

COST EFFECTIVENESS/ PUBLIC INTEREST FINDING GUIDELINES



**FEDERAL RESOURCES OFFICE
DIVISION OF BUDGETS**

October 2013

PREFACE

Federal requirements associated with cost effectiveness and public interest findings are scattered throughout federal statutes and regulations making it difficult for Project managers and engineers to fully grasp the scope and/or need for either. The purpose of these Guidelines is to consolidate all federal references to cost effectiveness findings and public interest findings (hereinafter referred to as PIFs) into one document and to summarize the federal requirements for each.

In order to keep as close to the federal requirements as possible much of the information contained in these Guidelines have been taken directly from Federal Highway Administration memorandums, regulations and guidelines associated with PIFs.

These Guidelines (October 2013) are an update from the original version that was released in 2006. For the reader's convenience all changes and revisions from the original version are noted with a line as indicated to the left of this paragraph.

INTRODUCTION

Federal law requires that transportation projects being funded with federal-aid highway funds conform to all applicable federal statutes and regulations. From time to time, federal regulations allow for exceptions to federal requirements when it is determined that such action is either cost effective or in the public interest. These Guidelines are provided for Project Managers, Project Engineers and Resident Engineers to gain an understanding as to when a Cost Effectiveness/Public Interest Finding (PIF)¹ is required for various aspects of a project and the process for having the PIF approved.

These Guidelines only apply to State administered projects that are federally funded. Local Entities may use the information contained in these Guidelines, however, their primary resource for PIF guidance is the Division of Local Assistance's Procedures Manual.

The PIF proposal must outline the basis for the request and any supporting documentation such as a cost/benefit analysis including the discussion of product compatibility, detailed product specifications, and any logistical concerns. In order for the Federal Highway Administration's (FHWA's) concerns to be properly addressed in the PIF, the Project Manager should refer to the federal regulations located in Appendix D of these Guidelines.

All PIFs require either FHWA or State approval. In conformance with the Stewardship Agreement with FHWA PIFs must be submitted to FHWA for approval for **High Profile** projects unless otherwise delegated to the State under the terms of the High Profile Project Agreement. For **Delegated** projects, PIFs must be submitted to and approved by the Department's Federal Resources Office, HQ Division of Budgets.

Exceptions to the preceding PIF approval guidelines are as follows:

1. All requests for waiver to Buy America Requirements must be submitted to and approved by FHWA regardless of oversight responsibilities.
2. Any PIFs that have District-wide or Statewide implications (i.e., Blanket approval of State furnished materials and expenses not found on FHWA's approved master list) must be submitted to FHWA for approval regardless of oversight responsibilities.

In accordance with the Ready-To-List (RTL) Guide all approved PIFs must be included as part of the PS&E Submittal to FHWA for High Profile projects and to the Federal Resources Office for Delegated projects. For additional information on High Profile and Delegated projects, see Section 7 of Chapter 2 of the Project Development Procedures Manual.

Headquarters PIF Database

FHWA requires that all PIFs be warehoused in one location for reporting purposes. In order to maintain consistency for all PIFs statewide please access the Headquarters PIF database using FileMaker Pro and fill out a blank PIF form there. You should work with your Federal Resources Area Engineer to access the PIF database and to properly fill out the FileMaker Pro

¹ A copy of these Guidelines is available at: <http://onramp/hq/budgets/fedres.shtml>.

version of the PIF. Once completed, print out a copy of the PIF and obtain the necessary approval signatures.

If you have questions or need help preparing a PIF, please contact you Federal Resources Area Engineer.

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When is a Cost Effectiveness/Public Interest Finding Required?

A **Cost Effectiveness Finding** is required for Federal-aid highway construction projects for:

- Non-competitive Consultant Procurement (23 CFR 172.5)
- Experimental Contracting Methods (23 CFR 635.204)
- Informal Bid (Less than 3 week advertisement) (23 CFR 635.112) (23 CFR 635.204)
- Use of Force Account (23 CFR 635.204) (23 CFR 635.205)
- Use of Publicly owned Equipment (23 CFR 635.106)

A **Public Interest Finding** is required for Federal-aid highway construction projects for:

- Use of State-Furnished Materials (23 CFR 635.407)
- Mandatory Use of Borrow/Disposal Site (23 CFR 635.407)
- Use of Patented and Proprietary Materials (23 CFR 635.411)
- Waiver of Buy America Requirements (23 CFR 635.410)
- Use or Disposal of Real Property Interests at Less Than Fair Market Value (23 CFR 710.403)

A copy of each of the Code of Federal Regulations (CFR) referenced above is located in Appendix D of these Guidelines. These regulations should be consulted and followed when preparing a Cost Effectiveness/Public Interest Finding.

Who Should Prepare the Cost Effectiveness/Public Interest Finding?

Project Engineers, Project Managers, the Federal Resources Engineer, the Resident Engineer and others may initiate the Cost Effectiveness/Public Interest Finding at anytime during the project development or during construction. However, the Project Manager is ultimately responsible for the contents of the PIF.

How to prepare the Cost Effectiveness/Public Interest Finding

The Cost Effectiveness/Public Interest Finding is a written supporting document that outlines the basis for the request based on a cost/benefit, discussion of product compatibility, and logistical concerns.

In order to keep track of all PIFs statewide please access the Headquarters PIF database using FileMaker Pro and fill out a blank PIF form there. You should work with your Federal Resources Area Engineer to access the PIF database and to properly fill out the FileMaker Pro version of the PIF. Once completed, print out a copy of the PIF and obtain the necessary approval signatures.

A copy of the PIF form that is found in the PIF database is located in Appendix A and is for information only.

Who is Responsible for Approving the Cost Effectiveness/Public Interest Finding?

Throughout these Guidelines, references will be made to FHWA's approval of the PIF. With the exception of Buy America, please read this statement with the understanding that the PIF can only be approved by the Caltrans Federal Resources Engineer for Delegated Projects and the Federal Highway Administration Engineer for High Profile Projects in accordance with the Stewardship Agreement. Exceptions to this policy are covered in the Introduction Section of these Guidelines.

A copy of all approved PIFs must be included in the PS&E submittal to FHWA and to the Federal Resources Office in accordance with the RTL Guide.

Non-competitive Consultant Procurement (23 CFR 172.5)

The Brooks Act requires the selection of engineering and design related services on the basis of demonstrated competence and qualifications for the type of professional services required and negotiation of a fair and reasonable compensation. The qualifications based selection procedures prescribed in the Brooks Act require public announcement/advertisement of all requirements for the desired services (40 U.S.C. 1101 and 23 CFR 172.5(a)(1)). The Brooks Act further requires evaluation of current statements of qualifications, performance data, and statements regarding the proposed project or services submitted by prospective consulting engineering firms. Contracting agencies shall then select and rank a minimum of three firms based on demonstrated competence and qualifications in accordance with the established/advertised criteria (40 U.S.C. 1103).

Noncompetitive negotiation may be used to procure engineering and design related services on Federal-aid participating contracts when it is not feasible to award the contract using competitive negotiation, equivalent State qualifications-based procedures, or small purchase procedures.

The State shall submit justification (public interest finding) and receive approval before using this form of contracting. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following and must be stated in the PIF:

1. The service is available only from a single source;
2. There is an emergency which will not permit the time necessary to conduct competitive negotiations; or
3. After solicitation of a number of sources, competition is determined to be inadequate.

Form
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Experimental Contracting Methods (23 CFR 635.204)

Section 112 of Title 23 of the United States Code requires all federally funded construction contracts to be advertised by the competitive bidding process. However, when a contracting method is proposed that deviates from the competitive bidding provisions in 23 USC 112, FHWA approval must be obtained prior to advertising. There are two categories of non-competitive contracting methods that are recognized by FHWA; those that are considered experimental and those that are not considered experimental (operational). Non-competitive contracting methods that are considered experimental must be evaluated and approved by FHWA through the Special Experimental Project No.14 (SEP-14) process.

