



Territorial Workshop Contract Administration Topics

August 24th, 2018

<https://www.fhwa.dot.gov/programadmin/contracts/index.cfm>

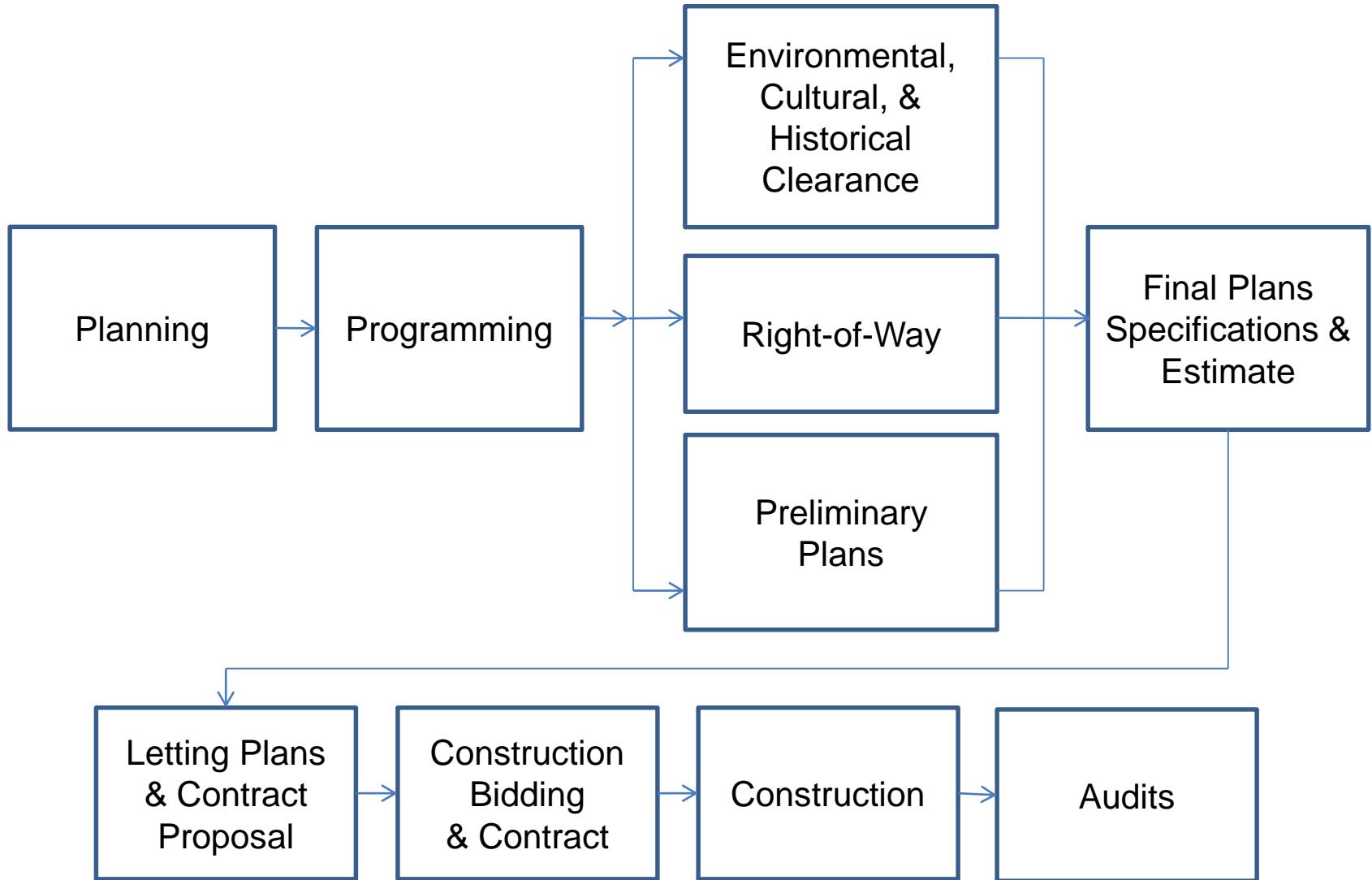
Topics

- Understanding Regulations
- Pre-Construction Requirements
- Specific Contract Requirements and Deviation Processes
- Contract Types and Innovative Contracts
- Change Orders and Transfer of Risk



