

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

Module 5 Part 3 – Other Program Requirements

Termination of Contract is action taken by the contracting agency to cancel a contract.

Grounds for termination include for CAUSE; for CONVENIENCE; and for DEFAULT

Prior to terminating an NHS project, the STA must consult with FHWA and get permission to terminate. Termination of contract applies to NHS federal aid highway construction projects. This also applies to any project greater than \$100,000 done under the Common Rule (see 49 CFR 18.36(i)). Contracts greater than \$10,000 must include termination provisions. Most STAs include these provisions in their standard specifications.

These termination provisions must include “manner of termination” in addition to “Basis and conditions for settlement”

Federal Aid participation may be limited for terminated contracts.

- no participation in anticipated profit for work not performed
- for contract awarded after default, participation limited to the lesser of either the initial contract value, or the new contract plus progress payments under initial contract

Non-Traditional Contracting Practices can also be referred to as “Innovative Contracting Practices”. This guidance applies to all Federal aid highway construction projects.

Special Experimental Project No. 14 or SEP-14 strives to "identify, evaluate, and document innovative contracting practices that have the potential to reduce the life cycle cost of projects, while at the same time, maintain product quality." Within the regulatory requirements of the Federal-aid highway program, some degree of flexibility does exist. SEP-14 is an effort to explore this flexibility to its fullest. However, SEP-14 does not seek alternatives to the open competitive bid process.

The FHWA will not mandate the use of innovative contracting practices. However, through SEP-14, the agency is working to maintain an environment that allows the STAs and the construction industry to try innovative contracting practices that may result in an improvement of the industry's traditional contracting methods.

Experimental Methods include:

Indefinite delivery/indefinite quantity (ID/IQ): This is a concept that is typically used for design, maintenance or traffic control activities, and for other recurring tasks where the contractor bids per unit of specific work with a guaranteed minimum amount of work units over the life of the contract (for example, the work unit might be signaling an intersection, or constructing an off-system bridge).

No excuse incentive (bonuses): Provides the contractor a "drop-dead date "(or an incentive date) for completion of a phase or project. If the work is completed in advance of that date, the contractor receives a bonus. The agency will not accept any excuses, including weather delays, for not meeting the incentive date; meaning that the incentive date will not be changed.

Lump sum bidding: This method requires the contractor to develop the quantities from the contract package. The contractor then submits a Lump Sum bid for the project. The method is designed to reduce quantity overruns due to errors in quantity calculations or changed field conditions. Agencies typically use this method for simple projects such as resurfacing, bike paths, box culvert extensions and minor bridge widening.

Best value: This method uses a form of price/qualifications-based bidding, and the contract is awarded to the Offeror whose proposal provides the Best Value to the Owner Agency. Different evaluation and scoring methods may be used to select the winning proposal

Alternative pavement type bidding: Guidance on alternate pavement type bidding procedures is contained in 23 CFR 626 Non-Regulatory Supplement. It states that "FHWA does not encourage the use of alternate bids to determine mainline pavement types primarily due to the difficulty in developing truly equivalent pavement designs". It further states that "In the rare instances where the use of alternate bids is considered, the STA's engineering and economic analysis process should clearly show there is no clear cut choice between two or more alternatives having equivalent designs".

Bid Averaging – Is not acceptable. It is a process which discards the high and low bids and then the remaining bids are averaged with the contract being awarded to the contractor that comes closest to the average bid.

Reverse Auction bidding - Is not acceptable. It is a process which uses actions format to procure a low bid.

CM@Risk – Construction management at Risk may be defined as an integrated team approach applying modern management techniques to the planning, design and construction of a project in order to control time and cost, and to assure quality for the project owner.

Warranties - A contracting procedure that guarantees the quality of specific services by the contractor for a pre-determined period of time. Prior to 1991, the FHWA had a longstanding policy that restricts the use of warranties on Federal-aid projects to electrical and mechanical equipment. The rationale for the restriction was that such contract requirements may indirectly result in Federal-aid funds participating in maintenance costs, and the use of Federal-aid funds for routine maintenance is prohibited by law.

The following contracting techniques are either:

- 1) Under evaluation by a number of states under SEP-14, or
- 2) Under evaluation by some states as non-participating (state funding only).

The FHWA published a final rule making for design-build in the December 10, 2002 Federal Register. However, due to the specific language in TEA-21 Section 1307, SEP-14 approval is still necessary for non-qualified projects.

Intelligent Transportation System or ITS projects less than 5 million dollars and other design-build projects less than 50 million dollars may be approved as SEP-14 non-qualified projects by FHWA Division Offices without Headquarters or HQ approval.

Qualified design-build projects may be approved by the Division Office in accordance with 23 CFR Part 636.

SAFETEA-LU §1503 removed the dollar limits that TEA-21 used to define 'qualified' projects, and required FHWA to initiate a revision to the regulations for some other issues.

Under the Design Build Final Rule effective January 9, 2003, the States could use Design-Build without HQ approval for ITS projects greater than 5 million dollars and other projects greater than 50 million dollars. SEP-14 continued for smaller projects.

NEPA, and major Right of Way and utility issues must be clear

Should have a "Strong design component"

Reasons for selection should not be:

- Obligation of funds, or
- Compensate for inadequate agency resources

The "Brooks Act" procedures are to be used for each contract for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services with respect to a construction project performed by or supervised by the State.

Consultant engineering contracts, which do not use Federal-aid funds, do not fall under these requirements even if the State will use Federal-aid funds in the construction phase.

Planning studies are not required to follow the Brooks Act procurement requirements since they are generally not directly related to a construction project.

Recent legislation changes the applicability to ANY A/E contract associated with a construction project, and funded with Federal Aid.

In addition, the legislation removed the right for a State to follow its own statutorily required procedure. Now all States must comply with the Federal Brooks requirements. See HQ memo 12-12-05.

Review Questions

A local county replaces an historical bridge over a railroad. They apply for federal funds through the LAP program. The project is advertised for 3 weeks and after a competitive bid analysis, is awarded to the lowest bidder. Is a SEP-14 approval required?

The answer is NO.

A historical train station is renovated for use as a local transportation museum. The most appropriate contracting method for this vertical construction was determined to be Construction Management at Risk. Money begins to dwindle and a local congressman secures additional funding through a congressional earmark. The town wants to use the funds through the Local Agency Program. Is a SEP-14 approval required?

The answer is Yes.

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>