

Module 11

Construction

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Guide Organization

This construction contract guide is organized into three sections: Overview, Local Government (LG) Contract Components Checklist and Local Government Contract Components.

Section 1 - Overview, this section provides basic information concerning the federal and state requirements associated with local government contracts.

Section 2 - Local Government (LG) Contract Components Checklist, this checklist is a useful way of ensuring all contract components are addressed. It is organized into four areas, labeled A. through D., according to the following contract stages:

- A. Bid Document Preparation,
- B. Letting and Award,
- C. Contract Execution, and
- D. Contract Administration.

Section 3 - Local Government (LG) Contract Components, this section provides detailed information on each of the contract components. The LG Contract Components section follows the same four contract stages mentioned in the LG Contract Components Checklist.

Section 1

Overview

General - Federal regulations apply to all federally funded projects. Title 23 (Highways) is the primary regulatory reference. However, other Titles have applicability, such as Title 49 (Transportation) and Title 29 (Labor). A useful link to Federal Highway Administration (FHWA) regulations is: <http://www.fhwa.dot.gov/legregs/electdirs.htm>. All other federal regulations may be obtained at: <http://www.access.gpo.gov/nara/cfr/cfr-table-search.html>.

The Federal-aid Highway program is NOT a grant program, but a reimbursement program. ELIGIBLE costs incurred IN COMPLIANCE WITH THE REGULATIONS will be reimbursed to the LG. The Texas Department of Transportation (TxDOT) and FHWA have an oversight and monitoring responsibility, even on these projects directly administered by a LG. The term LG includes municipalities, counties, regional mobility authorities (RMAs), local toll authorities and may even include private entities. The Federal share of project costs incurred without following the pertinent federal regulations are subject to being declared non-participating; this includes Pass-Through Finance projects (also called Pass-Through Toll projects) if federal funds are to be sought after construction is complete. Pass-Through Financing is a method of reimbursement to the LG from TxDOT. All state and federal regulations, as outlined in these LGPPs, apply to Pass-Through Finance project agreements as outlined for each project delivery method (D/B/B, D/B, and concession).

It is the LG's responsibility to ensure all project requirements are met so that federal or state funding is not jeopardized. If Federal funding is involved, this provision is covered in the TxDOT/LG Advanced Funding Agreement for the project.

Many contracting requirements depend largely upon the funding for the project. Projects may include federal, state, LG or even private funds (in cases where the work involves a public/private partnership). Federal funds involve certain requirements while state funds involve, in many instances, different requirements. Mixed funding projects exist, therefore, if a project involves any federal or state monies, applicable federal or state requirements will prevail. Both federal and state requirements will prevail if a contract involves federal funding, while only state requirements will prevail if the contract involves only state funding. Should conflicts exist between federal and state requirements, federal requirements will prevail for those contracts involving federal funds. Contracts for projects on the state highway system funded entirely with local or private funds not deposited in the state treasury and where work is performed by the LG are subject to TxDOT design requirements and local contracting requirements (i.e. Local Government Code, county and municipal requirements, etc.); unless otherwise noted. Please be aware that some of these federal or state requirements may affect the development of technical requirements or additional requirements associated with an individual project.

The LGPP provides guidance on a wide variety of project delivery methods available to TxDOT and LGs. This document provides information related to district responsibilities associated with the administration and oversight of highway improvement contracts and related transportation projects let or administered by the LG. Available project delivery methods include design-bid-build, design-build, and concessionaire, but all methods are not available to all LGs unless authorized by law.

Project Oversight - TxDOT’s goal is to allow the LG flexibility to administer their project while minimizing TxDOT resources. However, the Department has a stewardship responsibility. The degree to which TxDOT monitors these projects depends primarily on combinations of funding source, highway system, statutory requirements and the potential risk posed by non-compliance. Monitoring for projects on the state system with state or federal funds will focus on proper geometric design, application of TxDOT material and construction quality standards, and compliance with statutory requirements. Monitoring for projects on the state system with local or private funds should have the same focus on geometric design and construction quality, but there may be less emphasis on certain statutory requirements. In this case, the LG will assume more responsibility for compliance with statutes. TxDOT will minimize monitoring on projects off the state system that do not have federal or state funds. In summary, TxDOT will tailor the level of monitoring to the relative risk to TxDOT; keeping in mind TxDOT’s stewardship responsibilities.

The LGPP references several other manuals, guides, documents or other resources. In addition, many TxDOT manuals, guides, documents or other related resources are also available for use as references. The following table lists information for obtaining copies of these documents, or obtaining information related to other resources. Hyperlinks are provided for those documents or resources available on the Internet, simply "click" on the document/resource name. In addition, where indicated in the text of the guide, hyperlinks are provided to facilitate ready access to the document or resource listed. The requirement for TxDOT approval is referenced in many areas throughout this guide. If no specific office is referenced, the appropriate TxDOT district office may be contacted for coordination of TxDOT approval.

