs, and any State or local government agency, public-private partnership, or Indian Tribe (as defined in 2 CFR part 200) that is acting under the supervision of the State DOT and is awarding and administering an ID/IQ contract. The term *ID/IQ* refers to a method of contracting that allows an IQ of services for a fixed time. An *ID/IQ contract* is used to describe the principal contract between the contracting agency and the contractor under the ID/IQ method of contracting. The term *JOC* refers to a specific form of ID/IQ contracting, distinguished by its use of a unit price book in the solicitation and the bidder's adjustment factors or multipliers to establish contract prices. A *JOC contract* means a type of ID/IQ contract delivered using the JOC method. The term *NEPA process* refers to the applicable environmental reviews and has the same meaning as defined in Subpart E. *Unit price book* is used to describe the document that lists construction tasks, units of measure, and unit prices in the JOC method of contracting. *Work order* is used to describe the contract document issued for a definite scope of work under an ID/IQ contract.

#### Section 635.603—Applicability

In 23 CFR 635.603, FHWA establishes that the requirements of this subpart apply to all Federal-aid construction projects except engineering and design service contracts, to which 23 CFR part 172 applies, and Federal Lands Highway contracts, to which 48 CFR subpart 16.5 applies. The requirements do not apply to other non-construction activities, such as the procurement of supplies, to which 2 CFR part 200 applies.

## Section 635.604—ID/IQ Requirements

In 23 CFR 635.604, FHWA establishes requirements related to ID/IQ solicitations, contracts, and the ID/IQ procurement process.

### 1. Provisions Relating to Fairness, Transparency, and Competition

In 23 CFR 635.604(a)(1), FHWA clarifies that the contracting agency may procure the ID/IQ contract using applicable State or local competitive selection procurement procedures if those procedures: (i) comply with 23 CFR 635.604; (ii) are effective in securing competition; and (iii) do not conflict with applicable Federal laws and regulations. The requirement for free and open competition is a fundamental principle under 23 U.S.C. 112 for the procurement of all Federal-aid highway projects.

Other requirements that apply to contracting agencies' ID/IQ procedures are discussed below. Beyond these requirements, FHWA believes that preserving contracting flexibility for contracting agencies is consistent with contracting practices used by participants in the ID/IQ SEP-14 experiments approved by FHWA and provides needed flexibility to the States to manage Federal financial assistance under 23 U.S.C. 145.

In 23 CFR 635.604(a)(2) through 635.604(a)(4), FHWA establishes several requirements that apply to contracting agencies' ID/IQ procedures. In FHWA's experience, the information required under 23 CFR 635.604(a)(2)-(4) is needed to have an effective, fair, and transparent procurement process. In addition, this information is typical of what many of the contracting agencies that have utilized ID/IQ under SEP-14 have included in their solicitation documents.

Responding to the ANPRM, commenters suggested procedures to ensure fairness and transparency in the selection and implementation of multiple-award ID/IQ contracts. Suggestions related to work order awards included considering contractor performance and work-load; requiring secondary bidding (or bidding for individual work orders) from all contractors in the contract pool; or offering the work order to the lowest cost contractor, subject to the contractor's availability.

In addition, commenters recommended the solicitations and contracts clearly identify the procedures and criteria to be used by the contracting agency to award work. Commenters also recommended public posting of solicitations, selection criteria, bidder questions and answers, bids, contract awards, and work order awards.

Commenters also addressed how authorizations to proceed with work should be given for individual work orders. One commenter recommended that the process should follow the applicable stewardship and oversight plan with FHWA. Multiple commenters indicated that in practice they issue notices to proceed once the work order is authorized. Another commenter uses a signed contract modification with the work order.

The FHWA believes the provisions established in this rulemaking enable contracting agencies to ensure fairness and transparency in the selection and implementation of both single-award and multiple-award ID/IQ contracts. Section 635.604(a)(2) requires solicitations for ID/IQ contracts to state the procedures and criteria the contracting agency will use to award an ID/IQ contract. In addition, 23 CFR 635.604(a)(3) requires that an ID/IQ contract, and any solicitation for an ID/IQ contract, include: the period of the contract; whether optional contract extensions will be used and for what period; the basis for adjusting prices in optional contract extensions; the

estimated minimum and maximum quantity of services to be acquired; appropriate statements of work generally describing the services to be acquired; the procedures and selection criteria to be used to issue work orders; and the dispute resolution procedures available to awardees in cases where multiple awards are made.

To further ensure fairness and transparency, 23 CFR 635.604(a)(3)(ii) prohibits the use of Federal-aid funds for negotiated contract price adjustments on optional contract extensions.

In addition to the general requirements for ID/IQ solicitations and contracts, additional requirements for JOC solicitations and contracts are listed in 23 CFR 635.604(a)(4). The FHWA believes these requirements specific to JOC are necessary to ensure transparency and consistency.

Regarding authorizations to proceed with work for individual work orders, the comments responding to the ANPRM exhibited a variety of locally developed procedures that agencies considered successful during the SEP-14 Program. Considering this, FHWA is not requiring specific methodology for the issuance of work orders under the IFR.

## 2. Provisions Relating to Selection of Contractors

Section 635.604(a)(5) allows a contracting agency's procurement procedures to include selection of one or multiple contractors based on competitive low bid or best value selection under a single solicitation. Other than specifying that price must be included in the analysis, FHWA neither specifies nor limits the best value factors an agency may consider. For contracts awarded to multiple contractors under a single solicitation, the issuance of work orders must be based on lowest cost or lowest cost-plus

time to the Government for the specified work. The FHWA requires that work orders must not be issued to contractors on a rotating basis or other non-competitive method.

Several commenters recommended that FHWA should permit multiple awards under ID/IQ contracts, which is not allowed under Notice N5060.2. One State DOT commented that multiple awards allow for greater efficiency and require competition both at contract level and the work order level, which increases competition overall. This commenter explained that robust competition existed when it experimented with this method under the SEP-14 Program. It also explained that multiple-award contracts provide flexibility to States to use certain innovative bidding practices. With multiple-award ID/IQ contracts, this commenter explained that it achieved certain efficiencies in work order transactions, increased contractor participation and competition, and completed projects more quickly. Another State DOT also supported multiple awards based on its experience and success with that method on an experimental basis under the SEP-14 Program. Another State DOT supported multiple-award contracts with individual work orders awarded based on lowest bid using prices in the initial solicitation from awarded contractors.

Another commenter argued that multiple-award contracts should be allowed to maximize the flexibility of agencies to address project-specific needs and requirements. This commenter also argued, however, that secondary bidding for individual work orders should not be required since competition on price will have already occurred at time of initial bid. This commenter argued that secondary bidding would be redundant, slow project delivery, allow for variance from the contract pricing structure, and increase administrative burden.

