

23 USC 112

Sec. 112. Letting of contracts

(a) In all cases where the construction is to be performed by the State highway department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.

(b) Bidding Requirements. -

(1) In general. - Subject to paragraph (2), construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the State highway department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

(2) Contracting for engineering and design services. -

(A) General rule. - Each contract for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services with respect to a project subject to the provisions of subsection (a) of this section shall be awarded 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 or equivalent State qualifications-based requirements.

(B) Applicability. -

(i) In a complying state. - If, on the date of the enactment of this paragraph, the services described in subparagraph (A) may be awarded in a State in the manner described in subparagraph (A), subparagraph (A) shall apply in such State beginning on such date of enactment, except to the extent that such State adopts by statute a formal procedure for the procurement of such services.

(ii) In a noncomplying state. - In the case of any other State, subparagraph (A) shall apply in such State beginning

on the earlier of (I) August 1, 1989, or (II) the 10th day following the close of the 1st regular session of the legislature of a State which begins after the date of the enactment of this paragraph, except to the extent that such State adopts or has adopted by statute a formal procedure for the procurement of the services described in subparagraph (A).

(C) Performance and audits. - Any contract or subcontract awarded in accordance with subparagraph (A), whether funded in whole or in part with Federal-aid highway funds, shall be performed and audited in compliance with cost principles contained in the Federal Acquisition Regulations of part 31 of title 48, Code of Federal Regulations.

(D) Indirect cost rates. - Instead of performing its own audits, a recipient of funds under a contract or subcontract awarded in accordance with subparagraph (A) shall accept indirect cost rates established in accordance with the Federal Acquisition Regulations for 1-year applicable accounting periods by a cognizant Federal or State government agency, if such rates are not currently under dispute.

(E) Application of rates. - Once a firm's indirect cost rates are accepted under this paragraph, the recipient of the funds shall apply such rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment and shall not be limited by administrative or de facto ceilings of any kind.

(F) Prenotification; confidentiality of data. - A recipient of funds requesting or using the cost and rate data described in subparagraph (E) shall notify any affected firm before such request or use. Such data shall be confidential and shall not be accessible or provided, in whole or in part, to another firm or to any government agency which is not part of the group of agencies sharing cost data under this paragraph, except by written permission of the audited firm. If prohibited by law, such cost and rate data shall not be disclosed under any circumstances.

(G) State option. - Subparagraphs (C), (D), (E), and (F) shall take effect 1 year after the date of the enactment of this subparagraph; except that if a State, during such 1-year period, adopts by statute an alternative process intended to promote engineering and design quality and ensure maximum competition by professional companies of all sizes providing engineering and design services, such subparagraphs shall not apply with respect to the State. If the Secretary determines that the legislature of the State did not convene and adjourn a full regular session during such 1-year period, the Secretary

may extend such 1-year period until the adjournment of the next regular session of the legislature.

(c) The Secretary shall require as a condition precedent to his approval of each contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement, executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, 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 such contract.

(d) No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State highway department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

(e) Standardized Contract Clause Concerning Site Conditions. -

(1) General rule. - The Secretary shall issue regulations establishing and requiring, for inclusion in each contract entered into with respect to any project approved under section [106](#) of this title a contract clause, developed in accordance with guidelines established by the Secretary, which equitably addresses each of the following:

(A) Site conditions.

(B) Suspensions of work ordered by the State (other than a suspension of work caused by the fault of the contractor or by weather).

(C) Material changes in the scope of work specified in the contract.

The guidelines established by the Secretary shall not require arbitration.

(2) Limitation on applicability. - Paragraph (1) shall apply in a State except to the extent that such State adopts or has adopted by statute a formal procedure for the development of a contract clause described in paragraph (1) or adopts or has adopted a statute which does not permit inclusion of such a contract clause.

(f) The provisions of this section shall not be applicable to contracts for projects on the Federal-aid secondary system in those States where the Secretary has discharged his responsibility pursuant to section [117](#) of this title, except where employees of a political subdivision of a State are working on a project outside of such political subdivision.

Source

(Pub. L. 85-767, Aug. 27, 1958, 72 Stat. 895; Pub. L. 90-495, Sec. 22(c), Aug. 23, 1968, 82 Stat. 827; Pub. L. 96-470, title I, Sec. 112(b)(1), Oct. 19, 1980, 94 Stat. 2239; Pub. L. 97-424, title I, Sec. 112, Jan. 6, 1983, 96 Stat. 2106; Pub. L. 100-17, title I, Sec. 111, Apr. 2, 1987, 101 Stat. 147; Pub. L. 104-59, title III, Sec. 307(a), Nov. 28, 1995, 109 Stat. 581.)

REFERENCES IN TEXT

The Federal Property and Administrative Services Act of 1949, referred to in subsec. (b)(2)(A), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended. Title IX of the Federal Property and Administrative Services Act is classified generally to subchapter VI (Sec. 541 et seq.) of [chapter 10](#) of Title 40, Public Buildings, Property, and Works. For complete classification of this Act to the Code, see Short Title note set out under [section 471 of Title 40](#) and Tables.

The date of the enactment of this paragraph, referred to in subsec. (b)(2)(B), is the date of enactment of Pub. L. 100-17, which was approved Apr. 2, 1987.