Reference Guides	
Manual/Guide/Document/Resource	Contact Information
<u>Accelerated Construction Strategies Guideline</u>	Construction Division (512) 416-2528
<u>Construction Contract Administration Manual</u>	Construction Division (512) 416-2428
<u>Letting Manual</u> (Intranet only)	Construction Division (512) 416-2490
<u>FHWA Contract Administration Core Curriculum Manual</u>	Federal Highway Administration
<u>Material Inspection Guide</u> (Intranet only)	Construction Division (512) 506-5808
<u>Material Specifications</u>	Construction Division (512) 506-5808
<u>Test Procedures (Materials)</u>	Construction Division (512) 506-5808
<u>Prevailing Wage Rates (Davis-Bacon)</u>	United States Department of Labor (USDOL) Employment Standards Administration (ESA)
<u>Standard Specifications for Construction of Highways, Streets and Bridges</u>	<u>TxDOT General Services Division</u> (512) 416-4601
<u>Texas Administrative Code</u> (Transportation, TxDOT)	<u>Secretary of State</u> (512) 463-5555
<u>Government Code</u>	<u>Texas Legislative Council</u> (512) 463-1155
<u>Transportation Code</u>	
<u>Statutes (inclusive)</u>	TxDOT Office of General Counsel (512-463-8630
<u>Electronic State Business Daily</u>	<u>Office of the Comptroller</u> (512) 463-4000

Reference Guides	
Manual/Guide/Document/Resource	Contact Information
Texas Department of Transportation, <u>Disadvantaged Business Enterprise Program</u>	<u>Texas Department of Transportation</u> 200 East Riverside Austin, Texas 78704 Phone: (512) 486-5500 FAX: (512) 486-5509

Section 2

LG Contract Components Checklist

The following tables list all applicable federal and state provisions associated with a specific bidding or contracting component with a brief description of the requirements associated with each. Bidding and contracting components are divided into four primary areas: Bid Document Preparation, Letting and Award, Contract Execution and Contract Administration. Some bidding and contracting components will appear in more than one area. More detailed descriptions for each bidding or contracting component are listed in the section entitled LG Contract Components, which follows the federal and state checklists.

A. Bid Document Preparation

◆ Federal and State Requirements

Bid Document Preparation – Federal Requirements			
Requirement	Reference	LG Responsibility (Check if Applicable)	✓
Bonding	23 CFR 635.110	Submit qualifying / licensing procedures to TxDOT for approval. Include approved provisions in bid document.	<input type="checkbox"/>
	Government Code §2253.021 Transportation Code §223.006	Performance bonds required if the contract is in excess of \$100,000. Payment bonds required if the contract is in excess of \$25,000.	<input type="checkbox"/>
Buy America	23 CFR 635.410	Include provisions in bid document	<input type="checkbox"/>
	Transportation Code 223.045	If TxDOT awards the contract and the work is on the state highway system without federal aid, must contain the same preference provisions for steel and steel products that are required under federal law for a federally funded project.	<input type="checkbox"/>
Change Orders	23 CFR 635.120	Develop procedures outlining the conditions under which a change order is allowed and include in bid document.	<input type="checkbox"/>
Child Support Documentation	Family Code §231.006	Include language required by state statute <i>verbatim</i> in bid document.	<input type="checkbox"/>
Claims	23 CFR 635.124	Develop procedures outlining the conditions under which a claim is allowed and include in bid document.	<input type="checkbox"/>
Contract Time	23 CFR 635.121	For federally funded projects on the National Highway System, recipients should have adequate procedures for determining contract time.	<input type="checkbox"/>
Debarment Certification	23 CFR 635.112(g)	Include statement of certification in bid document	<input type="checkbox"/>
Designated Material Sources / Disposal sites	23 CFR 635.407	Develop public interest finding if specific sources are called for in the bid document	<input type="checkbox"/>
Differing Site Conditions	23 CFR 635.109	Ensure that the contract language contained at <u>23 U.S.C. 112(e)</u> is included verbatim in the bid document	<input type="checkbox"/>

Bid Document Preparation – Federal Requirements			
Requirement	Reference	LG Responsibility (Check if Applicable)	✓
Disadvantaged Business Enterprises (DBE), Historically Underutilized Businesses (HUB), and Small Business Enterprises (SBE)	49 CFR 26	The LG must develop their own program (in accordance with 49 CFR 26) or adopt TxDOT’s approved DBE program in coordination with TxDOT and the FHWA Texas Division Office. Establish project goal and include in bid document. Include DBE provisions in bid document. Use DBEs certified under the <u>Texas Unified Certification Program</u> .	
	Texas Administrative Code §9.55	Ensure SBE provision requirements are included in bid document.	
Title VI and Nondiscrimination Program	49 CFR 21 23 CFR 200	Develop a Title VI plan, policy and assurances. Title VI nondiscrimination references must be incorporated into all non-exempt Federal-aid bid proposals, construction contracts/subcontracts.	
Equipment rental rates	FAPG NS 23 CFR 635.120	Develop procedure based on 48 CFR 31 and include in bid document or use TxDOT’s specifications for equipment rental rates.	
FHWA Final Rule on Temporary Traffic Control Devices	23 CFR 630 Subpart K. 23 CFR 630.1008(d)	Adopt TxDOT’s program or submit an alternate for approval. Include bid items for traffic control features and operations, and if used, law enforcement in the bid documents. If law enforcement is used, ensure they have the required training	
Form FHWA 1273	23 CFR 633	Must be included verbatim in all contracts and subcontracts.	
Liquidated Damages	23 CFR 635.127	Develop rates and include in bid document Include contract provision for assessing damages.	
Lobbying Certification	49 CFR 20 23 CFR 635.112(g)	Include <u>certification form</u> in bid document.	
Local hiring Preference	23 CFR 635.117	Bid document may <u>not</u> include any local hiring preferences.	
Materials	23 CFR 630.205 23 CFR 636B	Plans and specifications must describe construction requirements in sufficient detail to facilitate construction. Solicitations for design-build projects describe evaluation factors, which may include particular material quality requirements or design performance criteria (i.e., pavement design life).	
Method of Construction (or Method of bidding)	23 CFR 635.104	Must be by competitive bidding except as supported by public interest finding and approved by TxDOT or for design-build projects, include language in RFP outlining selection criteria based on technical qualifications and cost.	
Non-collusion Statement	23 CFR 635.112	Include certification in bid document.	