Non-experimental (Operational) Contracting Methods

Through the SEP-14 process, FHWA has declared the following five experimental non-competitive contracting techniques as operational and thus do not require PIF approval:

1. Cost-plus-time bidding,
2. Lane rental,
3. Warranty clauses,
4. Design-build, and
5. Construction Manager/ General Contractor.

Force Account construction is also considered an operational “contracting” method and is covered later in these Guidelines.

Experimental Contracting Methods

In 1990 FHWA initiated SEP-14 to encourage the use of nontraditional innovative contracting practices. The objective of SEP-14 is to evaluate "project specific" innovative contracting practices, undertaken by State highway agencies that have the potential to reduce the life cycle cost of projects, while at the same time, maintain product quality.

With the exception of the five operational contracting techniques listed above FHWA Headquarters' SEP-14 approval is necessary for any non-traditional construction contracting technique which deviates from the competitive bidding provisions in 23 USC 112. Any contract which utilizes a method of award other than the lowest responsive bid (or force account as defined in 23 CFR 635.204) must be evaluated and approved by FHWA under SEP-14. These non-traditional contracting techniques may include best value, life cycle cost bidding, qualifications based bidding and other methods where cost and other factors are considered in the award process.

Informal Bid
(Less Than 3 Week Advertisement)

(23 CFR 635.112)

(23 CFR 635.204)

The informal bid process is sometimes used in emergencies to reduce the time between the receipt of the Projects with Plans, Specifications and Estimate (PS&E) that are urgently needed to restore facilities to their original condition and prevent additional damage from future events.

After a catastrophic incident occurs the informal bid project is subject to the same funding considerations as any other highway project on the Highway Systems.

Qualified informal bid projects must demonstrate that accelerating the delivery of the project with informal bids is needed to restore a facility damaged by a catastrophic event and is needed to reduce a threat of future damage to the facility.

Contract for the construction of each project shall be awarded to the lowest responsive bidder.

Use of Force Account

(23 CFR 635.204)

(23 CFR 635.205)

Before we begin this discussion, it needs to be understood that there is a difference between the Department's definition of Force Account and FHWA's definition of Force Account. The Caltrans definition of Force Account is similar to FHWA's definition of a *Solicited Contract*. The FHWA definition of Force Account is what many commonly refer to as *Day Labor*. A summary of federal and state definitions as it applies to Force Account, Day Labor, and so on, is included in these Guidelines in Appendix B.

FHWA Definition - The federal use of the term Force Account is discussed in 23 CFR 635 Subpart B where it is defined as "the direct performance of highway construction work by a State transportation department, 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."

Caltrans Definition - Caltrans interprets Force Account to mean a solicited time-and-materials contract pursuant to the Extra Work provisions of the Standard Specifications. Caltrans does not include work by its own employees in its definition of Force Account.

Caltrans Force Account contracts are not advertised. Any contractor may be immediately chosen that has the necessary equipment and expertise to perform the emergency work. There is no pre-qualification process. Hours of labor, materials consumed and equipment used are paid for pursuant to Chapter 9 of the Caltrans Standard Specifications. Plans are not required (rough plans, if possible, are recommended). Work proceeds at the direction of the Resident Engineer.

Even though state and federal definitions differ, federal regulations make allowances for Caltrans' definition of Force Account. Section 535.203(b) of Title 23 CFR states that, "In the unlikely event that circumstances are considered to justify a negotiated contract or another unusual method of construction, the policies and procedures prescribed herein for force account shall apply." Therefore, if a *Solicited Contract* method is being used by the Department, it should conform to the procedures outlined for Force Account in 23 CFR 635.

Federal Requirements

In conformance with 23 U.S.C. 112(b), force account work may be approved under one of two conditions:

1. The force account option is proven to be cost effective, or
2. An emergency exists and time is a critical factor.

Title 23 CFR 635 Subpart B allows that "rare" circumstances may justify the use of force account, negotiated contract, or other unusual method of construction. The regulations clearly indicate that, in the absence of an emergency situation, circumstances are unlikely to justify the use of other methods of construction. Therefore, the consideration of any non-competitive construction contract method

requires a cost effectiveness determination as well as an evaluation that demonstrates that the circumstances are unusual and unlikely to recur.

Cost Effectiveness Finding

A cost effectiveness finding is required for any non-competitive method of contracting. 23 CFR 635.205 cites the following situations as possible reasons for undertaking a construction project by force account:

1. When “the rights or responsibilities of the community at large are so affected as to require some special course of action, including situations where there is a lack of bids or the bids received are unreasonable”, and
2. When by reason of the inherent nature of the operation, it is deemed cost-effective to do minor adjustments of railroad and utility facilities (major work still to be accomplished by competitive bidding) by force account.

Under the first circumstance the use of force account may be found cost-effective when properly documented. Under the second circumstance, FHWA has determined that the use of force account is *always* cost-effective, and therefore, no Cost Effectiveness Finding is required.

Emergency Conditions

In an emergency, the competitive bidding requirements may be waived. For Force Account purposes, an emergency is defined as a situation that requires repair work (commonly referred to as “emergency opening”), as provided for under the federal Emergency Relief (ER) program (23 CFR 668.105(i)), or when a major element or segment of the highway system has failed and the situation is such that competitive bidding is not possible or is impractical. Competitive bidding under such circumstances may not be possible or may be impractical because immediate action is necessary to:

- minimize the extent of the damage,
- protect remaining facilities, or
- restore essential travel.

Therefore, the temporary work necessary to restore the traffic flow on the facility may be performed by either force account or negotiated contract. The regulation clarifies that this definition of emergency is only for the purpose of determining the applicability of the provisions and is not intended to define an “emergency” under 23 CFR 668.105 (i) or 23 CFR 635 Subpart B.

The guidance for the carrying out emergency repair work under the ER Program is contained in 23 CFR 668. Due to the urgency and nature of emergency repairs performed under the ER Program, the regulations allow the Department to select the method of construction based on the immediate need to protect public health and safety. This policy only applies to emergency repairs as defined in 23 CFR 668. Reconstruction and permanent repair work are subject to the competitive bidding policy of 23 CFR 635.

Filling Out the PIF

1. The Cost Effectiveness PIF for Force Account must contain the following information:
 - a. Project Description,
 - b. Scope of Work,
 - c. The contract method to be used (Force Account or Negotiated Contract, etc.),
 - d. The estimated costs,
 - e. The estimated federal funds to be provided, and
 - f. The reason or reasons that force account for project is considered cost effective.

2. The Emergency related PIF for Force Account must contain the following information:
 - a. Project Description,
 - b. Scope of Work,
 - c. The contract method to be used (Force Account or Negotiated Contract, etc.),
 - d. The estimated costs,
 - e. The estimated federal funds to be provided, and
 - f. The reason or reasons that the emergency exists.

Publicly Owned Equipment (23 CFR 635.106)

Publicly owned equipment should not normally compete with privately owned equipment. However, in exceptional cases, a showing that it would clearly be cost effective to use publicly owned equipment may be justified. Federal funds may participate in the costs associated with the use of publicly owned equipment provided that:

- the PS&E submittal clearly sets forth the proposed use
- the specifications indicate the items of equipment that are available
- the rates to be charged, and the point(s) of availability or delivery
- the specifications include the express condition that the contractor has the option to rent all or part of the available equipment, or to provide the equipment.
- The Department cannot benefit from the rental of its own equipment by virtue of a Federal-aid contract.

Exceptional Cases

- In unforeseen circumstances, publicly owned equipment may be used after award of contract, based on rental rates agreed to between the Department and the contractor. However, these rates shall not form the basis for an increase in Federal participation.
- In force account work the rates on publicly owned equipment eligible for Federal participation may be the agreed unit price or actual cost. For agreed unit price, the equipment need not be itemized on the estimate. If the project is to be performed on the basis of actual cost, the estimate should include a schedule of rates, exclusive of profit, to be charged for the use of publicly owned equipment.