Understanding Regulations

Federal-aid Project Flowchart

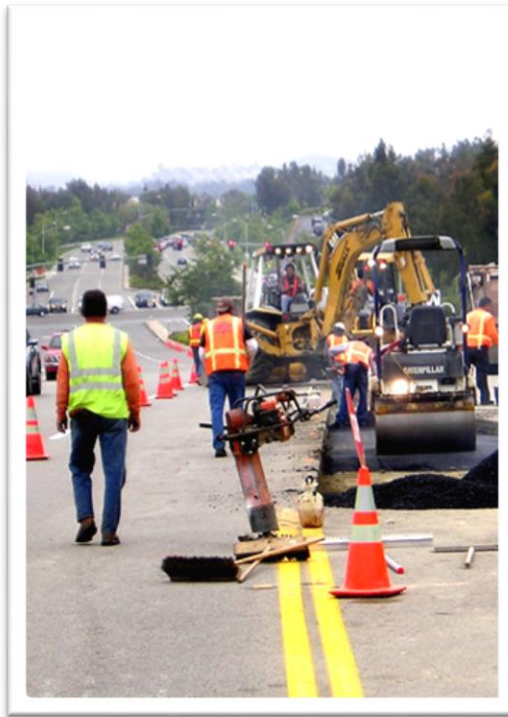


Purpose of the FAHP

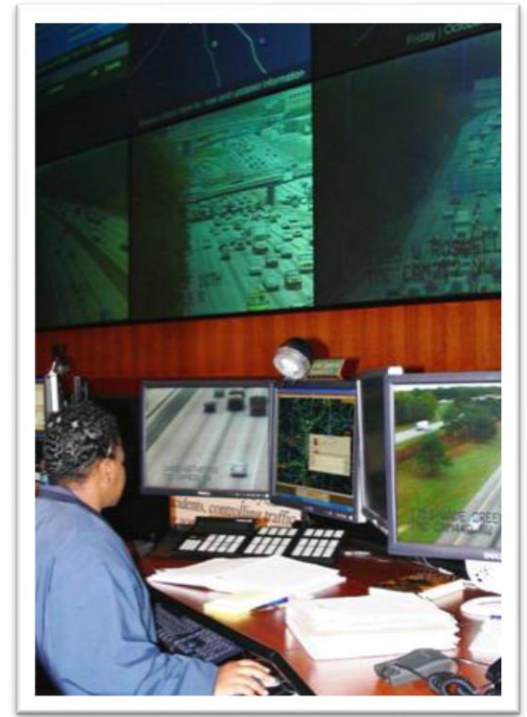
- Support Federal-aid system by providing financial assistance for



Planning and Design



Construction



Asset Management

Administering the FAHP

- FHWA is charged with
 - Implementing the FAHP in cooperation with the State and local agencies
- States and local agencies must meet general FAHP requirements and those outlined in the S&O Agreement

Sharing FAHP Responsibilities with the States

- State DOT assumption of program and project responsibilities is documented in the S&O Agreement
- MAP-21 impacts to S&O Agreements include
 - Removed provision prohibiting State oversight of projects exceeding \$1M
 - Emphasizes a risk-based approach to oversight

Risk Based Stewardship & Oversight

FHWA Risk Based Stewardship and Oversight

Provide reasonable assurance that recipients of federal highway funds are in compliance with key laws and regulations.

Assess a statistically valid sample of projects to inform the FHWA, with an acceptable level of certainty, of the degree of compliance.