Bid Document Preparation – Federal Requirements			
Requirement	Reference	LG Responsibility (Check if Applicable)	✓
Non-discrimination against Persons with Disabilities	Several, see actual section.	Ensure all new and existing transportation facilities are designed and constructed to comply with the provisions of all cited statutes. Request final inspection from TDLR. Implement ADA Program to include.	
Non-resident Bidder and Texas Preference	23 CFR 635.110(b) 23 CFR 635.110(f)(1) Government Code 2252.002	If Federal funds are used, don't use any procedures which prohibit consideration of a bid by a non-resident of the state. Also, for design-build projects, don't use any procedures that give geographical preferences. If no Federal funds are used, don't award a contract to a non-resident bidder unless the non-resident bidder underbids the lowest resident bidder by a reciprocal percentage	
Non-responsive bid	23 CFR 635.112	Include definition of a responsive bid and list of reasons for a bid being considered non-responsive in bid document.	
Non-segregated facilities	23 CFR 633 Subpart A	Include certification in bid document.	
On-the Job Training	23 CFR 230.113(g)	Include TxDOT OJT Special Provision in bid proposals or request for proposal.	
Patented/Proprietary Products	23 CFR 635.411	Develop public interest finding if such materials are specified in bid document.	
Prequalification	23 CFR 635.110	Submit qualifying / licensing procedures to TxDOT for approval. Include approved provisions in bid document.	
Prevailing Minimum Wage	23 USC 113 23 CFR 633A 40 USC 276(a) & (c) 23 CFR 635.309(f) 29 CFR 1,2,3	Include latest Davis-Bacon wage rate is in the contract. Current wages may be obtained at: www.access.gpo.gov/davisbacon/ or include appropriate wage rates in bid document in accordance with state statute if no federal funds are used.	
	Government Code Chapter 2258	Include appropriate wage rates in bid document in accordance with state statute.	
Prison Produced Materials	23 CFR 635.417	Develop contract language to prohibit the use of convict-produced materials and include in bid document.	
Publicly-owned Equipment	23 CFR 635.106	Do not allow in contract.	
Railroad Insurance Provision	23 CFR 646.107	Include requirement for railroad insurance in bid document when work is in the railroad right-of-way.	
Retainage	49 CFR 26.29 Transportation Code 223.010 Government Code Chapter 2251.022	Do not keep retainage unless subcontract work is incrementally accepted.	
Safety: Accident Prevention (OSHA)	23 CFR 635.108	Include provisions in contract to implement OSHA. This is implemented in Section VIII of Form FHWA-1273.	

Bid Document Preparation – Federal Requirements			
Requirement	Reference	LG Responsibility (Check if Applicable)	✓
State or Local Preference	23 CFR 635.409	Do not allow in contract.	
Subcontracting	23 CFR 633 23 CFR 635.116	Contractors are required to include Form FHWA-1273 in all subcontracts. Contractors must perform at least 30% of the work on a contract. Subcontractors are not allowed to perform work until the subcontract has been approved in writing by the contracting entity.	
Termination of Contract	23 CFR 635.125	Develop contract language for termination for cause, convenience, and default and include in bid document.	
Time Extensions	23 CFR 635.121	Include reasons time extensions are allowed in specifications.	
Title VI Compliance	49 CFR Part 21 23 CFR Part 200 TAC Title 43 §9.4	Provide methods of administration to ensure compliance Title VI and remedy any existing compliance problems.	
Trench Safety	Health and Safety Code 756.022 Health and Safety Code 756.023	Include the required provisions in the bid documents.	
Warranties and Warranty Clauses	23 CFR 635.413	Provide TxDOT with procedures to be used and include TxDOT approved procedures in bid document.	

B. Letting and Award

◆ Federal and State Requirements

Letting And Award - Federal Requirements			
Requirement	Reference	LG Responsibility (Check if Applicable)	✓
Addenda	23 CFR 635.112	Send addenda to TxDOT for approval before release. Send addenda to all bidders. Secure TxDOT approval of “minor” addenda prior to contract award.	
Advertising	23 CFR 635.112	Must be after TxDOT authorization. Minimum 3 weeks in advance of bid opening. Place notice on the <u>Electronic State Business Daily</u> a minimum of 21 days prior to bid opening. Advertise the place and time bids are to be opened and read.	

