

# Proposed Rules

Federal Register

Vol. 83, No. 123

Tuesday, June 26, 2018

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF TRANSPORTATION

### 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:** Advance notice of proposed rulemaking (ANPRM).

**SUMMARY:** The FHWA has announced that the Indefinite Delivery and Indefinite Quantity (ID/IQ) method of contracting, including job order contracts, for low-cost construction contracts will be allowed, without FHWA approval, under certain circumstances. This advance notice of proposed rulemaking seeks comment on how FHWA may further expand this contracting method on a permanent basis.

**DATES:** Comments must be received on or before August 27, 2018. Late comments will be considered to the extent practicable.

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

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

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

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

**FOR FURTHER INFORMATION CONTACT:** For questions about this ANPRM, please contact Mr. John Huyer, FHWA Office of Program Administration, (651) 291–6111, or via email at [John.Huyer@dot.gov](mailto:John.Huyer@dot.gov). For legal questions, please contact Mr. Jomar Maldonado, FHWA Office of the Chief Counsel, 202–366–1373, or via email at [Jomar.Maldonado@dot.gov](mailto:Jomar.Maldonado@dot.gov). Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., ET, Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** On May 2, 2018,<sup>1</sup> FHWA announced that contracting agencies no longer need to submit individual requests and work plans pursuant to Special Experimental Project No. 14 (SEP–14) for low-cost ID/IQ contracts that are awarded to the lowest responsive bidder based on an invitation for bids. The FHWA considers “low-cost contracts” to be 1- or 2-year contracts awarded to the lowest responsive bidder for construction of projects that qualify for FHWA categorical exclusions under the National Environmental Policy Act of 1969 (23 CFR 771.117) and where the total value of task or work orders does not exceed \$2,000,000 per year. However, the ID/IQ contracting technique continues to be authorized on an experimental basis while FHWA explores rulemaking to revise FHWA’s regulations to accommodate this contracting technique. This ANPRM seeks comment on how FHWA may operationalize this contracting technique on a permanent basis.

#### Background

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

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

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

#### A. Experience Under Special Experimental Project Number 14 (SEP–14)

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

<sup>1</sup> 83 FR 19393, May 2, 2018.

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

From 2007 to the present, FHWA, State departments of transportation (State DOTs), and Local Public Agencies (LPAs) through the State DOTs have experimented with the use of ID/IQ contracts and JOCs for construction. The FHWA has approved the use of this contracting method under SEP-14 for 16 different State DOTs and 6 LPAs. Evaluation reports indicate that JOCs and ID/IQ 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 JOCs and ID/IQ contracts for construction in the FAHP for over a decade, FHWA has now determined that they are suitable for operationalization. This is consistent with Senate report language accompanying fiscal years 2017 and 2018 appropriations to operationalize JOCs. S. Rept. No. 114–243, 43 (April 21, 2016); S. Rept. No. 115–138, 52 (July 27, 2017). The approach is also consistent with the Department of Justice's Office of Legal Counsel (OLC) opinion regarding competition and contracting requirements. See *Competitive Bidding Requirements Under the Federal-Aid Highway Program*, 23 U.S.C. 112 (Aug. 23, 2013).

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

The FHWA is proceeding with two phases to operationalize ID/IQ contracts and JOCs for construction in the FAHP. The first phase is the issuance of an FHWA Notice on how FHWA will allow ID/IQ contracts and JOCs for construction without the need for project-specific work plans from contracting agencies. The FHWA published a **Federal Register** Notice requesting public comment on allowing contracting agencies to establish ID/IQ and JOCs for low-cost construction contracts at 83 FR 19393 (May 2, 2018). Please refer to that notice for details on the proposed implementation of phase one. The second phase is the initiation of this rulemaking.

Amendments to the construction and approval regulations are necessary in order to allow the contracting technique on a permanent basis. To assist the Agency in this effort, FHWA seeks public comments on the following questions:

1. Would it be appropriate to allow notice and award of the base ID/IQ contract or JOC prior to approval of plans, specifications and estimates, environmental review, and right-of-way clearances, but require these prior to the issuance of individual tasks?
2. Would the allowance of time extensions be appropriate? What should be the minimum time extension length? What should be the maximum time extension length?
3. Is the \$2,000,000 per year limitation appropriate? Should this figure be indexed? If so, how?
4. Should FHWA consider allowing ID/IQ contracts using best value considerations? What criteria (for example, past performance, quality, timeliness) should be considered for best value determinations?
5. Should multiple award ID/IQ contracts be allowed? If so, what conditions or criteria should be used for awarding work orders?
6. What contract term/extension limits should be allowed? Should “on-ramp” procedures be used to allow new contractors to be considered for the award pool after the initial award and “off-ramp” procedures be used to discontinue the use of contractors who are not performing satisfactorily?
7. What procedures should be in place to ensure fairness and transparency in the selection and implementation of multiple-award ID/IQ contracts?
8. What change conditions clause would be appropriate for ID/IQ contracts and JOCs? What would be an appropriate clause for significant changes in the character of work?