Project Involvement

Required Project Actions
Prescribed in Federal Law

Risk-based Project Involvement
Projects of Division Interest (PoDI)

Data-driven Compliance Assurance
Compliance Assessment Program (CAP)

Program Involvement

Required Program Actions
Prescribed in Federal Law

Risk-based Program Involvement
Strategic National Initiatives
National and Division Program
Stewardship & Oversight Initiatives
Including Program
Reviews and Assessments

Data-driven Compliance Assurance
Compliance Assessment Program (CAP)

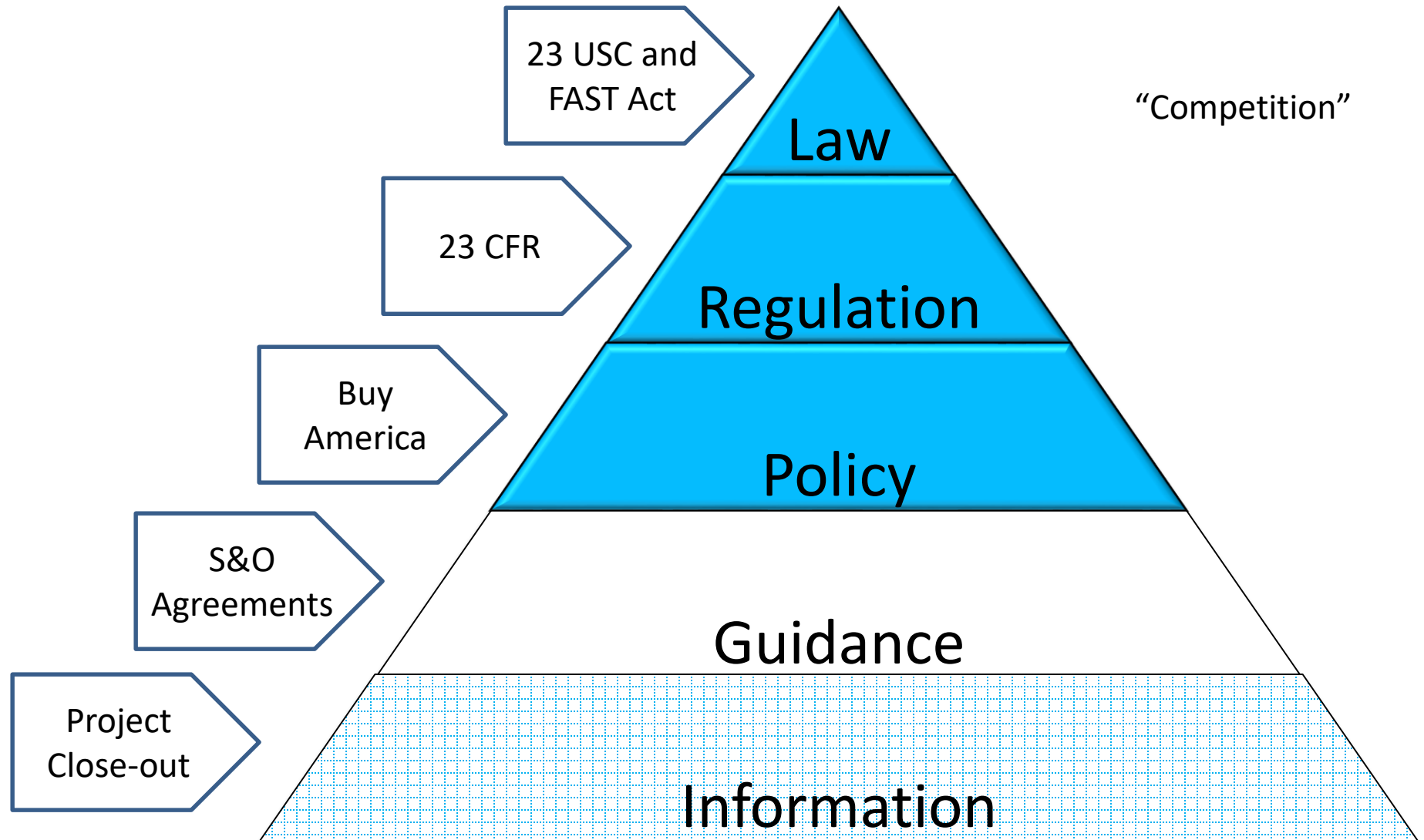
National
and
Division
levels

CAP also provides program-level compliance information

Our Core Principles of RBSO

Adds Value: actions are taken with a primary objective of improving programs and projects
Based on Risk: risk assessment is integrated throughout the performance planning process
Consistent: actions are based on consistent approach to planning, risk assessment, and S&O
Data-driven: decisions are grounded in objective data and information to the extent possible

Hierarchy of FAHP Requirements





Pre-Construction

<https://www.fhwa.dot.gov/programadmin/contracts/index.cfm>

Contract Administration

FHWA Contract Administration Issues

-[Indefinite Delivery and Indefinite Quantity Contracts for Federal-aid Construction](#) 05/02/2018

-[FHWA Contract Administration Core Curriculum Manual](#)

Topics

- What requirements need to be met in order to prepare a Federal-aid project for advertisement?
 - Brooks Act
 - PS&E requirements and approvals, including material and equipment requirements
 - Bid package requirements and approvals, including procurement requirements
 - Deviations from requirements

Brooks Act

- Qualifications based selection of Architect-Engineering Services
- CACC Manual page 36
- Engineering and Design related services are: program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, etc

Procurement Options for Federal-aid, Construction and Service Contracts ^{1/3}

(1)	(2) US DOT's Adoption of the Common Rule (Non-construction/ Non-engineering)	(3) Construction Contracts	(4) Engineering Service Contracts	(5) Special Experimental Project No. 14 (SEP-14)