**State-Furnished Materials/Expenses
And
Mandatory Use of Borrow/Disposal Sites**
(23 CFR 635.407)

Federal regulations require that the contractor must furnish all materials to be incorporated in the work, and that the contractor shall be permitted to select the sources from which the materials are to be obtained. Exceptions to this requirement may be made when there is a definite finding by the Department (using a PIF) that it is in the public interest to require the contractor to use materials furnished by the Department or from sources designated by the Department. The exception policy can best be understood by separating State-furnished materials into the categories of manufactured materials and local natural materials.

Manufactured Materials. When the use of State-furnished manufactured materials is approved based on a PIF, such use must be made mandatory. The optional use of State-furnished manufactured materials is in violation of federal policy prohibiting public agencies from competing with private firms. Manufactured materials to be furnished by the State must be acquired through competitive bidding, unless there is an approved PIF for another method.

Appendix C contains a copy of FHWA's August 16, 2013 blanket PIF approval for State-furnished Materials and Expenses. Every two years the Division of Construction, Office of Construction Engineering works with FHWA to update this list. Items on this list do not require a separate approved PIF in order to be eligible for federal-aid funding. Contact Chuck Suszko [(916) 227-7314] in the Office of Construction Engineering, the Division of Construction for the most current list of FHWA approved State-furnished materials and expenses.

Local Natural Materials. When the Department owns or controls a local natural materials source such as a borrow pit or a stockpile of salvaged pavement material, etc., the materials may be designated for either optional or mandatory use; however, mandatory use will require an approved PIF.

In order to permit prospective bidders to properly prepare their bids, the location, cost, and any conditions to be met for obtaining materials that are made available to the contractor shall be stated in the bidding documents.

Mandatory Disposal Sites. Normally, the disposal site for surplus excavated materials is to be of the contractor's choosing; although, an optional site(s) may be shown in the contract provisions. A mandatory site shall be specified when there is a finding by the Department (using a PIF), that such placement is the most economical or that the environment would be substantially enhanced without excessive cost. Discussion of the mandatory use of a disposal site in the environmental document may serve as the basis for the PIF.

Summarizing FHWA policy for the mandatory use of borrow or disposal sites:

- mandatory use of either requires an approved PIF,
- mandatory use of either may be based on environmental consideration where the environment will be substantially enhanced without excessive additional cost, and
- where the use is based on environmental considerations, the discussion in the environmental NEPA document may be used as the basis for the PIF.

Factors to justify a PIF should include such items as cost effectiveness, system integrity, and local shortages of material.

Patented or Proprietary Products (23 CFR 635.411)

Patented or Proprietary Product requirements apply to all Federal-aid highway construction projects funded under Title 23 of the U.S. Code. Federal requirements also apply to patented or proprietary *processes* required in the plans or specifications on a Federal-aid project. Materials referred to herein are only those materials that are incorporated into the Federal-aid highway project. Patented or proprietary products selected and used by the contractor on a temporary basis to assist with the construction of a Federal-aid highway project are not subject to the provisions of this Section. However, if the Department requires the contractor to use a temporary patented or proprietary product, the provisions of this section apply.

According to Federal regulations, federal funds shall 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 one of the following conditions are met:

1. Competitive bidding, provided under 23 CFR 635.411(a)(1):
 - a. The proprietary product is obtained through competitive bidding with other suitable proprietary and non-proprietary products from multiple manufacturers. Where both proprietary and non-proprietary products are available, the Department must compose specifications that allow the contractor to choose amongst as many acceptable products and technologies as possible. If the specification lists specific products, it must list all or at least 3 products, and must include the words "or equal" to ensure the broadest range of choice.
 - b. A competitively bid performance-based warranty specification is permitted, if it does not limit product selection to a single source. The warranty specification must clearly describe all potential products that are acceptable for use at the time of project advertisement
2. A certification by the Department (PIF), as provided in 23 CFR 635.411(a)(2), that the specified proprietary product is either:
 - a. Necessary for synchronization with existing facilities; or
 - b. A unique product for which there is no suitable alternative.

In this case the PIF must include a certified statement by the appropriate official attesting that the proprietary product is essential for synchronization with existing facilities; or that no equally suitable alternative exists (23 CFR 635.411(a)(2)), such as:

"I (name of certifying official), (position title), of the California Department of Transportation, do hereby certify that in accordance with the requirements of 23 CFR 635.411(a)(2), that this patented or proprietary item is essential for synchronization with existing highway facilities,

or

"I (name of certifying official), (position title), of the California Department of Transportation, do hereby certify that in accordance with the requirements of 23 CFR

635.411(a)(2), that that no equally suitable alternative exists for this patented or proprietary item.

The extent of the certification (project-specific, multiple projects, district wide, statewide, or programmatic) should be specified in the PIF. When the extent of a certification extends beyond a single project, a sunset date should also be specified.

3. A proprietary item is to be used for research or for a distinctive type of construction on relatively short sections of road on an experimental basis as provided in 23 CFR 635.411(a)(3).
4. Whenever the Division Administrator approves of the State's request to use a proprietary product as being in the public interest as provided in 23 CFR 635.411(c).

As used in 23 CFR 635.411(a)(2), providing a product that matches specific current or desired characteristics of a project. Synchronization may be based on:

- Function (the proprietary product is necessary for the satisfactory operation of the existing facility),
- Aesthetics (the proprietary product is necessary to match the visual appearance of existing facilities),
- Logistics (the proprietary product is interchangeable with products in an agency's maintenance inventory),

or any combination thereof.

In addition, it may be advisable to evaluate the following factors as they relate to synchronization:

- Lifecycle (the relative age of existing systems that will be expanded and the remaining projected life of the proposed proprietary element in relation to the remaining life of the existing elements),
- Size/extent of products and systems to be synchronized to/with, and the relative cost of the proprietary elements compared with replacing the elements requiring synchronization.

Trade names are generally the key to identifying patented or proprietary materials. Trade name examples include 3M, Corten, etc. Generally, products identified by their brand or trade name are not to be specified without an "or equal" phrase, and, if trade names are used, all, or at least 3 "equal" materials or products should be listed. The licensing of several suppliers to produce a product does not change the fact that it is a single product and should not be specified to the exclusion of other equally suitable products.

According to Deputy Directive DD-45, before a new product can be considered for use by the Department for the construction, maintenance and operation of the State's highway system, it must be approved for use under the Department's New Product Evaluation Process. All products going through this process are evaluated on the basis of need, performance, cost-competitiveness, and compliance with health, safety and environmental regulations. The most current list of approved products may be found at: http://www.dot.ca.gov/hq/esc/approved_products_list/. A product being considered for use must appear on this list before submitting a PIF for approval.

Some examples of proprietary materials which may be approved on Federal-aid projects:

1. The item is identified by the contract specifications along with a listing of other acceptable products, and the list includes at least 3 acceptable products followed by the phrase "or equal". The FHWA may then participate in the cost of a patented or proprietary item since it is acquired competitively. A PIF is not required.
2. A competitively bid performance-based warranty specification is permitted, if it does not limit product selection to a single source. The warranty specification must clearly describe all potential products that are acceptable for use at the time of project advertisement. A PIF is not required.
3. The State certifies that the product is essential for synchronization. This is particularly appropriate when upgrading or expanding existing traffic signal systems. The existing controller(s) is part of an existing system which is not compatible with any system hardware. To convert the overall system would be more expensive than to add to what is already there. Thus, it is in the public interest to require the compatible proprietary item, and upon PIF approval, the item may be specified.
4. The State certifies that there is no equally suitable unpatented alternate. This situation should be reasonably verified by FHWA. Based upon the approved PIF, the item may be specified.

The Department may specify a higher or "above average" standard of performance on certain construction projects. However, if this "above average" standard reduces the pool of suitable products to a single proprietary product, a PIF must be prepared that would document its minimum needs and support its contention that such a performance standard is necessary and reasonable to achieve these needs.

When filling out the PIF for approval to use a proprietary product, the following questions must be addressed as applicable:

1. Has this product been approved for use under the Department's New Product Evaluation Process per DD-45?
2. Why is this the only product that meets the required specifications?
3. What other products that have been approved for use under the Department's New Product Evaluation Process meet the required specifications?
4. Are these products of satisfactory quality?
5. Are the anticipated costs for the products approximately the same?