Letting And Award - Federal Requirements			
Requirement	Reference	LG Responsibility (Check if Applicable)	✓
	Government Code §2155.083 Transportation Code §223.002	Cities and counties should consider placing a notice on the Comptroller’s internet site (Electronic State Business Daily) a minimum of 21 days prior to bid opening. Advertise the place and time bids are to be opened and read. Advertisements in newspapers need to be in the county in which the work is to take place, and in two other newspapers (total of three newspapers). The newspaper advertisements must be placed at least two weeks prior to bid opening and run each week. If a newspaper is not published in the county in which the work is to be done, advertisements need to be published in a newspaper published in the county: ♦ Nearest the county seat of the county in which the work is to be done; and In which a newspaper is published.	
Bid Analysis and Contract Award	23 CFR 635.114	Evaluate bids. Determine lowest responsible / responsive bidder. Consider alternate bid items, if used. Establish low bid criteria if add alternates are used.	
	Transportation Code Chapter 223.0041	Award, if made, must be to lowest bidder. Forward bid tabulations and engineers estimate along with award recommendation to TxDOT District Office. Final award cannot be made without TxDOT concurrence (Except for Pass-Through Finance projects.).	
Bid Opening and Tabulation	23 CFR 635.113	Describe procedure to insure bids are opened and publicly read at time and location listed in advertisement.	
	Transportation Code §223.004	All bids must be sealed, filed with the LG and opened in a public meeting. Bidders may not be prohibited from attending the public meeting. All bids must be opened in the presence of the meeting attendees.	
Distribution of Bid Documents	23 CFR 635.112	Minimum 3 weeks prior to date of letting.	
Nonresident bidder	Government Code Chapter 2252.002	In those instances where the low bidder is a nonresident, contact the home state of the bidder to determine if any nonresident bidder preferences are applied. If so, then the same preferences will be reversed to apply in Texas (not applicable to projects involving federal funds).	

Contract Execution

◆ Federal and State Requirements

Contract Execution - Federal Requirements			
Requirement	Reference	LG Responsibility (Check if Applicable)	✓
Bonding	Government Code §2253.021 Transportation Code §223.006	Performance bonds required if the contract is in excess of \$100,000. Payment bonds required if the contract is in excess of \$25,000.	
Child Support Documentation	Family Code §231.006.	Collect names and social security numbers of all individuals owning 25% or more of company awarded the contract.	
Disadvantaged Business Enterprises (DBE), Historically Underutilized Businesses (HUB), and Small Business Enterprises (SBE)	49 CFR 26	Review DBE participation to ensure contract goals are satisfied in accordance with provisions contained in the bid document prior to contract execution.	
	Texas Administrative Code §9.55	Review SBE participation to ensure contract goals are satisfied in accordance with provisions contained in the bid document prior to contract execution.	
Railroad Insurance Provisions	23 CFR 646.107 23 CFR 646.216	Ensure that contractor has submitted the required insurance Ensure that railroad agreement has been executed prior to contract execution.	
Workers' compensation insurance	Labor Code §406.096	Ensure the contractor has filed the required certificate of insurance prior to contract execution.	

Contract Administration

◆ Federal and State Requirements

Contract Administration – Federal Requirements			
Requirement	Reference	LG Responsibility (Check if Applicable)	✓
Americans with Disabilities Act (ADA)	49 CFR 37	Ensure all transportation facilities are in compliance. Guidance for local governments may be obtained at the <u>U. S. Department of Justice</u> and the <u>U. S. Access Board</u> .	
Change orders	23 CFR 635.120	Develop definition of major / non-major change orders. Gain approval of major changes before starting work. Approval of non-major changes can be given later if definition developed. Have documented cost analysis of negotiated prices.	
Claims	23 CFR 635.124	Develop claims procedure as required and administer in accordance with procedures developed.	
Contractor Purchase of Equipment for LG	23 CFR 140 OMB Circular A-87	When an LG must purchase equipment to adequately meet the construction engineering requirements of a Federal-aid project, participation in purchase cannot be direct, but must be amortized.	
Convict (Inmate) Labor	23 CFR 635.117	Ensure that the contractor does not use convict labor.	

Contract Administration – Federal Requirements			
Requirement	Reference	LG Responsibility (Check if Applicable)	✓
Differing Site Conditions	23 CFR 635.109	Should such a condition exist, handle in accordance with provisions contained in contract document.	
Disadvantaged Business Enterprises (DBE), Historically Underutilized Businesses (HUB), and Small Business Enterprises (SBE)	49 CFR 26	Monitor progress / good faith efforts through monthly DBE progress reports submitted by the contractor.	
Environmental Concerns	23 CFR 450 23 CFR 771 23 CFR 777	Environmental commitments are often made during the environmental process. These commitments must be carried forward to the construction plans. Questions or concerns related to environmental issues should be directed to TxDOT's Environmental Affairs Division.	
Equal Employment Opportunity Contract Provisions; Equal Opportunity Clauses	23 CFR 633 41 CFR 60-4.9 Executive Order 11246	Physically incorporate Form FHWA 1273 into all non-exempt Federal-aid bid proposals, construction contracts/subcontracts. Also incorporate the equal opportunity clauses pursuant to Department of Labor regulations and by operation of the order.	
Equipment rental rates	FAPG NS 23 CFR 635.120	Ensure that contractor does not specify mark-ups.	
False Statements	23 CFR 635.119	Furnish Form <u>FHWA-1022</u> and ensure it is posted on the project bulletin board.	
Inspection	23 CFR 635.105	Ensure adequate project supervision and inspection to insure that project is completed in conformance with approved plans and specifications.	
Liquidated damages	23 CFR 635.127	Assess in accordance with specifications included in bid document.	
Non-segregated facilities	23 CFR 633 Subpart A	Contractor obtains certification from subcontractors (contained in Form FHWA-1273, Section III [Nonsegregated Facilities]). Visit project site periodically to verify compliance.	
Payrolls	23 CFR 635.118	Obtain payrolls weekly for all contractors and subcontractors. Review for completeness and certification. Retention for subsequent review by TxDOT or the United States Department of Labor (USDOL).	
Prevailing Minimum Wage	23 USC 113 23 CFR 633 Subpart A	Ensure that the contractor is paying the minimum wages as contained in the contract through review of certified payrolls, employee interviews, etc.	
Progress Payments	23 CFR 635.122 Government Code §2251.021	Should be based on work completed and may include stockpiled material with certain restrictions. Payment must be made to the contractor within 30 days or interest will accrue.	