Reference	49 CFR 18	23 USC 112 (b)(1) 23 CFR 635	23 USC 112 (b) (2) 23 CFR 172	23 USC 307
Basis for contract award	State Procedures for procurement	Lowest Responsive Bidder	Qualifications Based Selection	Experimental
Definitions	49 CFR 18.3	23 USC 101(a) -"construction"	23 USC 112 (b) (2)	None

Procurement Options for Federal-aid, Construction and Service Contracts ^{2/3}

(1)	(2) US DOT's Adoption of the Common Rule (Non-construction/ Non-engineering)	(3) Construction Contracts	(4) Engineering Service Contracts	(5) Special Experimental Project No. 14 (SEP-14)
Types of Projects	Service contracts, equipment purchases, limited software development and other services that do not meet the definitions of design or construction	Traditional highway construction	Traditional engineering and architectural services	Non-traditional projects (design- build, best value, life cycle cost bidding, etc.)

Procurement Options for Federal-aid, Construction and Service Contracts ^{3/3}

(1)	(2) US DOT's Adoption of the Common Rule (Non-construction/ Non-engineering)	(3) Construction Contracts	(4) Engineering Service Contracts	(5) Special Experimental Project No. 14 (SEP-14)
Exceptions/Applicability Limitations	<p>1) 49 CFR18.36(j) requires competitive bidding for highway construction grants using 23 CFR 635A (column 3)</p> <p>2) 49CFR18.36(t) requires qualifications based selection for architectural or engineering services using Brooks Act</p>	<p>1) For Transportation Enhancement projects off the highway ROW, 49 CFR 18 applies (col #2)</p> <p>2) Deviations from competitive bidding requirements should be evaluated experimentally</p>		

Plans, Specifications, Estimates

- What does the regulation require?

Plans and Specifications

Location

Design features

Construction requirements

With sufficient detail to:

- Facilitate the construction, the contract control and the estimation of construction costs of the project

Estimate

Anticipated cost of the project

With sufficient detail to:

- Provide an initial prediction of the financial obligations to be incurred by the State and FHWA
- Permit an effective review and comparison of the bids received.