Other commenters supporting multiple-award contracts cited reasons that FHWA believes could potentially harm competition or violate requirements of Title 23, U.S.C. For example, one municipality stated that multiple-award contracts allow for “spreading work evenly.” Another municipality referred to the ability to use rotating and round-robin selection methods under multiple-award contracts. Another commenter referred to agencies issuing orders on a rotating basis or equally distributing work to contractors. The FHWA believes these objectives are inconsistent with the statutory competition requirements under 23 U.S.C. 112.

Considering the comments, FHWA believes these provisions provide a balance of allowing flexibility to contracting agencies on procurement and selection procedures while also requiring contracting agencies to secure free and open competition. The FHWA is not prohibiting secondary bidding or bidding on individual work orders on multiple-award contracts under this IFR, but FHWA agrees it could defeat certain benefits and efficiencies gained by ID/IQ contracting. The FHWA will also not require secondary bidding for individual work orders under multiple-award contracts, provided that another competitive method of selection is used based on prices and other terms set forth in the contract.

Although FHWA is allowing multiple-award contracts, they must not be used in non-competitive ways that are inconsistent with the requirements of Title 23, U.S.C. When administering multiple-award contracts, State DOTs and other contracting agencies must continue to ensure that they comply with the requirement to secure competition effectively under 23 U.S.C. 112. To address this, the regulation provides that work

orders shall not be issued to contractors on a rotating basis or other non-competitive method.

In addition to recommending FHWA permit multiple-award ID/IQ contracts, commenters also addressed whether FHWA should allow best value considerations in awarding ID/IQ contracts. All responsive comments supported allowing best value considerations.

Considering the comments, FHWA allows, but does not require, best value considerations in awarding ID/IQ contracts. Under the IFR, contracting agencies may determine the appropriate best value factors or considerations to use in combination with price. The FHWA neither specifies nor limits the best value factors an agency may consider—except that price must be included. The FHWA also notes that best value considerations must not restrict competition.

The FHWA is aware that many contracting agencies utilize a method that monetizes construction completion time and uses that value as a factor in analyzing and awarding bids, commonly known as “A+B” bidding. The FHWA anticipates that this or similar contracting methods may be used in soliciting and awarding ID/IQ contracts in a manner consistent with the procedures set forth in the IFR.

### 3. Provisions Relating to Duration of Contract and Extension Periods

In 23 CFR 635.604(a)(6), FHWA prohibits the sum of the duration of the initial ID/IQ contract and any optional contract extensions from exceeding 5 years. The contracting agency may include a provision in the ID/IQ contract to exercise an option to extend the contract for a term that does not exceed the initial duration of the ID/IQ

contract. Provided that the duration of the base contract and extension periods do not exceed 5 years, the ID/IQ contract may include multiple options and extension periods.

Most commenters argued in favor of allowing base contracts of 1–5 years with various extension options. They believed that longer contract terms and the availability of extensions allow flexibility and reduce administrative burden on States. Another State DOT argued that minimum and maximum contract lengths should not be pre-determined by regulation, and that States should be allowed to use their own processes to make those determinations. The FHWA believes the provisions in this IFR provide a balance of allowing flexibility to contracting agencies on the length of contract terms and extensions while also setting reasonable limits to account for risk, inflation, and transparency.

Section 635.604(a)(6)(i) establishes that, prior to granting a contract extension, the contracting agency must receive concurrence from the Division Administrator. The FHWA believes requiring this concurrence is consistent with the requirements of 23 U.S.C. 112. In addition, for ID/IQ contracts where prevailing wages apply under 23 U.S.C. 113, 23 CFR 635.604(a)(6)(ii) establishes that the current prevailing wage rate determination, as determined by the U.S. Department of Labor (DOL), to be in effect on the date of the execution of the contract extension shall apply to work covered under the contract extension. The FHWA believes this provision is necessary to conform with DOL policy as outlined in its All Agency Memorandum No. 157, as clarified in the *Federal Register* on November 20, 1998, at 63 FR 64542.

Section 635.604(a)(6)(iii) provides that, for ID/IQ contracts exceeding 1 year in duration, the contracting agency may use price escalation methods, such as referring to a published index, to adjust the payment for items of work in the issuance of work orders.

Such price escalation methods, however, shall not be applied to items of work when those items are separately covered under commodity price escalation clauses in the ID/IQ contract. The FHWA believes this provision is necessary to avoid improper compounding of overlapping escalation factors. For example, if a contracting agency normally applies a commodity price escalation clause based upon a published index for steel and iron items, this index would account for changes in the material's cost relative to the time the contract was bid. The FHWA believes it would be improper and duplicative also to apply a price escalation method based on the duration of the ID/IQ contract or optional extension to steel and iron items, in this example, because changes in material costs have already been accounted for.

#### 4. Provisions Relating to Certain Payments Ineligible for Federal-aid Participation

Section 635.604(a)(7) clarifies that a contracting agency's payment to a contractor to satisfy a minimum award provision that is not supported by eligible work is not eligible for Federal-aid participation. The FHWA recognizes some State and local procurement rules may require a minimum award provision. The FHWA anticipates rare situations where a contracting agency executes an ID/IQ contract but does not receive work from a contractor and is required to make payment to the contractor to satisfy the agency's minimum award provision. The FHWA believes it would be improper for Federal-aid funds to participate in such a payment if insufficient eligible work is performed to support the payment.

#### 5. Other Miscellaneous ID/IQ Requirements

Section 635.604(b) clarifies that the requirements of 49 CFR part 26 and the State's approved DBE plan apply to ID/IQ contracts. The ID/IQ contracting method by

its nature is less predictable regarding the total amount of procured work, as compared to traditional contracting methods. Thus, FHWA believes the regulation should provide State DOTs the option of how to apply DBE contract or project goal setting and goal attainment, either to ID/IQ contracts in their entirety, or to individual work orders for ID/IQ contracts with single or multiple awards, or both.

Section 635.604(c) clarifies that, at the option of the State DOT, the minimum prime contractor participation requirement set forth at 23 CFR 635.116 may be applied over the entirety of the ID/IQ contract or applied to each individual work order. The solicitation shall specify the applicable requirements.

Commenters addressed how the 30 percent self-performance requirement in 23 CFR 635.116(a) would apply to ID/IQ contracts and JOC contracts. Commenters appear to believe that contracting agencies should have the discretion to determine how to meet the minimum self-performance requirement under 23 CFR 635.116(a) in this context. The FHWA agrees with these comments and establishes that the minimum self-performance requirement will continue to apply to ID/IQ contracts, but it may be applied either over the entirety of the ID/IQ contract or to each individual work order. To ensure transparency, the regulation also requires the solicitation to specify the applicable requirements related to satisfying 23 CFR 635.116(a).

In 23 CFR 635.604(d), FHWA requires that when a contracting agency's processes or procedures use project cost to establish the assessed rate of liquidated damages under 23 CFR part 635.127, the work order cost must be used to determine the rate when liquidated damages are assessed. Since an individual work order is a smaller

part of a larger ID/IQ contract, FHWA believes this clarification is necessary to reduce confusion and the disproportionate application of liquidated damages.