Contract Administration – Federal Requirements			
Requirement	Reference	LG Responsibility (Check if Applicable)	✓
Quality Assurance (QA) Program	23 CFR Part 637, Subchapter B FHWA Technical Advisory 6120.3	Adopt TxDOT Quality Assurance program or submit a program through TxDOT to FHWA that meets requirements of 23 CFR 637B. For design-bid-build projects where the developer (contractor) is responsible for QA tests, the LG is to employ an independent lab to verify the developer's (contractor's) QA tests in accordance with FHWA Technical Advisory 6120.3. Assure compliance with approved program. Submit letter of certification to TxDOT when construction is complete.	
Retainage	49 CFR 26.29	Do not keep retainage unless subcontract work is incrementally accepted.	
	Transportation Code 223.010 Government Code Chapter 2251.022	If retainage is kept on subcontractors, ensure contractor releases retainage on a subcontractor's work within 10 days after satisfactory completion of all of the subcontractor's work.	
Records	23 CFR 635.123 49 CFR 18.42	Project records must provide adequate assurance that the quantities of completed work are determined accurately and uniformly, and be maintained for a minimum of three (3) years following contract completion and acceptance.	
Safety: Accident Prevention (OSHA)	23 CFR 635.108	Safety provisions are contained in the contract under <u>FHWA-1273</u> . Contact OSHA with any suspected contractor/subcontractor safety violations.	
Salvage Credits	49 CFR 18.36	Follow <u>Texas Facilities Commission rules</u> .	
Specification Compliance	23 CFR 635.105	Follow provisions of agreement with TxDOT. Gain TxDOT approval of specification changes. Accommodate TxDOT inspection. Provide notarized certification of compliance to TxDOT.	
Statements and Payrolls	23 CFR 635.118 23 USC 113 40 USC 3141 29 CFR 3.1 29 CFR 5.6(a)(3) 23 CFR 636.119(c)	Include FHWA-1273 in contract. Adopt TxDOT monitoring program or submit alternate program for TxDOT approval. Monitor compliance according to approved program.	
Subcontracting	23 CFR 633 23 CFR 635.116	Monitor 30% limitation. Check debarred list for subcontractors: https://www.epls.gov/	
Supervision and Staffing	23 CFR 635.105	Outline procedure to insure compliance with plans and specifications. Must have full-time person in charge and responsible.	
Termination of contract	23 CFR 635.125	Administer contract terminations in accordance with contract provisions. Gain TxDOT concurrence before terminating contract.	
Time Extensions	23 CFR 635.121	Obtain TxDOT approval prior to extending time.	

Contract Administration – Federal Requirements			
Requirement	Reference	LG Responsibility (Check if Applicable)	✓
Warranties and Warranty Clauses	23 CFR 635.413	Follow procedures previously approved by TxDOT and included in the bid document.	

Section 3

Local Government (LG) Contract Components

The following is a detailed discussion of the required contract components of LG contracts. These components are listed according to the contract stage (Bid Document Preparation, Letting and Award, Contract Execution, and Contract Administration). Many of these LG contract components appear in more than one of the contract stages. The format for each contract component includes:

- ◆ General
- ◆ Federal Regulations
- ◆ State Regulations
- ◆ Required Practices
- ◆ LG Responsibilities
- ◆ TxDOT District Responsibilities

A. BID DOCUMENT PREPARATION

Bonding

General. A LG may include provisions for bid guaranties or bonds, or warranty bonds in invitations for receipt of bids. Bonding is grouped into five basic classifications; bid bonds, performance bonds, payment bonds, retainage bonds and warranty bonds.

A bid bond, or proposal guaranty, is a bond, certified check, cashier's check or other negotiable instrument which is submitted with the bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

A performance bond is a bond executed in connection with a contract to assure fulfillment of all the contractor's obligations under the contract.

A payment bond is a bond executed in connection with a contract to assure payment, as required by law, to all persons supplying labor and material in the execution of the work provided for in the contract.

A retainage bond is a bond executed in connection with a contract to assure that any monies owed to the owner by the contractor are recoverable (A retainage bond is used instead of actually withholding a percent of the contractor's payments.), and

A warranty Bond is a bond executed in connection with a contract to assure that a warranted item survives the warranty period in the prescribed condition.