Procurement Requirements

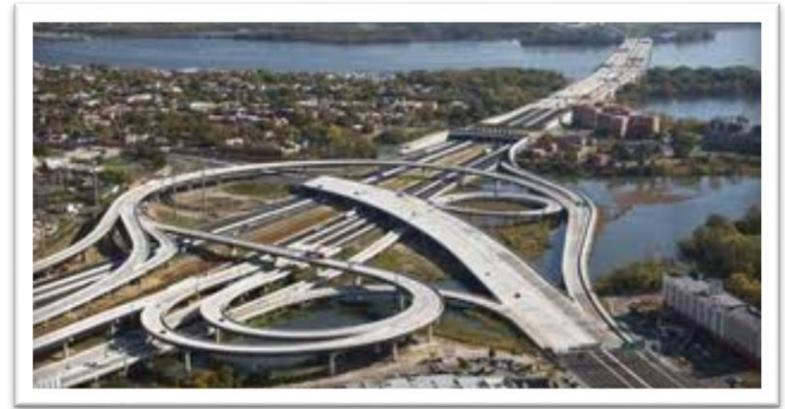
- Engineering and design-related services contracts
- Foreign contractors and suppliers restrictions
- Prohibition on use of State preference
- Contract time

Deviations from Requirements

- Public interest findings (PIF)
- Cost effectiveness findings
- Certification

Using Time-related Incentive/Disincentive Clauses

- Intended for projects with high traffic disruption potential
- Not intended to be used routinely
- Differs from liquidated damages



- Recommended caps are 5% for incentives; none for disincentives

Price Adjustment Clauses



- Quality Price Adjustment Clauses
- Commodity Price Escalation Clauses



Conducting a Value Engineering (VE) Study

- VE studies are required on certain FA projects
- Design-build projects are exempt from the VE requirements
- FHWA can require more than one VE analysis for major projects

Materials Requirements



- Patented or proprietary products
- Domestic steel and iron products
- State-owned, furnished, or designated materials
- Convict-produced materials
- Salvaged materials

Using Patented or Proprietary Items



- FHWA does not pay a premium or royalty for patented or proprietary materials, specifications, or products
- Discourages use of brand or trade names
- Requires use of “equal to” phrasing when trade or brand names cannot be avoided
- Requires inclusion of equivalent materials and products in specifications

Patented or Proprietary Items May Be Used When...

- Obtained through competitive bidding
- Contracting agency certifies product is necessary for synchronization or no suitable alternative exists
- Used for research or for a distinctive type of construction
- Approved by FHWA using a PIF

Buy America Requirements



- Domestic manufacturing of all steel and iron materials permanently incorporated in a Federal-aid project funded under Title 23 U.S.C.
- Includes the application of a coating

Circumstances that May Warrant Use of Non-domestic Steel or Iron



- Minimal use
- Temporary use
- Alternate bid procedures
- Buy America waivers

Buy America Project Waiver Process

- STA requests waiver through the Division with supporting documents
- Division provides initial review with recommendations to FHWA headquarters (HIPA-30)
- FHWA hosts public comments period and in-depth reviews
- STA must resolve all comments before the waiver request is published in the Federal Register

Materials Requirements (cont.)

- State-owned, furnished, or designated materials
- Convict-produced materials
- Salvaged materials



Equipment Requirements



- Publicly-owned equipment
- Contractor purchase for State

Other Bid Package Requirements

- Disadvantaged Business Enterprise (DBE)
- Right-of-way (ROW) clearances, including Utility and Railroad coordination
- Form FHWA-1273
- On-the-job training (OJT)
- Non-collusion statements