In 23 CFR 635.604(e), FHWA clarifies that nothing in this subpart shall be construed as prohibiting a State DOT from adopting more restrictive policies and procedures than contained herein regarding ID/IQ contracts.

#### Section 635.605—Approvals and Authorizations

Section 635.605 outlines requirements to establish the relationship between the ID/IQ procurement process and the NEPA process. The requirements in this section are designed to protect the integrity of the NEPA decision-making process because the solicitation and award of an ID/IQ contract will often occur before the completion of the NEPA process.

Through ID/IQ projects under the SEP-14 process, FHWA found that the NEPA process often cannot be completed until specific work locations are identified. The FHWA believes certain requirements preclude FHWA from authorizing final design and construction to proceed, or from obligating funds for final design and construction work, prior to completing the NEPA decision-making process; these requirements include 23 U.S.C. 112(c), 23 CFR 630.106, and 23 CFR 771.113(a). The FHWA thus establishes the requirements set forth in the following sections.

To call attention to the indefinite nature of the ID/IQ contracting method, 23 CFR 635.605(a)(1) stipulates that the solicitation for an ID/IQ contract may identify all, some, or none of the specific locations where construction is to be required under the contract.

To expedite project delivery, 23 CFR 635.605(a)(2) and (a)(3) allow a contracting agency to solicit and award an ID/IQ contract prior to completion of the NEPA process or

processes, as applicable. In addition, FHWA requires prior concurrence of the Division Administrator for these actions, which FHWA believes is consistent with other project delivery methods and is necessary to conform with the requirements of 23 U.S.C. 112.

To protect the NEPA decision-making process, 23 CFR 635.605(a)(4) prohibits the execution of an authorization to proceed and formal project agreement under 23 CFR 630.106 for final design and construction for the portion of an ID/IQ contract for work until the NEPA process has been completed for said work.

The FHWA anticipates that, through the duration of an ID/IQ contract, additional work locations will be identified by the contracting agency and the NEPA process will be completed for these locations. To address this, 23 CFR 635.605(a)(5) allows for modifications to the formal project agreement to accommodate the additional work.

In the ANPRM, FHWA solicited input regarding the agreement estimates required under 23 CFR 635.115, which must be submitted to FHWA Division Offices for use in the preparation of project agreements. The FHWA asked whether the estimate should be of the minimum value provided under the contract, the estimate for the base contract, or the estimated maximum value under the contract including contract extensions.

The FHWA considered the widely varied responses the commenters provided as well as the requirements of 23 CFR 771.113(a) regarding the relationship between the completion of required environmental reviews and the obligation of funds for final design and construction. Section 635.605(a)(6) establishes that the agreement estimate for final design or physical construction of an ID/IQ contract must not exceed the actual or best estimated costs of items necessary to complete the scope of work considered in

applicable work orders and in the completed NEPA processes since the estimate serves as the basis for the obligation of funds pursuant to 23 CFR 630.106(a)(3), and to satisfy the requirements of 23 CFR 771.113(a). The estimate also must be adjusted as necessary as set forth under 23 CFR 630.106(a)(4).

The FHWA recognizes that a contracting agency may use a project estimate developed for planning purposes under 23 CFR part 450 as it develops its ID/IQ solicitation. However, for projects to which NEPA applies, the allowable amount of an agreement estimate for final design or physical construction of an ID/IQ contract is determined after the NEPA process is complete.

In 23 CFR 635.605(b)(1), subject to the requirements in subpart F, the contracting agency may request Federal participation in the costs associated with an ID/IQ contract, or portion of a contract. In such cases, FHWA's construction contracting requirements will apply to all ID/IQ contract work orders if any ID/IQ contract work orders are funded with Title 23, U.S.C. funds. This provision is consistent with other project delivery methods. The FHWA believes this provision is necessary to ensure the ID/IQ contract is compliant with applicable Federal requirements, even if some portion of that contract's expenses are funded with non-Federal-aid funds. Further, any expenses incurred before FHWA authorization shall not be eligible for reimbursement except as may be determined in accordance with 23 CFR 1.9.

The FHWA anticipates contracting agencies may use an ID/IQ contract for multiple purposes during the contract period, such as for both planned work and emergency work. These situations may include separate Federal funding sources with differing Federal share payable requirements. Section 635.605(b)(2) permits contracting

agencies such flexibility while also requiring the applicable Federal share requirements for each work order be specified in the relevant project agreements.

#### Section 635.606—ID/IQ procedures

In 23 CFR 635.606(a), a State DOT must submit its proposed ID/IQ procurement procedures to the Division Administrator for review and approval. Following approval by the Division Administrator, any subsequent changes in procedures and requirements are also subject to approval by the Division Administrator before they are implemented. This review and approval is consistent with 23 U.S.C. 112(a), and is necessary to facilitate efficient administrative oversight of a State DOT's ID/IQ procurement process for compliance with Federal requirements. The FHWA's approval of the State DOT's process will eliminate the need for FHWA to review and evaluate the State DOT's ID/IQ procurement process on a project-by-project basis, subject to the terms of the Stewardship and Oversight Agreement between FHWA and the State DOT. This review and approval is consistent with other project delivery methods. Other contracting agencies may follow approved State DOT procedures in their State or their own procedures if approved by both the State DOT and FHWA. The Division Administrator's approval of ID/IQ procurement procedures is a program-level action and may not be delegated or assigned to the State DOT.

The FHWA establishes the parameters for the Division Administrator's approval of the State DOT's ID/IQ procedures. Under 23 CFR 635.606(b), the Division Administrator would be required to review a State DOT's ID/IQ procedures to verify that the procedures do not operate to restrict competition and conform to the requirements of applicable Federal regulations.

In 23 CFR 635.606(c), FHWA requires that ID/IQ procurement procedures document several procedures and responsibilities. The procedures and responsibilities listed relate to changes in this regulation and have been identified by FHWA as being sufficiently different under ID/IQ procurement when compared to other project delivery methods. As such, FHWA believes these procedures and responsibilities warrant having a documented and approved process to ensure compliance with applicable Federal requirements.

The FHWA is aware that some agencies combine the design-build contracting method with ID/IQ contracting. One commenter recommended that FHWA should allow a small percentage of design work to be performed under ID/IQ contracts when needed. In 23 CFR 635.606(d), FHWA clarifies that, subject to the approval of the Division Administrator as described in 23 CFR 635.606(a), contracting agencies may incorporate the design-build contracting method with ID/IQ contracts. In addition to the requirements of subpart F, the contracting agency must include procedures as needed to ensure compliance with 23 CFR part 636 and related requirements.

### **Request for Comments on Specific Issues**

Amendments to FHWA's current policies for reviewing and approving ID/IQ projects are necessary to allow this contracting technique on a permanent basis. To assist the Agency in this effort, FHWA seeks public comments on the following specific questions in addition to comments on its attempt to quantify cost savings from the regulation and the regulatory text:

1. Section 635.604(a)(3)(iii): To ensure transparency and effective competition, should FHWA require contracting agencies to provide estimated minimum and maximum

quantities of services in both ID/IQ solicitations and contracts? Or should FHWA require such estimates for any other reason?