Additional guidance regarding the use of patented and proprietary products on Federal-aid projects under 23 CFR 635.411 is posted at: <http://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm> .

Experimental Work Plans for Proprietary Products

Use of patented or proprietary items is allowed in accordance to 23 CFR 635.411. Caltrans' use of patented or proprietary items/processes is documented through the Construction

Evaluated (C-E) Program. This program provides the mechanism to field test and evaluate the constructability and performance of experimental features that have not previously been approved for use on highway facilities.

The C-E Program allows for the use of experimental materials, methods, equipment, traffic operational devices, patented or proprietary items or processes, or other features that:

1. have not been sufficiently tested under actual service conditions to merit acceptance without reservation in normal highway construction, or
2. have been accepted but need to be compared with alternative acceptable features for determining their relative merits and cost effectiveness, or
3. have been submitted to the New Products Committee for consideration, but further field evaluations are necessary to complete the review.

Details on the Construction Evaluated Program and how to gain approval to incorporate experimental features into a construction project may be found at the following Caltrans website:

<http://www.dot.ca.gov/hq/oppd/guidance.htm>.

Any Federal-aid project incorporating experimental features should be designated an experimental project and must be approved by FHWA.

Buy America (23 CFR 635.410)

Buy America requirements apply to all contracts eligible for assistance under Title 23 within the scope of a finding, determination, or decision under the National Environmental Policy Act (NEPA), regardless of funding source, if at least one contract within the scope of the same NEPA document is funded with Federal funding provided under Title 23. Consequently, if any phase of a project (including NEPA studies, right-of-way acquisition, preliminary engineering, or construction) receives federal funding, Buy America requirements shall apply to all contracts within the scope of the NEPA determination regardless of whether the contract uses federal funding².

According to Buy America provisions, all federal-aid construction projects must either require no permanently incorporated steel and/or iron materials, or require that all steel and iron materials used in the project be manufactured in the United States. "Manufactured in the United States" means that all manufacturing processes starting with the initial mixing and melting through the final shaping and coating processes must be undertaken in the United States. The only exceptions permitted are:

1. If the Department permits alternate bids for foreign vs. domestic steel and iron materials, and the total bid for the contract using foreign steel and iron materials is lower by more than 25 percent than the total bid using domestic source materials;
2. If the amount of foreign steel and iron materials is minimal, meaning it does not exceed 0.1 percent of the total contract value, or \$2,500, whichever is greater; or
3. If the FHWA approves a State requested waiver to permit use of foreign steel and/or iron materials.

Other points to remember:

1. All requests for waiver to Buy America Requirements must be submitted to and approved by FHWA regardless of oversight responsibilities. A PIF form is not used to request a waiver to Buy America requirements.
2. All steel and iron materials are covered by Buy America regardless of the percentage they comprise in a manufactured product or form they take.
3. Minimal amounts of foreign steel and iron materials - less than \$2,500 total for steel and iron materials per project, or 0.1 percent of the total project value, whichever is greater - may be used on Federal-aid projects.
4. The manufacturing process for steel or iron materials is considered to be complete, and a steel or iron product/component is considered to be produced when all grinding, drilling, and finishing of the steel or iron material has been accomplished. The steel or iron product may then be ready for use as such (i.e., fencing, posts, girders, pipe, manhole cover, etc.) or may be incorporated as a component in a further manufacturing

² Buy America Requirements do not apply to non-federally funded utility relocation work until January 1, 2013. Utility relocation work associated with utility agreements executed after January 1, 2013 must comply with Buy America requirements in accordance with the introductory paragraph on this page.

process (i.e., prestressed concrete girders, reinforced concrete pipe, traffic control devices, bearing pads, etc.).

Example: shapes produced domestically from foreign source steel billets are not acceptable under Buy America since the initial melting and mixing of alloys to create the steel occurred in a foreign country.

Example: all welding must take place domestically since the welding rod is an iron/steel product and the welding process substantially alters the rod.

5. Applying a coating to a finished steel or iron product/component is subject to Buy America. Coating includes epoxy coating, galvanizing, painting, and any other coating that protects or enhances the value of the coated steel or iron product/component.
6. A product containing both steel and/or iron components and other components, may be assembled outside the United States and meet Buy America requirements if the constituent steel and iron components (in excess of the minimal amounts permitted) were manufactured domestically and are not modified at the assembly location prior to final assembly.
7. Likewise, the final product could be assembled in the United States of foreign and domestic source components, provided that the "value as delivered to the project site" of the foreign components includes some pro-rata share of the shipping, assembly and testing costs.

Use or Disposal of Real Property Interests at Less Than Fair Market Value (23 CFR 710.403)

The State must charge current fair market value for rent for the use or disposal of real property interests, including access control, if those real property interests were obtained with federal funds.

Exceptions to the general requirement for charging fair market value may be approved in the following situations:

1. With FHWA approval, when the Department clearly shows that an exception is in the overall public interest for social, environmental, or economic purposes; nonproprietary governmental use; or uses under 23 U.S.C. 142(f), Public Transportation.
2. Use by public utilities in accordance with 23 CFR part 645.
3. Use by Railroads in accordance with 23 CFR part 646.
4. Use for Bikeways and pedestrian walkways in accordance with 23 CFR part 652.
5. Use for transportation projects eligible for assistance under Title 23 of the U.S. Code.

No PIF approval is required for disposal of property that is located outside of the limits of the right-of-way if Federal funds did not participate in the acquisition cost of the property.

Appendix A

Cost Effectiveness/Public Interest Finding Form

REQUEST FOR APPROVAL OF COST EFFECTIVENESS/PUBLIC INTEREST FINDING

<p>COST EFFECTIVENESS DETERMINATION REQUIRED</p> <p><input type="checkbox"/> Non-competitive Consultant Procurement (23 CFR 172.5) <input type="checkbox"/> Experimental Contracting Methods (23 CFR 635.204) <input type="checkbox"/> Informal Bid (Less than 3 week advertisement) (23 CFR 635.112) <input type="checkbox"/> Use of Force Account (23 CFR 635.204) (23 CFR 635.205) <input type="checkbox"/> Use of Publicly owned Equipment (23 CFR 635.106) <input type="checkbox"/> Other: _____</p>	<p>PUBLIC INTEREST DETERMINATION REQUIRED</p> <p><input type="checkbox"/> Use of State-Furnished Materials (23 CFR 635.407) <input type="checkbox"/> Mandatory Use of Borrow/Disposal Site (23 CFR 635.407) <input type="checkbox"/> Use of Patented and Proprietary Materials (23 CFR 635.411) <input type="checkbox"/> Waiver of Buy America Requirements (23 CFR 635.410) <input type="checkbox"/> Other: _____</p>
---	---

FEDERAL-AID PROJECT NO	CLASS OF FEDERAL FUNDS <input type="checkbox"/> IM <input type="checkbox"/> NH <input type="checkbox"/> STP <input type="checkbox"/> OTHER: _____	STEWARDSHIP: <input type="checkbox"/> DELEGATED <input type="checkbox"/> HIGH PROFILE	
------------------------	---	---	--

EA	DIST-CO-RTE-PM	ESTIMATED COST	FEDERAL FUNDS

GENERAL LOCATION	GENERAL DESCRIPTION OF WORK
------------------	-----------------------------

REASONS THAT THE REQUESTED APPROVAL IS CONSIDERED TO BE COST EFFECTIVE: _____ DIST (STATE): _____

SAMPLE ONLY
ALL PIFS ARE TO FILLED OUT IN THE PIF
DATABASE USING FILEMAKER PRO. YOUR
FEDERAL RESOURCES AREA ENGINEER CAN
ASSIST IF YOU NEED HELP ACCESSING THE PIF
DATABASE.