Federal Regulations

- a. 23 CFR 635.110 – The procurement or contract documents may not contain criteria that restrict competition.

State Regulations

- a. Local Government Code 252.044 – A municipality must require the successful bidder to execute a good and sufficient bond. The bond must be executed with a surety company authorized to do business in Texas.
- b. Local Government Code 262.032 - A county may require the successful bidder to provide a performance bond. The bid bond must be executed with a surety company authorized to do business in Texas.
- c. Government Code 2252.064 – A contractor is required to execute a performance bond issued by a surety company authorized to do business in this state in an amount determined by the contracting state agency, but not to exceed the contract price. (TxDOT only. N/A to RMA or RTA)
- d. Government Code 2253.021 – A contractor is required to execute a performance bond if the contract is in excess of \$100,000 and a payment bond if the contract is in excess of \$25,000. (State or local government)
- e. Transportation Code 223.205 (Comprehensive Development Agreement by TxDOT) – A private entity is required to provide a performance and payment bond or an alternative form of security in an amount equal to the cost of constructing or maintaining the project.
- f. Transportation Code 370.308 (Comprehensive Development Agreement by RMA) - A private entity is required to provide a performance and payment bond or an alternative form of security in an amount equal to the cost of constructing or maintaining the project or an amount sufficient to ensure performance and protect the beneficiaries.

Required Practices

- a. All Texas governmental entities have a statute that requires contractors to execute bonds. The type of the bond may vary, but all provide that the bond be issued by a surety company authorized to do business in Texas. When state or federal funds participate in the contract, TxDOT wants assurance that their funds are protected. Accordingly, the LG must either adopt TxDOT's bonding process or submit their own process for TxDOT approval if the project has state funds in any amount.
- b. For projects that do not have any state or federal funds, the administrating entity is expected to follow the applicable statutes for their condition. TxDOT will neither review and approve bonding processes nor monitor implementation. This policy applies to projects both on and off the state system.

LG Responsibilities

- a. The LG must get advanced TxDOT approval of procedures to bond contractors.
- b. Include approved procedures in contract documents.

TxDOT District Responsibilities

- a. General
 - i. For projects with state and/or federal funds, review LG bonding process for compliance. Submit questions and non-compliance issues to CST for final determination. If the bond requirements are different than the TxDOT's, submit bond procedures and requirements to CST for approval.
 - ii. There is no monitoring on projects without federal or state funds.
- b. Design-bid-build – For projects with state and/or federal funds, assure bonding provisions are in specifications before sending PS&E to Design Division.
- c. Design-build – For projects with state and/or federal funds, assure that Request for Proposals contains language requiring that the successful proposer provide a performance and payment bond or an alternative form of security.
- d. Concessionaire – For projects with state and/or federal funds, assure that the concessionaire agreement requiring the concessionaire provide a performance and payment bond or an alternative form of security.

Buy America

General. All steel and iron products must be of domestic origin. All manufacturing processes must take place domestically. Current regulations require the use of domestic steel and iron in federally funded highway construction. All foreign steel and iron materials and products are covered by Buy America regulations regardless of the percentage they comprise in a manufactured product or the form they may take. The regulations allow bidders and the LG some latitude through minimum use, waivers and alternate bids.

As previously mentioned, all manufacturing processes must take place domestically. Manufacturing begins with the initial melting and mixing, and continues through the coating stage. Any process that modifies the chemical content, the physical size or shape, or the final finish is considered a manufacturing process. These processes include rolling, extruding, machining, bending, grinding, drilling and coating. Coating includes epoxy coating, galvanizing, painting, or any other coating that protects or enhances the value of the material.

Buy America does not apply to raw materials (iron ore and alloys), scrap, pig iron or processed, pelletized, and reduced iron ore. Insufficient domestic supplies of raw materials caused FHWA to issue a nationwide waiver allowing foreign source supplies of these items. The waiver may be found at the FHWA website (<http://www.fhwa.dot.gov/programadmin/contracts/032495.cfm>) If domestically produced steel billets or iron ingots are shipped overseas for any manufacturing process, and then returned to the U.S., the resulting product does not conform to the Buy America requirements.

The manufacturing process for a steel/iron product is considered complete when the product is ready for use as an item (e.g., fencing, posts, girders, pipe, manhole cover, etc.) or could be incorporated as a component of a more complex product through a further manufacturing process (e.g., the case for a traffic signal head). The final assembly process does not need to

be accomplished domestically so long as the steel/iron component is only installed and no manufacturing process is performed on the steel/iron component.

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 itself is typically an iron/steel product and the welding process substantially alters the rod.

Buy America does not apply to minimal use of iron/steel materials provided that the total cost of all foreign source items used in the project, as delivered to the project site, is less than \$2,500 or one-tenth-of-one-percent (1/10 of 1%) of the contract amount, whichever is greater. If a supplier or fabricator wishes to use a partial fabrication process where domestic and foreign source components are assembled at a domestic location, the "as delivered cost" of the foreign components should include any transportation, assembly and testing costs required to install them in the final product.