2. Section 635.604(a)(3)(iii): Should FHWA require contracting agencies to specify in ID/IQ solicitations and contracts the estimated maximum or minimum quantities that may be expected under each work order?

3. Section 635.604(a)(5): When using multiple-award contracts, what criteria should, or should not be used, to issue work orders?

4. Section 635.604(a)(5): When using multiple-award contracts, are typical cause and convenience termination clauses sufficient to remove contractors from the pool of those to be considered when issuing work orders, when those contractors are not meeting the terms of the contract?

5. Section 635.605: What procedures can be implemented to review efficiently and approve small, preventive maintenance projects that provide for a very limited scope of work at numerous locations (e.g., impact attenuator repair, guardrail repair, pavement marking projects, etc.)?

6. Section 635.606(d): When using ID/IQ procedures within a design-build contract, what procedures should be in place to ensure compliance with this subpart, 23 CFR part 636, and related requirements?

7. In this IFR, FHWA attempted to quantify cost savings resulting from increasing administrative efficiency but lacked sufficient data to quantify cost savings based on: (a) expediting project delivery; and (b) reducing project or construction costs. Compared to a baseline scenario under which ID/IQ contracting is not allowed, and apart from cost savings based on increasing administrative efficiency (as addressed in this

IFR), do you expect State DOTs to achieve additional cost savings based on (a) or (b)? If so, how much? What is your estimate based on? What data, if any, is available and may be used to support and quantify any such cost savings?

8. Assuming ID/IQ contracting was not allowed (either experimentally or operationally), approximately how many traditional construction contracts would a State DOT process in a typical year? Of those contracts, what percentage do you anticipate the State DOT in your State would process using the ID/IQ contracting method if allowed in the form required by this IFR?

9. Approximately how long does it take State DOTs to administer a traditional contract as discussed in Question 8?

10. Approximately how long does it take to administer an ID/IQ contract as discussed in Question 8?

## **RULEMAKING ANALYSES AND NOTICES**

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the closing date will be filed in the docket and will be considered to the extent practicable, but FHWA may issue a final rule at any time after the close of the comment period. In addition to late comments, FHWA will also continue to file relevant information in the docket as it becomes available after the comment closing date, and interested persons should continue to examine the docket for new material.

The FHWA has determined that prior notice and opportunity for comment are unnecessary under 5 U.S.C. 553(b)(3)(B) because this IFR does not impose any new

obligation or requirement on the States or highway contractors. Instead it simply enables ID/IQ contracting for Federal-aid highway construction on a permanent basis and thus provides benefits to State DOTs and other contracting agencies including expediting project delivery, increasing administrative efficiency, reducing project costs, and increasing flexibility for State DOTs to use Federal-aid funds on certain projects. Furthermore, prior notice and an opportunity for public comment is contrary to the public interest because allowing States DOTs to utilize this method of contracting as soon as possible would promote economic recovery. Because of the Coronavirus Disease (COVID-19) public health emergency, and in response to EO 13924, “Regulatory Relief to Support Economic Recovery” (issued on May 22, 2020), FHWA believes this IFR would promote job creation and economic growth. Many State DOTs and Local Public Agencies are already familiar with this method of contracting and could begin using it in a very short period of time. ID/IQ contracting also offers an opportunity to streamline procurement through bundling similar-type projects, which reduces the contracting agencies’ administrative overhead by having fewer contracts to prepare, advertise, and award. In addition, ID/IQ would provide more flexibility to States that are struggling with reduced budgets and programming of projects due to COVID-19 issues.

For these reasons, FHWA finds good cause to forgo further procedures for notice and opportunity for comment under 5 U.S.C. 553(b)(3)(B). For these same reasons, this IFR is effective upon its date of publication under 5 U.S.C. 553(d)(3) and, therefore, is exempt from the 30-day delayed effective date requirement of that section for these same reasons. Nonetheless, this IFR includes a 60-day comment period. The FHWA will consider and address any submitted comments in a final rule that will follow this IFR.

**Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), Executive Order 13771 (Reducing Regulations and Controlling Regulatory Costs), and DOT Policies and Procedures for Rulemaking (49 CFR Part 5, Subpart B)**

The FHWA has determined that this action would not be a significant regulatory action within the meaning of Executive Order (EO) 12866, and within the meaning of DOT's Policies and Procedures for Rulemaking (49 CFR Part 5, Subpart B). This action complies with EOs 12866, 13563, and 13771 to improve regulation. The FHWA anticipates that the economic impact of this rulemaking would be minimal. The FHWA anticipates that the rule would not adversely affect, in a material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

Although FHWA has determined that this action would not be a significant regulatory action, this action is expected to be an EO 13771 deregulatory action because it would generate cost savings. These cost savings, measured in 2019 dollars and discounted at 7 percent, are expected to be \$3.4 million per year. These cost savings are generated by allowing ID/IQ contracting on a permanent basis. States' experience shows that ID/IQ contracting can lead to cost savings due to increased administrative efficiency, faster project delivery, and reduced project costs. By granting States the flexibility to use ID/IQ contracting, they can achieve the associated cost savings.

Currently, as explained in more detail above, there are two methods available to approve ID/IQ contracts for use on Federal-aid highway construction projects:

1. Special Experimental Project Number 14: Under the SEP-14 Program, contracting agencies interested in testing an innovative contracting technique submit project-specific (or programmatic) work plans to FHWA 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.

2. FHWA Notice N5060.2: Under Notice N5060.2, an ID/IQ contract not requiring advance approval under the SEP-14 Program must satisfy certain conditions, including that the contract must be: low-cost (the total value of task or work orders may not exceed \$2,000,000 per year on average over the contract term); short-term (a base contract of 1 to 2 years); awarded by competitive bidding to the lowest responsive bidder; a single-award contract; qualified for a NEPA categorical exclusion listed under 23 CFR 771.117; and compliant with certain other laws and regulations related to Federal-aid construction. Additional requirements are detailed in FHWA Notice 5060.2.

These approval methods are only authorized experimentally and on a temporary basis. To estimate the cost savings from operationalizing ID/IQ contracting on a permanent basis, FHWA compared a baseline scenario under which ID/IQ contracting is undertaken for 32 contracts per year under the SEP-14 Program, based on the historical record, with the scenario established by the rule. The SEP-14 Program historical average assumes that approximately two to three States actively use ID/IQ contracting each year. Some States have also sought approval for individual contracts.<sup>4</sup>

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<sup>4</sup> The survey responses in Appendix A of NCHRP Synthesis 473 were averaged to determine that each State surveyed undertakes approximately 10.5 contracts per year. FHWA assumes this average was consistent for States undertaking ID/IQ using the SEP-14 Program. The full listing of ID/IQ SEP-14 Program projects can be found at: <https://www.fhwa.dot.gov/programadmin/contracts/sep14list.cfm>.