The date of the enactment of this subparagraph, referred to in subsec. (b)(2)(G), is the date of enactment of Pub. L. 104-59, which was approved Nov. 28, 1995.

AMENDMENTS

1995 - Subsec. (b)(2)(C) to (G). Pub. L. 104-59 added subpars. (C) to (G).

1987 - Subsec. (b). Pub. L. 100-17, Sec. 111(a), (b), (d), inserted subsec. heading, designated existing provisions as par. (1), inserted par. (1) heading, substituted "Subject to paragraph (2), construction" for "Construction" and inserted "or that an emergency exists", added par. (2), and realigned margins.

Subsecs. (e), (f). Pub. L. 100-17, Sec. 111(c), added subsec. (e) and redesignated former subsec. (e) as (f).

1983 - Subsec. (b). Pub. L. 97-424, Sec. 112(1), substituted "unless the State highway department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective" for "unless the Secretary shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest" after "by competitive bidding,".

Subsec. (e). Pub. L. 97-424, Sec. 112(2), inserted exception relating to a situation where employees of a political subdivision of a State are working on a project outside of such political subdivision.

1980 - Subsec. (b). Pub. L. 96-470 struck out provision that all

findings by the Secretary that a method other than competitive bidding is in the public interest be reported in writing to the Committees on Public Works of the Senate and the House of Representatives.

1968 - Subsec. (b). Pub. L. 90-495 required that contracts for the construction of each project be awarded only on the basis of the lowest responsive bid by a bidder meeting established criteria of responsibility and required that, to be imposed as a condition precedent, requirements and obligations have been specifically set forth in the advertised specifications.

EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-495 effective Aug. 23, 1968, see section 37 of Pub. L. 90-495, set out as a note under section [101](#) of this title.

PRIVATE SECTOR INVOLVEMENT PROGRAM

Pub. L. 102-240, title I, Sec. 1060, Dec. 18, 1991, 105 Stat. 2003, provided that:

"(a) Establishment. - The Secretary shall establish a private sector involvement program to encourage States to contract with private firms for engineering and design services in carrying out Federal-aid highway projects when it would be cost effective.

"(b) Grants to States. -

"(1) In general. - In conducting the program under this section, the Secretary may make grants in each of fiscal years 1992, 1993, 1994, 1995, 1996, and 1997 to not less than 3 States which the Secretary determines have implemented in the fiscal year preceding the fiscal year of the grant the most effective programs for increasing the percentage of funds expended for contracting with private firms (including small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals) for engineering and design services in carrying out Federal-aid highway projects.

"(2) Use of grants. - A grant received by a State under this subsection may be used by the State only for awarding contracts for engineering and design services to carry out projects and activities for which Federal funds may be obligated under title 23, United States Code.

"(3) Funding. - There are authorized to be appropriated to carry out this section \$5,000,000 for each of fiscal years 1992 through 1997. Such sums shall remain available until expended.

"(c) Report by FHWA. - Not later than 120 days after the date of the enactment of this Act (Dec. 18, 1991), the Administrator of the Federal Highway Administration shall submit to the Secretary a report on the amount of funds expended by each State in fiscal years 1980 through 1990 on contracts with private sector engineering and design firms in carrying out Federal-aid highway

projects. The Secretary shall use information in the report to evaluate State engineering and design programs for the purpose of awarding grants under subsection (b).

"(d) Report to Congress. - Not later than 2 years after the date of the enactment of this Act (Dec. 18, 1991), the Secretary shall transmit to Congress a report on implementation of the program established under this section.

"(e) Engineering and Design Services Defined. - The term 'engineering and design services' means any category of service described in [section 112\(b\) of title 23](#), United States Code.

"(f) Regulations. - Not later than 180 days after the date of the enactment of this Act (Dec. 18, 1991), the Secretary shall issue regulations to carry out this section."

PILOT PROGRAM FOR UNIFORM AUDIT PROCEDURES

Pub. L. 102-240, title I, Sec. 1092, Dec. 18, 1991, 105 Stat. 2024, directed Secretary to establish pilot program to include no more than 10 States under which any contract or subcontract awarded in accordance with subsec. (b)(2)(A) of this section was to be performed and audited in compliance with cost principles contained in Federal acquisition regulations of part 41 of title 48 of Code of Federal Regulations, provided for indirect cost rates in lieu of performing audits, and required each State participating in pilot program to report to Secretary not later than 3 years after Dec. 18, 1991, on results of program, prior to repeal by Pub. L. 104-59, title III, Sec. 307(b), Nov. 28, 1995, 109 Stat. 582. See subsec. (b)(2)(C) to (F) of this section.

EVALUATION OF STATE PROCUREMENT PRACTICES

Pub. L. 102-240, title VI, Sec. 6014, Dec. 18, 1991, 105 Stat. 2181, directed Secretary to conduct a study to evaluate whether or not current procurement practices of State departments and agencies were adequate to ensure that highway and transit systems were designed, constructed, and maintained so as to achieve a high quality for such systems at the lowest overall cost and, not later than 2 years after Dec. 18, 1991, to transmit to Congress a report on the results of the study, together with an assessment of the need for establishing a national policy on transportation quality assurance and recommendations for appropriate legislative and administrative actions.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section [210](#) of this title.