For the Buy America requirements to apply, the steel or iron product must be permanently incorporated into the project. Buy America does not apply to temporary steel items (e.g. temporary sheet piling, temporary bridges, steel scaffolding and falsework, etc.) Further, Buy America does not apply to materials that remain in place at the contractor's convenience.

The practice of making otherwise eligible items non-participating for the purpose of circumventing the Buy America requirements is unacceptable and will not be approved. There is no clear-cut rule for resolving an after-the-fact discovery of an inadvertent incorporation of an excess amount of foreign materials into a project. Each situation should be resolved on a case-by-case basis. FHWA retains the authority to resolve all Buy America issues.

Buy America provisions apply to all material incorporated in a Federal-aid project, even if an item is rendered as a "donated material" in accordance with 23 U.S.C. 323 - Donations and Credits. While the LG may receive a credit for donated material, this material must generally comply with Buy America.

Waivers. Approval authority for waivers of Buy America requirements is retained by FHWA for all federally funded projects. The FHWA may grant a waiver of the Buy America requirements for specific projects if the LG can demonstrate either of the following:

- a. Compliance with the requirements is inconsistent with the public interest; or
- b. Insufficient quantities of satisfactory quality domestic products are available.

Materials delivery delay will not be considered as grounds for a waiver. The cost differential between domestic and foreign products is also not grounds for a waiver.

An LG may apply for a waiver of the Buy America provisions if it believes that a waiver is warranted. The LG must submit the waiver request with supporting information through

TxDOT to FHWA sufficiently in advance of need to allow time for proper review and action.

Alternative Bidding Procedures. An alternative bidding procedure may be used to justify the use of foreign steel or iron. Under this procedure, the total project is bid using two alternatives: one which is based on foreign source products, and the second, using domestic products. The use of foreign products may be justified if the lowest total bid based on domestic steel or iron products is 25 percent more than the lowest bid using corresponding foreign steel or iron products. The 25 percent differential applies to the total bid for the entire project, not just the bids for the steel or iron products.

Enforcement. The LG is responsible for enforcing the Buy America provisions. The contract provisions should require the contractor to provide a definitive statement about the origin of all products covered under the Buy America provisions. An alternate procedure is to use step certification for products. Under step certification, each handler of the product (supplier, fabricator, manufacturer, processor, etc.) certifies that his or her step in the process was domestically performed.

Federal Regulations

- a. 23 CFR 635.410 – All iron and steel products must be of domestic origin. Waivers may be approved by FHWA.
- b. 23 CFR 636.119 Design-build – TxDOT must ensure compliance with Buy America regardless of the form of FHWA funding.

State Regulations

- a. Transportation Code 223.045 – A contract awarded by TxDOT on the state highway system without federal aid must contain the same preference provisions for steel and steel products that are required under federal law for a federally funded project. There is no specific requirement for other entities to follow this statute.

Required Practices

- a. Projects with federal funds comply with the Buy America statute.
- b. Concessionaire projects administered by TxDOT must comply with TTC 223.045. TxDOT executing an agreement with a concessionaire is considered the same as TxDOT awarding a contract.

LG Responsibilities

- a. The LG must prepare any requests for waivers and submit the request through TxDOT to FHWA for approval prior to advertisement for receipt of bids.
- b. The LG must include contract provisions that address Buy America.

TxDOT District Responsibilities

- a. The District must assure that Buy America provisions are included in all procurement documents for federally funded projects and that the provisions of

Transportation Code 223.045 are included in concessionaire projects administered by TxDOT.

Change Orders

General. TxDOT must approve all changes to the contract. The construction industry recognizes that it is unrealistic to expect that a construction project could be built without deviating from the project plans. Project designers should be diligent and exercise due care in developing the plans. However, there are many peculiarities (e.g., unforeseen site conditions, utility conflicts, changes in the geology, etc.) that can arise during construction and virtually every project should expect changes. Only the construction engineer is in a position to judge the adequacy of project designs and respond to needed changes.

TxDOT must formally approve proposed major extra work or major changes in the contract plans and provisions before work begins. However, when emergency or unusual conditions justify, the TxDOT may give advance verbal approval and confirm such approval with formal approval, as soon as practical. Non-major changes and non-major extra work also require formal approval. However, such approval may be given retroactively at TxDOT's discretion.

The LG, with TxDOT concurrence, should establish and document specific parameters for non-major change and non-major extra work. The definition of a major change is a change that:

- ◆ reduces the geometric design or structural capacity below project design criteria (any reduction in geometric design which would normally have required a design exception)
- ◆ increases the contract by 25% of the original contract or by \$300,000 whichever is less
- ◆ changes project limits
- ◆ any change in the Traffic Control Plan ([TCP](#)), which reduces the capacity as shown on the plans for the through traffic or the traffic on major cross streets
- ◆ settlement of a dispute or
- ◆ changes the access on a controlled access highway

Early coordination between the LG and TxDOT is essential in the review of change orders. There are four basic components that TxDOT will consider during its review of change orders. These considerations are:

- a. Impact on the Original "Scope of the Work" Typically, if the proposed change falls within the previously authorized scope of work, then Federal and State participation follows.
- b. Eligibility. The FHWA is often asked to approve change orders to correct work because of a design or construction engineering error. Federal-aid participation in errors that may reasonably be expected to occasionally occur (despite the exercise of normal diligence) may be justified, as long as the LG's carelessness, negligence, incompetence or under-staffing were not contributing factors.