To conduct the analysis, FHWA used the evaluations of ID/IQ contracts required under the SEP-14 Program, ANPRM comments, and responses to *NCHRP Synthesis 473: Indefinite Delivery/Indefinite Quality Contracting Practices*. The estimates used within the analysis are based on this small sample of data. The FHWA welcomes additional feedback on potential impacts of using ID/IQ contracts.

The FHWA estimated cost savings over an 11-year analysis period, with year one modeled as an implementation year, assuming lower than normal contracting volume as contracting processes take time to plan and initiate in general, and two 5-year contract cycles. Elapsed contracting times, based on agency estimates, were converted to labor hours, assuming a standard 40-hour work week. These labor hours were monetized using a mix of State employee wage rates.<sup>5</sup> To account for the cost of employer provided benefits, wage rates were multiplied by a factor of 1.43.<sup>6</sup>

The NCHRP Synthesis 473 included survey responses for how many new ID/IQ contracts are awarded each year by each State agency. The average of these responses was multiplied by 50 States, assuming all States will implement ID/IQ contracting using the rule.<sup>7</sup> One major advantage of ID/IQ contracting is the ability to issue a work order instead of making a separate, time-intensive traditional contract. The average number of

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<sup>5</sup> BLS May 2018 National Industry-Specific Occupational Employment and Wage Estimates NAICS 999200 - State Government, excluding schools and hospitals (OES Designation). Three employees are expected to work on the contracts: Buyers and Purchasing Agents (13-1020), Purchasing Manager (11-3061), and Procurement Clerk (43-3061). The weighted average wage rate is \$26.65.

<sup>6</sup> BLS Employer Costs for Employee Compensation, December 2018, Table 5 (page 9) State and Local Government, Management, Professional, and Related Occupations. For this group, 70.0 percent of employee compensation is wages and the remainder is the cost of benefits, which suggests factoring wages by 1.43 (100%/70%) to estimate the total cost of compensation. The adjusted weighted average wage rate is \$38.12.

<sup>6</sup> The survey responses to question 8, catalogued in Appendix A of NCHRP Synthesis 473 were averaged to determine that each State surveyed undertakes approximately 10.5 contracts per year.

<sup>7</sup> The survey responses to question 8, catalogued in Appendix A of NCHRP Synthesis 473 were averaged to determine that each State surveyed undertakes approximately 10.5 contracts per year.

work orders per contract (9) reported by agencies was multiplied by expected domestic ID/IQ contracts annually to estimate total work orders issued per year. Based on data presented within NCHRP Synthesis 473, approximately 4 percent of work orders will be processed separately using ID/IQ, rather than with traditional contracts.<sup>8</sup> Furthermore, the number of work orders was further scaled down by 30 percent because FHWA assumes smaller work orders would not have been done as traditional contracts. The cost savings associated with avoided traditional contracts was monetized using this conversion rate, and the estimated elapsed time difference between issuing a work order versus a new traditional contract. The estimate incorporates a modest assumed growth rate of 1 percent for contracts and work orders per contract annually.

The FHWA estimates that an average traditional contract takes 911 hours to complete, whereas an ID/IQ contract takes 272 hours, leading to total time savings of 639 hours per contract. The FHWA assumes administrative time savings from this action will account for approximately 25 percent, or 160 hours (639 hours x 0.25), of the shortened contract time. In addition to the administrative savings per contract, a small amount of time savings is estimated to avoid the need for new contracts altogether, based on having ID/IQ contracts in place. The FHWA estimates administrative time savings of approximately 25 percent of the traditional contract time, or 228 hours saved per avoided contract (911 hours x 0.25).

The per contract time savings were multiplied by the number of contracts and wage rates to determine total savings. For example, in 2021, FHWA assumes 499 ID/IQ contracts will lead to 79,695 hours saved (499 contracts x 160 hours) and 57 avoided

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<sup>8</sup> Minnesota DOT reports that 1 of 24 work orders (4 percent) would be eligible for ID/IQ.

traditional contracts will lead to 12,980 hours saved (57 contracts x 228 hours), for total administrative time savings of 92,675 hours (79,695 hours + 12,980 hours). Dollars saved were calculated in a similar manner by applying wage rates to the administrative time savings. In 2021 this led to approximately \$3.0 million in savings generated by using ID/IQ contracts and \$505,000 in savings, leading to total 2021 cost savings of approximately \$3.5 million. In future years FHWA assume the number of contracts will grow by approximately 1 percent.

Aggregating over the 11-year analysis period leads to total time savings of approximately 1.0 million hours from the use of ID/IQ contracts. This leads to total undiscounted cost saving of \$38.8 million. When discounted at 7 percent and 3 percent present value, the cost savings equal approximately \$25.8 million and \$32.3 million, respectively. Table 1 shows these costs savings for the analysis period.

**Table 1: ID/IQ Administrative Cost Savings**

<b>Year</b>	<b>Expected New ID/IQ Contracts</b>	<b>Expected Traditional Contracts Avoided</b>	<b>Hours Saved</b>	<b>Total Cost Savings (Undiscounted)</b>	<b>Total Cost Savings (Discounted at 7%)</b>	<b>Total Cost Savings (Discounted at 3%)</b>
2020	231	26	42,818	\$1,632,031	\$1,525,263	\$1,584,496
2021	499	57	92,675	\$3,532,317	\$3,085,263	\$3,329,548
2022	504	58	93,733	\$3,572,637	\$2,916,336	\$3,269,469
2023	509	59	94,804	\$3,613,461	\$2,756,692	\$3,210,513
2024	514	61	95,888	\$3,654,796	\$2,605,819	\$3,152,659
2025	519	62	96,986	\$3,696,648	\$2,463,233	\$3,095,884
2026	524	63	98,098	\$3,739,025	\$2,328,477	\$3,040,170

2027	530	64	99,224	\$3,781,935	\$2,201,121	\$2,985,495
2028	535	66	100,364	\$3,825,385	\$2,080,756	\$2,931,839
2029	540	67	101,518	\$3,869,383	\$1,966,998	\$2,879,184
2030	546	68	102,687	\$3,913,936	\$1,859,483	\$2,827,511
<b>Total</b>	<b>5,452</b>	<b>651</b>	<b>1,018,794</b>	<b>\$38,831,555</b>	<b>\$25,789,440</b>	<b>\$32,306,768</b>

In addition to the cost savings that have been quantified here, there may be additional positive impacts from the rulemaking related to allowing ID/IQ contracts. Many of the SEP-14 evaluations claim that, along with administrative savings, the agencies saw savings in the construction phase, getting lower prices than they were quoted with traditional contracting. These construction cost savings were not quantified but are likely to be significant and will lead to increased efficiency and quickened construction timelines.

Although FHWA has undertaken various efforts to grant States the flexibility to use ID/IQ contracts, specifically through the SEP-14 Program, to the extent that the current rules and guidance discourage their use, this rule removes those barriers.