APPROVED BY CAL _____	DISTRICT REPRESENTATIVE NAME AND TITLE:	DATE:
-----------------------	---	-------

APPROVED BY CT FEDERAL _____ (Delegated Projects)	FEDERAL RESOURCES REP. NAME AND TITLE:	DATE:
---	--	-------

REMARKS (FHWA): _____

APPROVED BY FHWA'S REPRESENTATIVE (High Profile Projects)	REPRESENTATIVE NAME AND TITLE:	DATE:
---	--------------------------------	-------

NOTE: FHWA'S SIGNATURE NOT REQUIRED FOR FEDERALLY DELEGATED PROJECTS, EXCEPT FOR "BUY AMERICA".
 FNM-406 (REV. 2013)

Appendix B Federal & State Definitions

	FHWA	FEMA	Caltrans
Force Account	The direct performance of highway construction work by a State transportation department, a county, a railroad, or a public utility company by use of labor, equipment, materials, and supplies furnished by them and used under their control.	Construction work performed by an agency's own employees.	<p>Caltrans interprets Force Account to mean a solicited time-and-materials contract pursuant to the Extra Work provisions of the Standard Specifications. Caltrans does not include work by its own employees under Force Account; see Day Labor.</p> <p>Force Account contracts are not advertised. Any contractor may be immediately chosen that has the necessary equipment and expertise to perform the emergency work. There is no pre-qualification process. Hours of labor, materials consumed and equipment used are paid for pursuant to Chapter 9 of the Caltrans Standard Specifications. Plans are not required (rough plans, if possible, are recommended). Work proceeds at the direction of the Resident Engineer. For standard contract language contact the Office of Procurement and Contracts.</p>
Day Labor	None. In general, however, the common usage of Day Labor means casual workers hired by an agency for one day's work.	None. In general, however, the common usage of Day Labor means casual workers hired by an agency for one day's work.	"Day Labor" is defined by State law as the construction of a capital improvement project by the use of casual labor or by State forces. To be considered Day Labor, work must be a new improvement to the infrastructure, or full repair of existing infrastructure. Work for the normal upkeep and maintenance of the infrastructure is not considered Day Labor. It is the State's policy to contract for the performance of construction type projects, and to do so in full conformance with the State Contract Act. The State Contract Act prohibits the use of Day Labor in excess of \$25,000 unless at least one (1) out of four (4) criteria is met. (See DD-26-R2, effective July 2009). Three out of the four criteria involve emergencies of various kinds. The fourth criteria gives authority to the Director to use Day Labor if it is in the "best interests" of the State after plans, specifications, and estimates have been approved.
Solicited Contract	A solicited contract may be warranted due to the emergency character of the work. The State may contact a reasonable minimum number of contractors by telephone to solicit equipment rental, labor, and materials bids for a specific amount of work. 23 U.S.C. 112(c) requires that a sworn statement of non-collusion to restrain of free competitive bidding must accompany the contractor's bid submittal. A summary showing how the solicitation was conducted, who was contacted, and the responses by the contractors must also be prepared.	FEMA uses the term "Noncompetitive Proposal" when referring to no-bid solicited contracts.	Caltrans Force Account contracts are equivalent to a no-bid solicited contract (FHWA) or a noncompetitive proposal (FEMA).

Appendix B Federal & State Definitions

	FHWA	FEMA	Caltrans
Negotiated Contract	<p>A negotiated contract provides for performance of a certain amount of work after a contractor has been selected. Usually such contracts include compensation for "move-in and move out" costs and/or a percentage of cost based on actual cost of equipment, labor, and materials. If one contractor acts as the prime contractor, there may also be an additional percentage of actual cost included for supervision of the other contractors' equipment on the job, similar to a subcontracting agreement.</p>	<p>None.</p>	<p>None. Caltrans does not officially recognize negotiated contracts for construction.</p>

Appendix C

FHWA Blanket Approval Letter for State-Furnished Materials and Expenses



U.S. Department
of Transportation
**Federal Highway
Administration**

California Division

August 16, 2013

650 Capitol Mall, Suite 4-100
Sacramento, CA 95814
(916) 498-5001
(916) 498-5008 (fax)

In Reply Refer To:
HDA-CA
DFME-SFME

Chuck Suszko, Office Chief
California Department of Transportation
Office of Construction Engineering
Division of Construction
1120 N Street
Sacramento, CA 95816

Attention: Ericson Ugbo

Dear Mr. Suszko:

This letter provides blanket approval for use of Federal funding for all Department-Furnished Materials and Expenses (DFME) included in the lists enclosed with your August 15, 2013 letter, subject only to submittal of cost justification on a project by project basis. This concludes the first action item on page 4 of the May 15, 2013 Caltrans-FHWA Joint Process Review Report covering DFME and related topics.

If Caltrans requests federal funding for DFME that are included on these approved lists, a project by project Public Interest Finding (PIF) by FHWA is not required. Items not on the approved DFME lists will require an approved project-by-project PIF if federal-aid funds are used (these approvals are delegated to Caltrans' Office of Federal Resources for delegated/assigned projects).

The blanket approval for Laminated Wood Box Posts and Battery Back Up Systems will expire in February 2014. This allows ample time for development of specifications to allow these items to be competitively bid or otherwise provide alternative solutions to Department-Furnishing these materials in Federal-aid contracts. Otherwise, the approved lists are planned to be reevaluated with the possibility of addition or deletion of items on a 2-year cycle in coordination with our staff. It is expected that FHWA and Caltrans will address the remaining DFME related recommendations and action items included in the May 15, 2013 Process Review report prior to the 2015 reevaluation.

If you have any questions or comments regarding this approval, please contact Mr. Eric Worrell at 916-498-5890 or email eric.worrell@dot.gov.

Sincerely,

For Vincent P. Mammano
Division Administrator

Enclosure

DEPARTMENT OF TRANSPORTATION

DIVISION OF CONSTRUCTION
OFFICE OF CONSTRUCTION ENGINEERING, MS 5
1120 N STREET
SACRAMENTO, CA 95816
PHONE: (916) 227-7314
FAX: (916) 227-7075



*Flex your power!
Be energy efficient!*

August 6, 2013

AUG 15 2013

Vincent P. Mammano
California Division Administrator
Federal Highway Administration
650 Capitol Mall, Suite 4-100
Sacramento, CA 95814-2724

Attention: Eric Worrell

Dear Mr. Mammano:

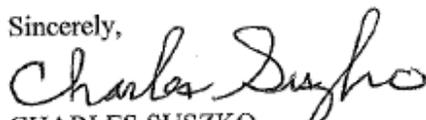
Please provide your blanket approval to use federal funding when the Department is furnishing the materials and expenses listed in the attached. A public interest justification is included for each item when applicable. The items in the list have been discussed with Mr. Eric Worrell, and we have his concurrence.

The Department will use the Public Interest Finding process to request a separate approval from FHWA, on a project-by-project basis, for all other Department-furnished items not on the attached list.

We will update this list and reapply for this approval on a two-year cycle.

If you have questions or comments concerning this request, please contact Ericson Ugbo at (916) 227-7013 or email at ericson.ugbo@dot.ca.gov; or Charles Suszko at (916) 227-7314, email chuck.suszko@dot.ca.gov.

Sincerely,


CHARLES SUSZKO
Office Chief
Office of Construction Engineering
Division of Construction

Enclosures



Department-Furnished Expenses - 2013

	FEDERALLY PARTICIPATING DEPARTMENT-FURNISHED EXPENSES	RATIONALE (Department expenses are directly related to project construction and do not include work done by the Contractor (RTL Guide Section 7, 2012)).
1	Railroad Work	This is any work done by railroad agency according to 23 CFR 635.205(b).
2	Traffic Management Plan	Required on all capital construction projects on the State highway system to minimize motorist delays. Incorporates traffic mitigation strategies with innovative public and motorist information techniques and tools to plan for and manage the traffic impacts.
3	Construction Zone Enforcement Enhancement Program (COZEEP)	The COZEEP is jointly operated by Caltrans and CHP to increase the safety of motorists and construction workers in State highway project construction zones. COZEEP is used to increase traffic enforcement above normal levels during the various construction stages when lane closures and diversions increase the potential for traffic accidents within the highway construction project zone. (This is inter-agency agreement to improve and enforce traffic safety in construction zone)
4	Electrical Service Connection	Expenses necessary to connect power supply at the service point to the utility company facilities. This is needed for the power company to install meter and service conductors to the service cabinet on the job site. The connection work is done by public utility companies according to 23 CFR 635.205(b). (This is service connection prearranged by Caltrans and done by utility company).
5	Telephone Service Connection	Expenses necessary for telephone company to connect telephone service to the telephone demarcation cabinet or controller cabinet on the project. The telephone demarcation cabinet will be furnished and installed by the contractor. This is connection work done by public utility companies according to 23 CFR 635.205(b). (This is service connection prearranged by Caltrans and done by utility company).
6	Water Services Connection	Expenses necessary for connecting water services to the irrigation systems for planting and maintaining existing plants within the project limits. For convenience, the contractor is allowed to use water from department facilities where available within project limits. The connection work is done by public utility companies according to 23 CFR 635.205(b). (This is service connection prearranged by Caltrans and done by utility company).