9. How should the contracting agencies address the estimates required under 23 CFR 635.115? Would the estimate quantities be the minimum value provided under the contract, the estimate for the base contract, or the estimated maximum value under the contract including contract extensions?

10. How would the 30 percent self-performance requirement in 23 CFR 635.116(a) apply to ID/IQ contracts and JOCs? How would it be enforced given the nature of the task orders?

11. How should authorizations to proceed with work be given for individual task orders?

12. What costs, benefits, and cost-savings would result from allowing this contracting technique on a permanent basis? Please submit data that would help FHWA quantify cost-effectiveness, as well as quantifiable cost-savings associated with advertising and awarding small contracts and increasing flexibility in programming, and any other efficiencies that may result from the operationalization of this contracting method.

13. Are there any other aspects related to the use of ID/IQ contracts or JOC for construction in the FAHP that FHWA should consider?

The FHWA will consider all responses and comments and take them into account in the development of a notice of proposed rulemaking (NPRM) on this subject.

### **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 comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, FHWA also will continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. An NPRM may be published at any time after close of the comment period.

### **Executive Order 13771 (Reducing Regulations and Controlling Regulatory Costs), Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures**

The FHWA has preliminarily determined that this action would not be a significant regulatory action within the meaning of Executive Order (E.O.)

12866 and within the meaning of the DOT regulatory policies and procedures. This action complies with E.O.s 12866, 13563, and 13771 to improve regulation. The FHWA anticipates that this rulemaking would be a deregulatory action and result in cost-savings because it proposes to remove the traditional procurement requirements for Federal-aid highway construction work for small construction work that would result in expeditious project delivery of low-cost and/or repetitive work. The FHWA seeks data on the costs, benefits, and cost-savings associated with this action.

Based upon the information received in response to this ANPRM, FHWA intends to carefully consider the costs and benefits associated with this rulemaking. Accordingly, comments, information, and data are solicited on the economic impact of any proposed recommendation.

This ANPRM is not a regulatory action under Executive Order 13771.

#### **Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), and based upon the information received in response to this ANPRM, FHWA will evaluate the effects of any action proposed on small entities. This action merely seeks information regarding the use of the ID/IQ method of contracting, including JOCs, for low-cost construction contracts. Therefore, FHWA is unable to certify at this time whether or not it will have a significant impact on a substantial number of small entities.

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

Because of the preliminary nature of this document and lack of necessary information on costs, FHWA is unable to evaluate the effects of the potential regulatory changes in regard to imposing a Federal mandate involving expenditure by State, local, and Indian Tribal governments, in the aggregate, or by the private sector, of \$151.1 million or more in any one year (2 U.S.C. 1532). Nevertheless, FHWA will evaluate any regulatory action that might be proposed in subsequent stages of this rulemaking to assess the effects on State, local, and Indian Tribal governments and the private sector.

#### **Executive Order 12988 (Civil Justice Reform)**

The FHWA will evaluate any rule that may be proposed in response to comments received to ensure that such action meets applicable standards in section 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize

litigation, eliminate ambiguity, and reduce burden.

#### **Executive Order 13045 (Protection of Children)**

The FHWA will evaluate any rule that may be proposed in response to comments received to ensure that such action meets the requirements of E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks. The Agency does not, however, anticipate that any such rule would be economically significant or would present an environmental risk to health or safety that may disproportionately affect children.

#### **Executive Order 12630 (Taking of Private Property)**

The FHWA will evaluate any rule that may be proposed in response to comments received to ensure that any such rule will not affect a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

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

The FHWA will analyze any action that might be proposed in accordance with the principles and criteria contained in E.O. 13132, and FHWA anticipates that any action contemplated will not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA also anticipates that any action taken will not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions. We encourage commenters to consider these issues.

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

The FHWA will analyze any proposal under E.O. 13175, dated November 6, 2000. The FHWA preliminarily believes that any proposal will not have substantial direct effects on one or more Indian Tribes, will not impose substantial direct compliance costs on Indian Tribal governments, and will not preempt Tribal law. Therefore, a Tribal summary impact statement may not be required.

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

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

#### **Paperwork Reduction Act of 1995**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. Any action that might be contemplated in subsequent phases of this proceeding will be analyzed for the purpose of the PRA for its impact upon information collection. The FHWA would be required to submit any proposed collections of information to OMB for review and approval at the time the NPRM is issued, and, accordingly, seeks public comments. Interested parties are invited to send comments regarding any aspect of any proposed information collection requirements, including, but not limited to: (1) Whether the collection of information would be necessary for the performance of the functions of FHWA, including whether the information would have practical utility; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collection of information; and (4) ways to minimize the collection burden without reducing the quality of the information collected.