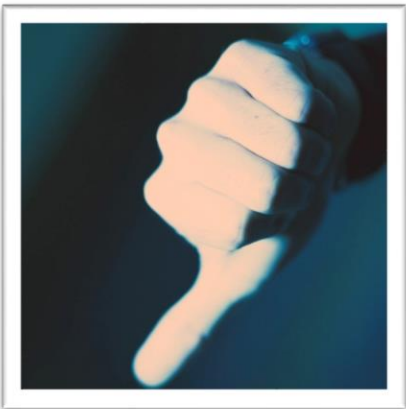
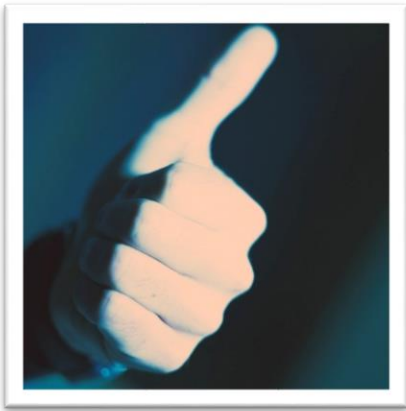
Obtaining FHWA Approval to Advertise

- PS&E approved
- ROW clearances complete or proper coordination in contract
- Public hearing and environmental processes complete (NEPA)
- Other agency reviews complete
- Funding deemed adequate

Advertising Requirements

- Method of Advertising
- Bid Advertisement Period
- Pre-bid meeting
- Addenda

Concurrence in Award Decision



- Required to
 - Authorize construction and award the contract to the successful bidder
 - Select a bid that was not the lowest
 - Reject all bids



Contracts Types and Innovative Contracts

Topics

- DBB
- Other than DBB
- Waiving Competitive Bidding
- Sole Sourcing

Allowable Contracting Methods

- Traditional design-bid-build, low bid contracts
- Alternative contracting (operational methods)
 - Cost-plus-time bidding (A+B)
 - Lane rental
 - Design-build contracting
 - Additive alternate bidding
 - Warranty clauses
 - Construction Manager/General Contractor (CM/GC)
 - Alternate pavement type bidding using life-cycle cost adjustment factors

Allowable Contracting Methods, cont.

- Alternative contracting (experimental methods)
 - Best value
 - ID/IQ
 - No excuse incentive/bonus
 - Lump sum bidding

Waiving Competitive Bidding Requirements



- Public agency force account can be used
 - When STA proves cost-effectiveness
 - When an emergency exists
- Negotiated contracts for emergency work to restore essential travel



Contract Changes and Transfer of Risk

Topics

- Change Orders
- Disputes
- Claims
- ROW Clearance
- NEPA Violations during construction

Contract Changes

- What constitutes a contract change?
 - A change which affects the cost, alters the termini, character, or scope of work
- What constitutes a “major” contract change?
 - A change which will significantly affect the cost of the project to the Federal government or alter the termini, character, or scope of work

Components of Contract Changes



- Changes to plans
- Changes to specification
- Change in cost (+/-)
- Change in time (+/-)

Reviewing and Approving Change Orders

- Main considerations of a review
 - Federal-aid eligibility
 - Impact on the original scope of the work
 - Basis of payment
 - Time adjustments

Avoiding Disputes: Partnering



- Establish a plan upfront that supports
 - Communication
 - Achievement of mutual goals
 - Regular meetings

Dispute Resolution



- Negotiation
- Mediation
- Dispute Review Board
- Mini-trials
- Arbitration
- Private judging

Claims

- Is FHWA participation in a claim automatic?
 - No
- When can FA funds participate in a claim?
 - When the claim can be supported by the facts
 - When the claim has a basis in the contract and under applicable State law

Managing Other Contract Issues

- Other contract issues that can arise
 - Time extensions and liquidated damages
 - Contract termination
 - Legal issues

Liquidated Damages for Time Overruns

- Each STA is required to develop and maintain its own LD rates
- STA rates are subject to verification and approval by the Division Administrator
- STA must review and adjust LD rates every 2 years, as needed
- STA LD rates may include costs of project-related delays or inconveniences to the STA or the public
- I/D amounts are shown separately from the LD amounts, and are to be based on road user costs

Contract Termination



- Categorical reasons for termination are
 - Cause or Convenience
 - Default

Other Risk Transfer situations

- ROW
 - Delayed clearance
 - Encroachment during construction
- NEPA
 - Violation during construction



Conclusion and Questions