Department-Furnished Materials - 2013

	FEDERALLY PARTICIPATING DEPARTMENT-FURNISHED MATERIALS	RATIONALE (There is a history of very long delays by the manufacturers of some products. Procurement of those products, by the department, starts early to meet construction deadlines. All items listed here are obtained by the department, for convenience and cost savings, in competitive bid contracts from qualified vendors.)
1	Laminated wood box posts and metal caps.	Avoid project delays due to order delays of not commonly available materials. The department benefits by purchasing in large quantities. This blanket approval is for 6 months from the date this approval is signed.
2	Monument discs.	Statewide uniformity allows replacement with department stock. Volume purchase by State benefits due to typical project small quantities.
3	Traffic signal controller assemblies, including wired cabinets and loop detector units.	Avoid project delays due to fabrication, delivery, testing, operational unit programming, modifications, and retesting requirements. Volume purchase benefits the department due to typical project small quantities. Require statewide uniformity, compatibility, and maintenance factors.
4	Changeable message signs and assemblies.	Avoid project delays due to fabrication, delivery, testing, operational unit programming, modifications, and retesting requirements. Require statewide uniformity, compatibility, replacement exchangeability, and maintenance factors. Volume purchase benefits the department due to typical project small quantities.
5	Salvaged (recycled) material. e.g. temporary traffic signals, and flashing beacons.	Salvaging and recycling materials are resource conservation efforts. The service of salvaging is Contractor Furnished, but the department has to furnish these "salvaged materials" to the contractors for reuse on projects.
6	Battery Back Up System (BBS) - Electronics Assembly	The electronics portion of the BBS is highly customized and complex. Statewide uniformity and operational compatibility with state systems. The cabinet and batteries of the BBS will be contractor furnished. Volume purchase benefits the department due to typical project small quantities. Require statewide uniformity, compatibility, and maintenance factors. This blanket approval is for 6 months from the date this approval is signed.

Appendix D

Code of Federal Regulations Relating to Cost Effectiveness/Public Interest Finding Requirements

Note: All references are listed in the order of their appearance in Title 23 of the Code of Federal Regulations
(April 1, 2013)

Non-competitive Consultant Procurement

23 CFR Sec. 172.5 Methods of procurement.

(a) *Procurement*. The procurement of Federal-aid highway contracts for engineering and design related services shall be evaluated and ranked by the contracting agency using one of the following procedures:

(1) *Competitive negotiation*. Contracting agencies shall use competitive negotiation for the procurement of engineering and design related services when Federal-aid highway funds are involved in the contract. These contracts shall use qualifications-based selection procedures in the same manner as a contract for architectural and engineering services is negotiated under title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541-544) or equivalent State qualifications-based requirements. The proposal solicitation (project, task, or service) process shall be by public announcement, advertisement, or any other method that assures qualified in-State and out-of-State consultants are given a fair opportunity to be considered for award of the contract. Price shall not be used as a factor in the analysis and selection phase. Alternatively, a formal procedure adopted by State Statute enacted into law prior to June 9, 1998 is also permitted under paragraph (a)(4) of this section.

(2) *Small purchases*. Small purchase procedures are those relatively simple and informal procurement methods where an adequate number of qualified sources are reviewed and the total contract costs do not exceed the simplified acquisition threshold fixed in 41 U.S.C. 403(11). Contract requirements should not be broken down into smaller components merely to permit the use of small purchase requirements. States and subrecipients of States may use the State's small purchase procedures for the procurement of engineering and design related services provided the total contract costs do not exceed the simplified acquisition threshold fixed in 41 U.S.C. 403(11).

(3) *Noncompetitive negotiation*. Noncompetitive negotiation may be used to procure engineering and design related services on Federal-aid participating contracts when it is not feasible to award the contract using competitive negotiation, equivalent State qualifications-based procedures, or small purchase procedures. Contracting agencies shall submit justification and receive approval from the FHWA before using this form of contracting. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

- (i) The service is available only from a single source;
- (ii) There is an emergency which will not permit the time necessary to conduct competitive negotiations; or
- (iii) After solicitation of a number of sources, competition is determined to be inadequate.

(4) *State statutory procedures*. Contracting agencies may procure engineering and design related services using an alternate selection procedure established in State statute enacted into law before June 9, 1998.

(b) *Disadvantaged Business Enterprise (DBE) program*. The contracting agency shall give consideration to DBE consultants in the procurement of engineering and design related service contracts subject to 23 U.S.C. 112(b)(2) in accordance with 49 CFR part 26.

(c) *Compensation*. The cost plus a percentage of cost and percentage of construction cost methods of compensation shall not be used.

Use of Publicly Owned Equipment

23 CFR Sec. 635.106 Use of publicly owned equipment.

(a) Publicly owned equipment should not normally compete with privately owned equipment on a project to be let to contract. There may be exceptional cases, however, in which the use of equipment of the State or local public agency for highway construction purposes may be warranted or justified. A proposal by any STD for the use of publicly owned equipment on such a project must be supported by a showing that it would clearly be cost effective to do so under the conditions peculiar to the individual project or locality.

(b) Where publicly owned equipment is to be made available in connection with construction work to be let to contract, Federal funds may participate in the cost of such work provided the following conditions are met:

(1) The proposed use of such equipment is clearly set forth in the Plans, Specifications and Estimate (PS&E) submitted to the Division Administrator for approval.

(2) The advertised specifications specify the items of publicly owned equipment available for use by the successful bidder, the rates to be charged, and the points of availability or delivery of the equipment; and

(3) The advertised specifications include a notification that the successful bidder has the option either of renting part or all of such equipment from the State or local public agency or otherwise providing the equipment necessary for the performance of the contract work.

(c) In the rental of publicly owned equipment to contractors, the State or local public agency shall not profit at the expense of Federal funds.

(d) Unforeseeable conditions may make it necessary to provide publicly owned equipment to the contractor at rental rates agreed to between the contractor and the State or local public agency after the work has started. Any such arrangement shall not form the basis for any increase in the cost of the project on which Federal funds are to participate.

(e) When publicly owned equipment is used on projects constructed on a force account basis, costs may be determined by agreed unit prices or on an actual cost basis. When agreed unit prices are applied the equipment need not be itemized nor rental rates shown in the estimate. However, if such work is to be performed on an actual cost basis, the STD shall submit to the Division Administrator for approval the schedule of rates proposed to be charged, exclusive of profit, for the publicly owned equipment made available for use.

**Informal Bid
(Less Than 3 Week Advertisement)**

Sec. 635.112 Advertising for bids and proposals.

(a) No work shall be undertaken on any Federal-aid project, nor shall any project be advertised for bids, prior to authorization by the Division Administrator.

(b) The advertisement and approved plans and specifications shall be available to bidders a minimum of 3 weeks prior to opening of bids except that shorter periods may be approved by the Division Administrator in special cases when justified.

(c) The STD shall obtain the approval of the Division Administrator prior to issuing any addenda which contain a major change to the approved plans or specifications during the advertising period. Minor addenda need not receive prior approval but should be identified by the STD at the time of or prior to requesting FHWA concurrence in award. The STD shall provide assurance that all bidders have received all issued addenda.