### **Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), FHWA has evaluated the effects of this action on small entities and has determined that the action is not anticipated to have a significant economic impact on a substantial number of small entities. The amendment addresses obligation of Federal funds to States for Federal-aid highway projects. As such, it affects only States and States are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, FHWA

certifies that the action will not have a significant economic impact on a substantial number of small entities.

### **Unfunded Mandates Reform Act of 1995**

This rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48, March 22, 1995) as it will not result in the expenditure by State, local, Tribal governments, in the aggregate, or by the private sector, of \$155 million or more in any 1 year (2 U.S.C. 1532 *et seq.*). In addition, the definition of “Federal mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

### **Executive Order 13132 (Federalism)**

This action has been analyzed in accordance with the principles and criteria contained in EO 13132 dated August 4, 1999, and FHWA has determined that this action would not have a substantial direct effect or sufficient federalism implications on the States. The FHWA has also determined that this action would not preempt any State law or regulation or affect the States’ ability to discharge traditional State governmental functions.

### **Executive Order 12372 (Intergovernmental Review)**

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing EO 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Local entities should refer to the Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction, for further information.

### **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et. seq.*), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that the rule does not contain collection of information requirements for the purposes of the PRA.

### **National Environmental Policy Act**

The FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and has determined that this action would not have any effect on the quality of the environment and meets the criteria for the categorical exclusion at 23 CFR 771.117(c)(20).

### **Executive Order 13175 (Tribal Consultation)**

The FHWA has analyzed this action under EO 13175, dated November 6, 2000, and believes that the action would not impose substantial direct compliance costs on Indian Tribal governments; and would not preempt Tribal laws. The rulemaking addresses obligations of Federal funds to States for Federal-aid highway projects and would not impose any direct compliance requirements on Indian Tribal governments. To the extent that Tribes utilize these regulations, they would be expected to derive the same benefits identified above. Therefore, a Tribal summary impact statement is not required.

### **Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service

Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

**List of Subjects in 23 CFR part 630**

Government contracts, grant programs-transportation, highway safety, highways and roads, reporting and recordkeeping requirements, traffic regulations.

**List of Subjects in 23 CFR part 635**

Grant programs-transportation, highways and roads, reporting and recordkeeping requirements.

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Nicole R. Nason  
Administrator  
Federal Highway Administration

For the reasons stated in the preamble, FHWA amends title 23, Code of Federal Regulations, parts 630 and 635 as follows:

**PART 630—PRECONSTRUCTION PROCEDURES**

1. Revise the authority citation for part 630 to read as follows:

**Authority:** 23 U.S.C. 106, 109, 112, 115, 315, 320, and 402(a); Sec. 1303 of Pub. L. 112–141, 126 Stat. 405; Sec. 1501 and 1503 of Pub. L. 109–59, 119 Stat. 1144; Pub. L. 105–178, 112 Stat. 193; Pub. L. 104–59, 109 Stat. 582; Pub. L. 97–424, 96 Stat. 2106; Pub. L. 90–495, 82 Stat. 828; Pub. L. 85–767, 72 Stat. 896; Pub. L. 84–627, 70 Stat. 380; 23 CFR 1.32 and 49 CFR 1.85.

**Subpart A—[Amended]**

2. In subpart A, revise all references to “STD” to read “State DOT”.

3. Amend § 630.106 by revising the first sentence of paragraph (a)(1) and adding paragraph (a)(9) to read as follows:

**§ 630.106 Authorization to proceed.**

(a)(1) The State Department of Transportation (State DOT) must obtain an authorization to proceed from the FHWA before beginning work on any Federal-aid project. \* \* \*

\* \* \* \* \*

(9) For Indefinite Delivery/Indefinite Quantity projects, the execution or modification of the project agreement for final design or physical construction, and authorization to proceed, shall not occur until after the completion of the NEPA process.

\* \* \* \* \*

4. Amend § 630.112 by revising paragraphs (c)(3) and (4) to read as follows:

**§ 630.112 Agreement provisions.**

\* \* \* \* \*

(c) \* \* \*

(3) *Drug-free workplace.* By signing the project agreement, the State DOT agrees to maintain a drug-free workplace, identify all known workplaces under Federal awards, and fulfill other responsibilities required by 49 CFR part 32.

(4) *Suspension and debarment verification.* By signing the project agreement, the State DOT agrees to verify that contractors are not excluded through suspension or debarment, as required by 2 CFR parts 180, subpart C, and 1200.

\* \* \* \* \*

**Subpart B—Plans, Specifications, and Estimates**

5. Amend § 630.205 by revising paragraphs (d) and (e) to read as follows:

**§ 630.205 Preparation, submission, and approval.**

\* \* \* \* \*

(d) The State DOT shall be advised of approval of the PS&E by the FHWA.

(e) No project or part thereof for actual construction shall be advertised for contract nor work commenced by force account until the PS&E has been approved by the FHWA and the State DOT has been so notified, except in the case of an Indefinite Delivery/Indefinite Quantity project conforming to the requirements of 23 CFR part 635 subpart F.

**PART 635—CONSTRUCTION AND MAINTENANCE**

6. The authority citation for part 635 continues to read as follows:

Authority: Sections 1525 and 1303 of Pub. L. 112–141, Sec. 1503 of Pub. L. 109–59, 119 Stat. 1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 et seq.; Sec. 1041(a), Pub. L. 102–240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.85(a)(1).

7. In part 635, revise all references to “STD” to read “State DOT”.

**Subpart A—Contract Procedures**

8. Amend § 635.102, by adding in alphabetical order the definition of “Indefinite Delivery/Indefinite Quantity (ID/IQ) Project” and revising the definition of “State Department of Transportation (State DOT)” to read as follows:

**§ 635.102 Definitions.**

\* \* \* \* \*

*Indefinite Delivery/Indefinite Quantity (ID/IQ) Project* means a project to be developed using one or more ID/IQ contracts.

\* \* \* \* \*

*State department of transportation (State DOT)* means that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction. The term “State” should be considered equivalent to State DOT if the context so implies. In addition, State Highway Agency (SHA), State Transportation Agency (STA), State Transportation Department, or other similar terms should be considered equivalent to State DOT if the context so implies.

\* \* \* \* \*

9. Amend § 635.104 by adding a new paragraph (e) to read as follows:

**§ 635.104 Method of construction.**

\* \* \* \* \*

(e) In the case of an ID/IQ project, the requirements of subpart F of this part and the appropriate provisions pertaining to the ID/IQ method of contracting in this part will apply. However, no justification of cost effectiveness is necessary in selecting projects for the ID/IQ delivery method.

10. Amend § 635.107 by revising paragraph (b) to read as follows:

**§ 635.107 Participation by disadvantaged business enterprises.**

\* \* \* \* \*

(b) In the case of a design-build, a CM/GC, or an ID/IQ project funded with title 23 funds, the requirements of 49 CFR part 26 and the State’s approved DBE plan apply.

