

Local Agency Program & Florida Highway Administration Certification & Recertification Computer Based Training

Module 5 Part 1 – Other Program Requirements

Let us now take a look at “Other Program Requirements”

"No public agency shall be permitted to bid in competition or to enter into subcontracts with private contractors." This applies to all federal-aid highway construction projects. Key Tenet - Open competitive bidding by private enterprises and the Public agency has competitive advantage.

There are no exceptions to this competitive bidding policy. However, under limited circumstances a public agency may be permitted to undertake efforts normally reserved for the private sector. These circumstances are:

- Publicly Owned Equipment,
- Convict Produced Materials, and
- State Owned/Furnished/Designated Materials.

In addition, under limited circumstances an STA or local public agency may perform highway construction work on a force account basis by providing the labor, equipment, materials, and supplies needed to complete the work.

FHWA will not participate, directly or indirectly, in payment for any premium or royalty on any patented or proprietary material, specification, or process specifically set forth in the plans and specifications for a project, unless:

- The item is purchased or obtained through competitive bidding with equally suitable unpatented items,
- The STA certifies either that the proprietary or patented item is essential for synchronization with the existing highway facilities or that no equally suitable alternative exists, or
- The item is used for research or for a special type of construction on relatively short sections of road for experimental purposes.

Patented or Proprietary product items are not federal-aid eligible unless:

- Specified in contract with “reasonable” number of acceptable products and “or equal”
- System synchronization (with Public Interest Finding)
- Coordinate with existing facilities (Functionally, Aesthetically)

- No equally suitable alternative (with Public Interest Finding)
- New product for experimental or research purposes , and,
- Proprietary products of public interest are required.

The STA shall not impose any requirement or enforce any procedure which operates to require the use of, or provides a price differential in favor of, articles or materials produced within the State.

This guidance basically states that materials produced within a State shall not be favored to the exclusion of comparable materials produced outside of the State. State preference clauses give particular advantage to the designated source and thus restrict competition. Therefore, State preference provisions shall not be used on any Federal aid construction projects.

One of the most basic tenets of Federal aid contracting is that construction contracts are to be awarded competitively to the contractor which submits the lowest responsive bid.

These principles are the basis for Federal assistance to the STA highway construction programs. The act of a contracting agency negotiating with an apparent low bidder prior to award is defined as "bid rigging in reverse," which states the following:

"The State highway agencies do not have the authority under any circumstances to negotiate with a bidder before an award to reduce the price of a construction contract."

Competitive bidding is the principal means to award Federal-aid contracts. However, there may be situations that support the use of a contracting method other than competitive bidding.

- Emergency Work
- Special Experimental Projects Number 14 or SEP-14, and
- force account work

Since 1990, the FHWA has allowed the State DOTs to evaluate non-traditional contracting techniques under a program titled "Special Experimental Project No. 14 - Innovative Contracting." Originally, the contracting practices approved for evaluation were: cost-plus-time bidding, lane rental, design-build contracting, and warranty clauses. After a period of evaluation, the FHWA decided that all four practices were suitable for use as operational practices (non-experimental).

Force Account is defined as *"the direct performance of highway construction work by a State highway agency, a county, a railroad, or a public utility company by use of labor, equipment, materials, and supplies furnished by them and used under their direct control."*

In other words, an agency should not need to hire employees or purchase equipment to undertake the work. Force account contracts with a private contractor are an exception to normal construction contracting procedures and should rarely be approved.

Value engineering (VE) is a systematic review process that:

- Analyzes a project's design, and
- Develops recommendations to improve design or reduce cost.

SAFETEA-LU, §1904(a)(1) revised the program to require that Value Engineering be applied to any project on the Federal Aid system with a value greater than 25 million dollars.

- Environmental studies
- Preliminary Engineering
- Final Design
- Construction

For a project estimated to cost more than 500 million dollars, FHWA may require more than one analysis.

Value Engineering is an effective and proven method for improving quality. It fosters innovation, reduces project costs and eliminates unnecessary and costly design elements.

The STA should periodically review its procedures for determining contract time, which should include a comparison of the actual construction time against the estimated completion time for several projects to ascertain whether its procedures result in appropriate contract times.

This guidance is applicable to all NHS Federal-aid highway construction projects.

Contract time is defined as the maximum time allowed in the contract for completion of all work contained in the contract documents.

The American Association of State Highway and Transportation Officials or AASHTO defines prequalification as a means of predetermining job experience, performance and work capacity to identify individuals and organizations from which the agency may accept a bid. This is normally performed annually and this is NOT a means of limiting competition.

The FHWA does not require the STAs to implement procedures or requirements for prequalification, qualification, bonding, or licensing, on Federal-aid projects. However, if an STA has these procedures or requirements, they must conform to FHWA competitive bidding policy, in other words, the requirements cannot restrict competition as set forth in 23 CFR 635.110(a).

Advance approval from the Division Administrator is required for National Highway System or NHS projects. Procedures and requirements must not: Restrict Competition, Prevent Submission of a Bid, Prohibit Consideration of a Submitted Bid, or Require a License before Bid Submission or Consideration of Bid Submission.

Review Questions

A local government advertises a paving contract requiring Tire Grip to be to the asphalt mix. Can the local agency include this propriety product in its bid contract?

NO, Materials and products should be bid under generic specifications. If only patented or proprietary products are acceptable, they should be bid as alternatives with a reasonable number of acceptable materials or products listed.

The engineering unit, in coordination with the public works department, of a LAP certified city designs and install new sidewalks along a few federal aid routes. The work is completed using federal funds through the LAP program. Did the city violate federal requirements using this approach?

Yes, before proceeding with the sidewalk installation in-house, the city is required to first submit a cost effectiveness analysis to FDOT, for review and approval.

LINKS

LAP Website

<http://www.dot.state.fl.us/projectmanagementoffice/LAP/default.shtm>

Florida Statutes

<http://www.leg.state.fl.us/statutes/>

Wage Tables and related info

<http://www.dot.state.fl.us/construction/wage.htm>

Federal Statutes and Regulations

<http://www.fhwa.dot.gov/programadmin/contracts/core02.cfm#s2A02>

Environmental Process Acronyms

<http://www.fhwa.dot.gov/programadmin/contracts/coregloss.cfm>

FHWA 1273

<http://ecfr.gpoaccess.gov/cgi/t/text/textidx?c=ecfr&rgn=div6&view=text&node=23:1.0.1.7.22.1&idno=23>

Civil Rights Act of 1964

http://www.fhwa.dot.gov/environment/title_vi.htm

Section II.1 EEO

<http://www.fhwa.dot.gov/programadmin/contracts/core02.cfm#s2A02>

Davis Bacon Act

<http://www.gpo.gov/davisbacon/>

Federal aid policy guide 6011.10 has additional information:

<http://www.access.gpo.gov/nara/cfr/cfr-table-search.html#page1>

“Guidelines on Preparing Engineer's Estimate, Bid Reviews and Evaluation”

<http://www.fhwa.dot.gov/programadmin/contracts/ta508046.cfm>