(d) Nondiscriminatory bidding procedures shall be afforded to all qualified bidders regardless of National, State or local boundaries and without regard to race, color, religion, sex, national origin, age, or handicap. If any provisions of State laws, specifications, regulations, or policies may operate in any manner contrary to Federal requirements, including title VI of the Civil Rights Act of 1964, to prevent submission of a bid, or prohibit consideration of a bid submitted by any responsible bidder appropriately qualified in accordance with § 635.110, such provisions shall not be applicable to Federal-aid projects. Where such nonapplicable provisions exist, notices of advertising, specifications, special provisions or other governing documents shall include a positive statement to advise prospective bidders of those provisions that are not applicable.

(e) Except in the case of a concession agreement, as defined in section 710.703 of this title, no public agency shall be permitted to bid in competition or to enter into subcontracts with private contractors.

(f) The STD shall include a noncollusion provision substantially as follows in the bidding documents: Each bidder shall file a statement executed by, or on behalf of the person, firm, association, or corporation submitting the bid certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action, in restraint of free competitive bidding in connection with the submitted bid. Failure to submit the executed statement as part of the bidding documents will make the bid nonresponsive and not eligible for award consideration.

(1) The required form for the statement will be provided by the State to each prospective bidder.

(2) The statement shall either be in the form of an affidavit executed and sworn to by the bidder before a person who is authorized by the laws of the State to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(g) The STD shall include the lobbying certification requirement pursuant to 49 CFR part 20 and the requirements of 49 CFR part 29 regarding suspension and debarment certification in the bidding documents.

(h) The STD shall clearly identify in the bidding documents those requirements which the bidder must assure are complied with to make the bid responsive. Failure to comply with these identified bidding requirements shall make the bid nonresponsive and not eligible for award consideration.

(i) In the case of a design-build project, the following requirements apply:

(1) When a Request for Proposals document is issued after the NEPA process is complete, the FHWA Division Administrator's approval of the Request for Proposals

**Informal Bid
(Less Than 3 Week Advertisement) (cont.)**

document will constitute the FHWA's project authorization and the FHWA's approval of the STD's request to release the document. This approval will carry the same significance as plan, specification and estimate approval on a design-bid-build Federal-aid project.

(2) Where a Request for Proposals document is issued prior to the completion of the NEPA process, the FHWA's approval of the document will only constitute the FHWA's approval of the STD's request to release the document.

(3) The STD may decide the appropriate solicitation schedule for all design-build requests. This includes all project advertising, the release of the Request for Qualifications document, the release of the Request for Proposals document and all deadlines for the receipt of qualification statements and proposals. Typical advertising periods range from six to ten weeks and can be longer for large, complicated projects.

(4) The STD must obtain the approval of the Division Administrator prior to issuing addenda which result in major changes to the Request for Proposals document. Minor addenda need not receive prior approval but may be identified by the STD at the time of or prior to requesting the FHWA's concurrence in award. The STD must provide assurance that all offerors have received all issued addenda.

**Experimental Contracting Methods
Informal Bid (Less Than 3 Week Advertisement)
Use of Force Account**

Sec. 635.204 Determination of more cost effective method or an emergency.

(a) Congress has expressly provided that the contract method based on competitive bidding shall be used by a State transportation department or county for performance of highway work financed with the aid of Federal funds unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists.

(b) When a State transportation department determines it necessary due to an emergency to undertake a federally financed highway construction project by force account or negotiated contract method, it shall submit a request to the Division Administrator identifying and describing the project, the kinds of work to be performed, the method to be used, the estimated costs, the estimated Federal Funds to be provided, and the reason or reasons that an emergency exists.

(c) Except as provided in paragraph (b) of this section, when a State transportation department desires that highway construction work financed with the aid of Federal funds, other than the kinds of work designated under § 635.205(b), be undertaken by force account, it shall submit a request to the Division Administrator identifying and describing the project and the kind of work to be performed, the estimated costs, the estimated Federal funds to be provided, and the reason or reasons that force account for such project is considered cost effective.

(d) The Division Administrator shall notify the State transportation department in writing of his/her determination.

Finding of Cost Effectiveness

Sec. 635.205 Finding of cost effectiveness.

(a) It may be found cost effective for a State transportation department or county to undertake a federally financed highway construction project by force account when a situation exists in which the rights or responsibilities of the community at large are so affected as to require some special course of action, including situations where there is a lack of bids or the bids received are unreasonable.

(b) Pursuant to authority in 23 U.S.C. 112(b), it is hereby determined that by reason of the inherent nature of the operations involved, it is cost effective to perform by force account the adjustment of railroad or utility facilities and similar types of facilities owned or operated by a public agency, a railroad, or a utility company provided that the organization is qualified to perform the work in a satisfactory manner. The installation of new facilities shall be undertaken by competitive bidding except as provided in § 635.204(c). Adjustment of railroad facilities shall include minor work on the railroad's operating facilities routinely performed by the railroad with its own forces such as the installation of grade crossing warning devices, crossing surfaces, and minor track and signal work.

Adjustment of utility facilities shall include minor work on the utility's existing facilities routinely performed by the utility with its own forces and includes minor installations of new facilities to provide power, minor lighting, telephone, water and similar utility service to a rest area, weigh-station, movable bridge, or other highway appurtenance, provided such installation cannot feasibly be done as incidental to a major installation project such as an extensive highway lighting system.

Use of State Furnished Materials Mandatory Use of Borrow/Disposal Sites

Sec. 635.407 Use of materials made available by a public agency.

(a) Contracts for highway projects shall require the contractor to furnish all materials to be incorporated in the work and shall permit the contractor to select the sources from which the materials are to be obtained. Exception to this requirement may be made when there is a definite finding by the State transportation department and concurred in by the FHWA Division Administrator, that it is in the public interest to require the contractor to use material furnished by the State transportation department or from sources designated by the State transportation department. In cases such as this, the FHWA does not expect mutual sharing of costs unless the State transportation department receives a related credit from another agency or political subdivision of the State. Where such a credit does accrue to the State transportation department, it shall be applied to the Federal-aid project involved. The designation of a mandatory material source may be permitted based on environmental considerations, provided the environment would be substantially enhanced without excessive cost. Otherwise, if a State transportation department proposal to designate a material source for mandatory use would result in higher project costs, Federal-aid funds shall not participate in the increase even if the designation would conserve other public funds.

(b) The provisions of paragraph (a) of this section will not preclude the designation in the plans and specifications of sources of local natural materials, such as borrow aggregates, that have been investigated by the State transportation department and found to contain materials meeting specification requirements. The use of materials from such designated sources shall not be mandatory unless there is a finding of public interest as stated in paragraph (a) of this section.

(c) Federal funds may participate in the cost of specifications materials made available by a public agency when they have been actually incorporated in accepted items of work, or in the cost of such materials meeting the criteria and stockpiled at the locations specified in § 635.114 of this chapter.

(d) To be eligible for Federal participation in its cost, any material, other than local natural materials, to be purchased by the State transportation department and furnished to the contractor for mandatory use in the project, must have been acquired on the basis of competitive bidding, except when there is a finding of public interest justifying the use of another method of acquisition. The location and unit price at which such material will be available to the contractor must be stated in the special provisions for the benefit of all prospective bidders. The unit cost eligible for Federal participation will be limited to the unit cost of such material to the State transportation department.

(e) When the State transportation department or another public agency owns or has control over the source of a local natural material the unit price at which such material will be made available to the contractor must be stated in the plans or special provisions. Federal participation will be limited to (1) the cost of the material to the State transportation department or other public agency; or (2) the fair and reasonable value of the material, whichever is less. Special cases may arise that will justify Federal participation on a basis other than that set forth above. Such cases should be fully documented and receive advance approval by the FHWA Division Administrator.

(f) Costs incurred by the State transportation department or other public agency for acquiring a designated source or the right to take materials from it will not be eligible for Federal participation if the source is not used by the contractor.