11. Amend § 635.109 by adding paragraph (d) to read as follows:

**§ 635.109 Standardized changed condition clauses.**

\* \* \* \* \*

(d) For ID/IQ projects, State DOTs are strongly encouraged to use “suspensions of work ordered by the engineer” clauses, and may consider “differing site condition” clauses and “significant changes in the character of work” clauses, as appropriate.

12. Amend § 635.110 by revising paragraph (e) and the first sentence of paragraph (f) to read as follows:

**§ 635.110 Licensing and qualification of contractors.**

\* \* \* \* \*

(e) Contractors who are currently suspended, debarred or voluntarily excluded under 2 CFR parts 180 and 1200, or otherwise determined to be ineligible, shall be prohibited from participating in the Federal-aid highway program.

(f) In the case of design-build, CM/GC, and ID/IQ projects, the State DOTs may use their own bonding, insurance, licensing, qualification or prequalification procedure for any phase of procurement.

\* \* \* \* \*

13. Amend § 635.112 by revising paragraph (g) and adding paragraph (k) to read as follows:

**§ 635.112 Advertising for bids and proposals.**

\* \* \* \* \*

(g) The State DOT shall include the lobbying certification requirement pursuant to 49 CFR part 20 and the requirements of 2 CFR parts 180 and 1200 regarding suspension and debarment certification in the bidding documents.

\* \* \* \* \*

(k) In the case of an ID/IQ project, the FHWA Division Administrator’s approval of the solicitation document will constitute FHWA’s approval to use the ID/IQ contracting method and approval to release the solicitation document. The State DOT must obtain the approval of the FHWA Division Administrator before issuing addenda which result in major changes to the solicitation document.

14. Amend § 635.114 by adding paragraph (m) to read as follows:

**§ 635.114 Award of contract and concurrence in award.**

\* \* \* \* \*

(m) In the case of an ID/IQ project, the ID/IQ contract shall be awarded in accordance with the solicitation document. See subpart F of this part for ID/IQ project approval procedures.

§ 635.118 [Amended]

15. Amend § 635.118 by removing “49 CFR part 18” and adding in its place “2 CFR 200.333”.

§ 635.123 [Amended]

16. Amend § 635.123(b) by removing “49 CFR part 18” and adding in its place “2 CFR 200.333”.

**Subpart C—Physical Construction Authorization**

17. Amend § 635.309 by adding paragraph (q) to read as follows:

**§ 635.309 Authorization.**

\* \* \* \* \*

(q) In the case of an ID/IQ project, FHWA may authorize advertisement of the solicitation document prior to approving the PS&E. However, FHWA’s project authorization for final design and physical construction will not be issued until the following conditions have been met:

(1) All projects must conform with the statewide and metropolitan transportation planning requirements (23 CFR part 450).

(2) All projects in air quality nonattainment and maintenance areas must meet all transportation conformity requirements (40 CFR parts 51 and 93).

(3) The NEPA process has been concluded as described in § 635.605.

(4) A statement is received from the State that either all ROW, utility, and railroad work has been completed or that all necessary arrangements will be made for the completion of ROW, utility, and railroad work.

18. Add subpart F, consisting of §§ 635.601 – 635.606, to read as follows:

**Subpart F—Indefinite Delivery/Indefinite Quantity (ID/IQ) Contracting**

Sec.	
635.601	Purpose.
635.602	Definitions.
635.603	Applicability.
635.604	ID/IQ Requirements.
635.605	Approvals and authorizations.

635.606 ID/IQ procedures.

**§635.601 Purpose.**

The regulations in this subpart prescribe policies, requirements, and procedures relating to the use of the ID/IQ method of contracting on Federal-aid construction projects.

**§635.602 Definitions.**

As used in this subpart:

*Best value selection* means any selection process in which proposals contain both price and qualitative components and award of the contract is based upon a combination of price and qualitative considerations. Qualitative considerations may include past performance, timeliness, reliability, experience, work quality, safety, or other considerations.

*Contracting agency* means the State department of transportation (State DOT), and any State or local government agency, public-private partnership, or Indian tribe (as defined in 2 CFR part 200) that is acting under the supervision of the State DOT and is awarding and administering an Indefinite Delivery/Indefinite Quantity (ID/IQ) contract.

*ID/IQ* means a method of contracting that allows an indefinite quantity of services for a fixed time. This method is used when a contracting agency anticipates a recurring need but has not determined, above a specified minimum, the precise quantities of services that it will require during the contract period. Contractors bid unit prices for estimated quantities of standard work items, and work orders are used to define the location and quantities for specific work.

*ID/IQ contract* means the principal contract between the contracting agency and the contractor. Contracting agencies may use other names for ID/IQ contracts including job order contracting (JOC) contracts, master contracts, on-call contracts, push-button contracts, design-build ID/IQ contracts, design-build push button contracts, stand-by contracts, or task order contracts.

*JOC, or Job order contracting,* means a form of ID/IQ contracting that uses a unit price book in the solicitation and the bidder's adjustment factors or multipliers to establish contract prices.

*JOC contract* means a type of ID/IQ contract delivered using the JOC method. Requirements for ID/IQ contracts apply to JOC contracts unless otherwise specified in this subpart.

*NEPA process* has the same meaning as defined in § 635.502 of this part.

*Unit price book* means a book, guide, list, or similar document which includes defined construction tasks, and for each task, includes a unit of measure and a preset unit price.

*Work order* means the contract document issued for a definite scope of work under an ID/IQ contract. It defines the location, time, and scope of work required by the contracting agency. It also defines required pay items, quantities, and unit prices, as applicable. Contracting agencies may use other names for work orders including job orders, service orders, task orders, or task work orders.

### **§635.603 Applicability.**

(a) Except as provided in paragraph (b) of this section, the provisions of this subpart apply to all Federal-aid construction projects.

(b) This subpart does not apply to engineering and design service contracts, to which 23 CFR part 172 applies, or Federal Lands Highway contracts, to which 48 CFR subpart 16.5 applies.

**§635.604 ID/IQ Requirements.**

(a) *Procurement requirements.*

(1) The contracting agency may procure the ID/IQ contract using applicable State or local competitive selection procurement procedures if those procedures:

- (i) Comply with this section;
- (ii) Are effective in securing competition; and
- (iii) Do not conflict with applicable Federal laws and regulations.

(2) The solicitation for an ID/IQ contract shall state the procedures and criteria the contracting agency will use to award the ID/IQ contract.

(3) In addition to the requirements set forth under (a)(2), the ID/IQ contract, and any solicitation for an ID/IQ contract, must:

(i) Specify the period of the contract, including the number of optional contract extensions and the period for which the contracting agency may extend the contract under each optional extension.

(ii) Specify the basis, such as a published index, and procedure to be used for adjusting prices for optional contract extensions when optional contract extensions are included. Negotiated contract price adjustments for optional contract extensions are not eligible for Federal-aid participation.

(iii) Specify the estimated minimum and maximum quantity of services the contracting agency will acquire under the contract. The ID/IQ contract may also specify

estimated minimum or maximum quantities that the contracting agency may order under each work order.