#### **National Environmental Policy Act**

The FHWA will analyze any action that might be proposed for the purposes of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321-4347) to assess whether there would be any effect on the quality of the environment.

#### **Executive Order 13211 (Energy Effects)**

The FHWA will analyze any proposed action under E.O. 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use, to assess whether there would be any adverse effect on the supply, distribution, or use of energy.

#### **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 contained in the heading of this document can be used to cross-reference this section with the Unified Agenda.

#### **List of Subjects in 23 CFR Part 635**

Grant programs—transportation, Highways and roads, Reporting and recordkeeping requirements.

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

Issued on June 20, 2018 under authority delegated in 49 CFR 1.85.

**Brandye L. Hendrickson,**

*Acting Administrator, Federal Highway Administration.*

[FR Doc. 2018-13645 Filed 6-25-18; 8:45 am]

**BILLING CODE 4910-22-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 301

[REG-132434-17]

RIN 1545-BO12

#### **Certain Non-Government Attorneys Not Authorized To Participate in Examinations of Books and Witnesses as a Section 6103(n) Contractor; Hearing**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notification of a public hearing on notice of proposed rulemaking.

**SUMMARY:** This document provides a notification of public hearing on proposed regulations relating to section 7602(a) of the Internal Revenue Code relating to administrative proceedings.

**DATES:** The public hearing is being held on Tuesday, July 31, 2018, at 10:00 a.m. The IRS must receive outlines of the topics to be discussed at the public hearing by Thursday, July 19, 2018.

**ADDRESSES:** The public hearing is being held in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue NW, Washington, DC 20224. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present a valid photo identification to enter the building.

Send Submissions to CC:PA:LPD:PR (REG-132434-17), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday to CC:PA:LPD:PR (REG-132434-17), Couriers Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224 or sent electronically via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (IRS REG-132434-17).

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, William V. Spatz (202) 317-5461; concerning submissions of comments, the hearing and/or to be placed on the

building access list to attend the hearing Regina Johnson at (202) 317-6901 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:** The subject of the public hearing is the notice of proposed rulemaking (REG-132434-17) that was published in the **Federal Register** on Wednesday, March 28, 2018 (83 FR 13206).

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing that submitted written comments by June 26, 2018, must submit an outline of the topics to be addressed and the amount of time to be devoted to each topic by Thursday, July 19, 2018.

A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing or by contacting the Publications and Regulations Branch at (202) 317-6901 (not a toll-free number).

Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this document.

**Martin V. Franks,**

*Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).*

[FR Doc. 2018-13695 Filed 6-25-18; 8:45 am]

**BILLING CODE 4830-01-P**

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

#### 30 CFR Parts 56 and 75

[Docket No. MSHA-2018-0016]

RIN 1219-AB91

#### **Safety Improvement Technologies for Mobile Equipment at Surface Mines, and for Belt Conveyors at Surface and Underground Mines**

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Request for information.

**SUMMARY:** Mining safety could be substantially improved by preventing accidents that involve mobile equipment at surface coal mines and metal and nonmetal mines and belt

conveyors at surface and underground mines. The Mine Safety and Health Administration (MSHA) is taking a number of actions related to mobile equipment and belt conveyors to improve miners' safety, including providing technical assistance, conducting awareness campaigns, and developing best practices and training materials. MSHA is also considering the role of engineering controls that would increase the use of seatbelts, enhance equipment operators' ability to see all areas near the machine, warn equipment operators of potential collision hazards, prevent equipment operators from driving over a highwall or dump point, and help prevent entanglement hazards related to working near moving or re-energized belt conveyors. MSHA is seeking information and data on engineering controls that could reduce the risk of accidents and improve miner safety. MSHA is also seeking suggestions from stakeholders on: Best practices, training materials, policies and procedures, innovative technologies, and any other information they may have to improve safety in and around mobile equipment, and working near and around belt conveyors.

MSHA will hold stakeholder meetings to provide the mining community an opportunity to discuss and share information about the issues raised in this notice. A separate notice announcing stakeholder meetings will be published in the **Federal Register** at a later date.

**DATES:** Comments must be received or postmarked by midnight Eastern Daylight Time on December 24, 2018.

**ADDRESSES:** Comments must be identified with "RIN 1219-AB91" and may be sent to MSHA by any of the following methods:

- *Federal E-Rulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *Email:* [zzMSHA-comments@dol.gov](mailto:zzMSHA-comments@dol.gov).

- *Mail:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202-5452.

- *Hand Delivery or Courier:* 201 12th Street South, Suite 4E401, Arlington, Virginia, between 9:00 a.m. and 5:00 p.m. Monday through Friday, except Federal holidays. Sign in at the receptionist's desk on the 4th Floor East, Suite 4E401.

- *Fax:* 202-693-9441.

**Instructions:** All submissions must include "RIN 1219-AB91" or "Docket No. MSHA 2018-0016." Do not include personal information that you do not