(g) The contract provisions for one or a combination of Federal-aid projects shall not specify a mandatory site for the disposal of surplus excavated materials

Use of State Furnished Materials (cont.)
Mandatory Use of Borrow/Disposal Sites (cont.)

unless there is a finding by the State transportation department with the concurrence of the FHWA Division Administrator that such placement is the most economical except that the designation of a mandatory site may be permitted based on environmental considerations, provided the environment would be substantially enhanced without excessive cost.

Waiver to Buy America Requirements

Sec. 635.410 Buy America requirements.

(a) The provisions of this section shall prevail and be given precedence over any requirements of this subpart which are contrary to this section. However, nothing in this section shall be construed to be contrary to the requirements of § 635.409(a) of this subpart.

(b) No Federal-aid highway construction project is to be authorized for advertisement or otherwise authorized to proceed unless at least one of the following requirements is met:

(1) The project either: (i) Includes no permanently incorporated steel or iron materials, or (ii) if steel or iron materials are to be used, all manufacturing processes, including application of a coating, for these materials must occur in the United States. Coating includes all processes which protect or enhance the value of the material to which the coating is applied.

(2) The State has standard contract provisions that require the use of domestic materials and products, including steel and iron materials, to the same or greater extent as the provisions set forth in this section.

(3) The State elects to include alternate bid provisions for foreign and domestic steel and iron materials which comply with the following requirements. Any procedure for obtaining alternate bids based on furnishing foreign steel and iron materials which is acceptable to the Division Administrator may be used. The contract provisions must (i) require all bidders to submit a bid based on furnishing domestic steel and iron materials, and (ii) clearly state that the contract will be awarded to the bidder who submits the lowest total bid based on furnishing domestic steel and iron materials unless such total bid exceeds the lowest total bid based on furnishing foreign steel and iron materials by more than 25 percent.

(4) When steel and iron materials are used in a project, the requirements of this section do not prevent a minimal use of foreign steel and iron materials, if the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater. For purposes of this paragraph, the cost is that shown to be the value of the steel and iron products as they are delivered to the project.

(c)(1) A State may request a waiver of the provisions of this section if: (i) The application of those provisions would be inconsistent with the public interest; or (ii) Steel and iron materials/products are not produced in the United States in sufficient and reasonably available quantities which are of a satisfactory quality.

(2) A request for waiver, accompanied by supporting information, must be submitted in writing to the Regional Federal Highway Administrator (RFHWA) through the FHWA Division Administrator. A request must be submitted sufficiently in advance of the need for the waiver in order to allow time for proper review and action on the request. The RFHWA will have approval authority on the request.

(3) Requests for waivers may be made for specific projects, or for certain materials or products in specific geographic areas, or for combinations of both, depending on the circumstances.

(4) The denial of the request by the RFHWA may be appealed by the State to the Federal Highway Administrator (Administrator), whose action on the request shall be considered administratively final.

(5) A request for a waiver which involves nationwide public interest or availability issues or more than one FHWA region may be submitted by the RFHWA to the Administrator for action.

(6) A request for waiver and an appeal from a denial of a request must include facts and justification to support the granting of the waiver. The FHWA response to a request or appeal will be in writing and made available to the

Waiver to Buy America Requirements (cont.)

public upon request. Any request for a nationwide waiver and FHWA's action on such a request may be published in the **Federal Register** for public comment.

(7) In determining whether the waivers described in paragraph (c)(1) of this section will be granted, the FHWA will consider all appropriate factors including, but not limited to, cost, administrative burden, and delay that would be imposed if the provision were not waived.

(d) Standard State and Federal-aid contract procedures may be used to assure compliance with the requirements of this section.

Use of Patented and Proprietary Materials

Sec. 635.411 Material or product selection.

(a) Federal funds shall 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:

(1) Such patented or proprietary item is purchased or obtained through competitive bidding with equally suitable unpatented items; or

(2) The State transportation department certifies either that such patented or proprietary item is essential for synchronization with existing highway facilities, or that no equally suitable alternate exists; or

(3) Such patented or proprietary item is used for research or for a distinctive type of construction on relatively short sections of road for experimental purposes.

(b) When there is available for purchase more than one nonpatented, nonproprietary material, semifinished or finished article or product that will fulfill the requirements for an item of work of a project and these available materials or products are judged to be of satisfactory quality and equally acceptable on the basis of engineering analysis and the anticipated prices for the related item(s) of work are estimated to be approximately the same, the PS&E for the project shall either contain or include by reference the specifications for each such material or product that is considered acceptable for incorporation in the work. If the State transportation department wishes to substitute some other acceptable material or product for the material or product designated by the successful bidder or bid as the lowest alternate, and such substitution results in an increase in costs, there will not be Federal-aid participation in any increase in costs.

(c) A State transportation department may require a specific material or product when there are other acceptable materials and products, when such specific choice is approved by the Division Administrator as being in the public interest. When the Division Administrator's approval is not obtained, the item will be nonparticipating unless bidding procedures are used that establish the unit price of each acceptable alternative. In this case Federal-aid participation will be based on the lowest price so established.

(d) Reference in specifications and on plans to single trade name materials will not be approved on Federal-aid contracts.

(e) In the case of a design-build project, the following requirements apply: Federal funds shall 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 Request for Proposals document unless the conditions of paragraph (a) of this section are applicable.

(f) State transportation departments (State DOTs) shall have the autonomy to determine culvert and storm sewer material types to be included in the construction of a project on a Federal-aid highway.

Disposal of Real Property Interests at Less Than Fair Market Value

Sec. 710.403 Management.

a) The STD must assure that all real property within the boundaries of a federally-aided facility is devoted exclusively to the purposes of that facility and is preserved free of all other public or private alternative uses, unless such alternative uses are permitted by Federal regulation or the FHWA. An alternative use must be consistent with the continued operation, maintenance, and safety of the facility, and such use shall not result in the exposure of the facility's users or others to hazards.

(b) The STD shall specify procedures in the State manual for determining when a real property interest is no longer needed. These procedures must provide for coordination among relevant STD organizational units, including maintenance, safety, design, planning, right-of-way, environment, access management, and traffic operations.

(c) The STD shall evaluate the environmental effects of disposal and leasing actions requiring FHWA approval as provided in 23 CFR part 771. (d) Acquiring agencies shall charge current fair market value or rent for the use or disposal of real property interests, including access control, if those real property interests were obtained with title 23 of the United States Code funding, except as provided in paragraphs

(d) (1) through (5) of this section. Since property no longer needed for a project was acquired with public funding, the principle guiding disposal would normally be to sell the property at fair market value and use the funds for transportation purposes. The term fair market value as used for acquisition and disposal purposes is as defined by State statute and/or State court decisions. Exceptions to the general requirement for charging fair market value may be approved in the following situations:

(1) With FHWA approval, when the STD clearly shows that an exception is in the overall public interest for social, environmental, or economic purposes; nonproprietary governmental use; or uses under 23 U.S.C. 142(f), Public Transportation. The STD manual may include criteria for evaluating disposals at less than fair market value. Disposal for public purposes may also be at fair market value. The STD shall submit requests for such exceptions to the FHWA in writing.

(2) Use by public utilities in accordance with 23 CFR part 645.

(3) Use by Railroads in accordance with 23 CFR part 646.

(4) Use for Bikeways and pedestrian walkways in accordance with 23 CFR part 652.

(5) Use for transportation projects eligible for assistance under title 23 of the United States Code, provided that a concession agreement, as defined in section 710.703, shall not constitute a transportation project.

(e) The Federal share of net income from the sale or lease of excess real property shall be used by the STD for activities eligible for funding under title 23 of the United States Code. Where project income derived from the sale or lease of excess property is used for subsequent title 23 projects, use of the income does not create a Federal-aid project.

(f) No FHWA approval is required for disposal of property which is located outside of the limits of the right-of-way if Federal funds did not participate in the acquisition cost of the property.

(g) Highway facilities in which Federal funds participated in either the right-of-way or construction may be relinquished to another governmental agency for continued highway use under the provisions of 23 CFR 620, subpart B.