(iv) Include appropriate statements of work, specifications, or other descriptions that reasonably and accurately describe the general scope, nature, complexity, and purpose of the services the contracting agency will acquire under the contract.

(v) State the procedures that the contracting agency will use in issuing work orders, and, if multiple awards may be made, state the procedures and selection criteria that the contracting agency will use to provide awardees a fair opportunity to be considered for each work order.

(vi) Include the contracting agency's dispute resolution procedures available to awardees if multiple awards may be made.

(4) In addition to the requirements set forth under (a)(3), a JOC contract shall:

(i) Use a unit price book to contain or reference the information described under (a)(3)(iv).

(ii) Include the unit price book both in the contract and the solicitation.

(iii) Include prices adjusted by the contractor's adjustment factors or multipliers for each item in the unit price book.

(5) The contracting agency's procurement procedures may include selection of one or multiple contractors based on competitive low bid or best value selection under a single solicitation. For contracts awarded to multiple contractors under a single solicitation, the issuance of work orders must be based on lowest cost or lowest cost plus time to the government for the specified work. Work orders shall not be issued to contractors on a rotating basis or other non-competitive method.

(6) The sum of the duration of the initial ID/IQ contract and any optional contract extensions shall not exceed five years. The contracting agency may include a provision in the ID/IQ contract to exercise an option or options to extend the contract for a term or terms such that the duration of each optional contract extension does not exceed the initial duration of the ID/IQ contract.

(i) Prior to granting a contract extension, the contracting agency must receive concurrence from the Division Administrator.

(ii) For ID/IQ contracts where prevailing wages apply under 23 U.S.C. 113, the current prevailing wage rate determination as determined by the U.S. Department of Labor in effect on the date of the execution of the contract extension shall apply to work covered under the contract extension.

(iii) For ID/IQ contracts exceeding one year in duration, the contracting agency may use price escalation methods, such as referring to a published index, to adjust the payment for items of work in the issuance of work orders. Such price escalation methods, however, shall not be applied to items of work when those items are separately covered under commodity price escalation clauses in the ID/IQ contract.

(7) Contracting agency payment to a contractor to satisfy a minimum award provision that is not supported by eligible work is not eligible for Federal-aid participation.

(b) *Participation by disadvantaged business enterprises.* The requirements of 49 CFR part 26 and the State's approved Disadvantaged Business Enterprise (DBE) plan apply to ID/IQ contracts. At the option of the State DOT, DBE contract or project goal setting and goal attainment may apply to ID/IQ contracts in their entirety, or to individual

work orders for ID/IQ contracts with single or multiple awards, or both. The solicitation for ID/IQ contracts shall specify the applicable requirements.

(c) *Subcontracting.* At the option of the State DOT, the minimum prime contractor participation requirement set forth at § 635.116 may be applied over the entirety of the ID/IQ contract or applied to each individual work order. The solicitation shall specify the applicable requirements.

(d) *Liquidated damages.* When a contracting agency's processes or procedures use project cost to establish the assessed rate of liquidated damages under § 635.127, the work order cost shall be used to determine the rate when liquidated damages are assessed.

(e) *Applicable State procedures.* Nothing in this subpart shall be construed as prohibiting a State DOT from adopting more restrictive policies and procedures than contained herein regarding ID/IQ contracts.

#### **§ 635.605 Approvals and authorizations.**

(a) *Advertisement, award, and the relationship to NEPA.*

(1) The solicitation for an ID/IQ contract may identify all, some, or none of the specific locations where construction is to be required under the ID/IQ contract.

(2) With prior concurrence of the Division Administrator, the contracting agency may advertise the solicitation for an ID/IQ contract prior to the completion of the NEPA process.

(3) With prior concurrence of the Division Administrator, the contracting agency may award an ID/IQ contract prior to the completion of the NEPA process.

(4) An authorization to proceed, or formal project agreement under § 630.106 of this chapter for an ID/IQ contract, shall not be issued or executed for final design or

physical construction for work until the NEPA process has been completed for said work. An authorization or agreement under this paragraph may apply to work in multiple locations.

(5) With the approval of the Division Administrator, the formal project agreement under § 630.106 of this chapter for final design or physical construction under an ID/IQ contract may be amended as necessary as additional work locations are identified and the NEPA process is completed for the additional work locations.

(6) The agreement estimate for final design or physical construction required for an ID/IQ contract under § 635.115 shall not exceed the actual or best estimated costs of items necessary to complete the scope of work considered in applicable work orders and in the completed NEPA processes as described in paragraphs (4) and (5) of this subsection. The estimate shall be adjusted as necessary as set forth under § 630.106(a)(4) of this chapter.

*(b) Federal participation.*

(1) Subject to the requirements in this subpart, the contracting agency may request Federal participation in the costs associated with an ID/IQ contract, or portion of a contract. In such cases, FHWA's construction contracting requirements will apply to all ID/IQ contract work orders if any ID/IQ contract work orders are funded with Title 23, U.S.C. funds. Any expenses incurred before FHWA authorization shall not be eligible for reimbursement except as may be determined in accordance with § 1.9 of this chapter.

(2) The applicable Federal share for each work order shall be specified in the relevant project agreement.

**§ 635.606 ID/IQ procedures.**

(a) *FHWA approval.* The State DOT shall submit its proposed ID/IQ procurement procedures to the Division Administrator for review and approval. Following approval by the Division Administrator, any subsequent changes in procedures and requirements shall also be subject to approval by the Division Administrator before they are implemented. Other contracting agencies may follow approved State DOT procedures in their State or their own procedures if approved by both the State DOT and FHWA. The Division Administrator's approval of ID/IQ procurement procedures may not be delegated or assigned to the State DOT.

(b) *Competition.* ID/IQ procurement procedures shall effectively secure competition in the judgment of the Division Administrator.

(c) *Procurement requirements.* ID/IQ procurement procedures shall include the following procedures and responsibilities:

- (1) Review and approval of ID/IQ solicitations;
- (2) Review and approval of work item descriptions and specifications;
- (3) Approval to advertise solicitations;
- (4) Concurrence with ID/IQ contract awards to single or multiple contractors;
- (5) Approval of and amendments to formal project agreements and authorizations to proceed pursuant to § 630.106 of this chapter;
- (6) Issuance of work orders;
- (7) Approval of and amendments to agreement estimates pursuant to §635.115;
- (8) Changed conditions clauses;
- (9) Approval of contract changes and extra work pursuant to § 635.120; and

(10) Other procedures as needed to ensure compliance with other requirements in this subpart and under Title 23, U.S.C. and its implementing regulations and 49 CFR part 26.

(d) *Design-build and ID/IQ*. Subject to the approval of the Division Administrator, as described in § 635.606(a), contracting agencies may incorporate the design-build contracting method with ID/IQ contracts. In addition to the requirements of this section, the contracting agency shall include procedures as needed to ensure compliance with part 636 of this chapter and related requirements.

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