- c. Consultant Design Errors. Federal policy regarding participation in consultant design errors is that the consultant should pay for the cost of the new design, but is generally not held responsible for additional construction costs resulting from such errors, as long as the errors are not a result of gross negligence or carelessness. If gross negligence or carelessness is determined, neither State nor Federal funds can be used to pay for needed design or construction.
- d. Basis of Payment. The LG must perform and suitably document the cost analysis for each negotiated work change order. The method and degree of analysis are the LG's decision; however, the process should be acceptable to TxDOT. Force account procedures should only be used as a last resort when agreement cannot be reached on the price of a new work item, or when the extent of the work is unknown or of such character that a price cannot be determined to a reasonable degree of accuracy.
- e. Time Extensions. The change order should also provide the time needed to accomplish the work. Contract time extensions granted by an LG that affect project costs or liquidated damages shall be subject to the concurrence of TxDOT and will be considered in determining the amount of Federal participation.

Federal Regulations

- a. 23 CFR 635.120 Design-bid-build – All changes to projects on the National Highway System must be approved by the FHWA. TxDOT assumes this responsibility for projects administered under the provisions of the TxDOT/FHWA Stewardship/Oversight Agreement for Design and Construction. The bid documents should include language describing administration of change orders.
- b. Design-build – Since design and construction are performed under the same contract it is not anticipated that change orders for plan errors or omissions would be approved. (This is a matter of FHWA policy. See FHWA Contract Administration Core Curriculum Participant's Manual). However, TxDOT may direct changes to a design-build contract after work begins, in which case a change order may be appropriate.

State Regulations

- a. Local Government Code 252.048
 - i. The governing body of the municipality may approve changes.
 - ii. The total contract price may not be increased unless there are available funds.
 - iii. The original contract price may not be increased by more than 25%.
 - iv. The original contract price may not be decreased by more than 25% without the consent of the contractor.
- b. Local Government Code 262.031 – County Commissioner's Court has authority to make changes. The total contract cost may not be increased unless there are available funds.

- c. Local Government Code 271.060 – A governing body may approve change orders if there are available funds.

Required Practices

- a. For all projects on the state system, TxDOT must approve all changes to the types of safety appurtenances, geometric design criteria, and structural design of pavements and structures (including drainage structures) before the LG gives the contractor authority to proceed with the change. This policy applies regardless of whether there are state funds in the project.
- b. Changes on all projects with state or federal funds must be approved by TxDOT. Failure to coordinate with TxDOT before issuing a change order may jeopardize TxDOT participation.
- c. For all projects with state or federal funds, TxDOT approval of changes will be governed by the type and extent of TxDOT funding. Details will be covered in the funding agreement. There are several possible scenarios:
 - i. TxDOT participates in a fixed amount based on a percentage of the estimated contract cost and additional TxDOT funding is not sought.
 - 1. If the contract price as awarded is less than the fixed amount, TxDOT will approve all change orders for participation until their fixed amount is reached. The change orders must be within the scope of the agreement with TxDOT. The LG should not consider additional work just to “use up” the available funds. Subsequent change orders do not require TxDOT approval except as outlined in 3.a.
 - 2. If the contract price is equal to or greater than estimated, change orders do not require TxDOT approval except as outlined in 3.a.
 - ii. TxDOT participates in a percentage of the contract and there is an upper limit to TxDOT financial participation.
 - 1. Change orders will require TxDOT approval for participation until the upper limit is reached. Subsequent change orders do not require TxDOT approval except as outlined in 3.a.
 - iii. TxDOT participates in a percentage of the contract and there is no upper limit to TxDOT financial participation.
 - 1. All change orders will require TxDOT approval for participation.
- d. For projects with state and/or federal funds, TxDOT follows FHWA Texas Division policy guidance for participation. Participation in change orders is NOT permitted for additional costs for delays in purchasing right-of-way, adjusting utilities, and other delays that are not the responsibility of the contractor. Participation is also not permitted for the cost to correct design errors.
- e. Change orders on projects that are either not on the state system or anticipated to be on the state system and do not have state or federal funds do not need to be submitted to TxDOT for approval.
- f. Design-build – Since design and construction are performed under the same contract it is not anticipated that change orders for plan errors or omissions would be approved. However, TxDOT may direct changes to a design-build contract after work begins, in which case a change order may be appropriate.

LG Responsibilities

- a. TxDOT retains approval authority over all change orders and time extensions. This authority also determines Federal participation limits.
- b. The LG must submit changes for TxDOT approval in accordance with “Required Practices”.

TxDOT District Responsibilities

- a. For projects with state or federal funds, the District must approve all change orders in accordance with the above policy statements. Submit questions to CST for interpretation.
- b. For all projects on the state highway system, the District must approve all changes to the types of safety appurtenances, geometric design criteria, and structural design of pavements and structures (including drainage structures) regardless of source of funds.
- c. There is no monitoring on projects without state or federal funds off the state system.

Child Support Documentation

General. In accordance with Family Code §231.006, a contractor's bid for a contract must include the name and social security number of the individual or sole proprietor and each partner, shareholder, or owner with an ownership interest of at least 25 percent of the business entity submitting the bid. The following language must be included in the bid document verbatim:

"Under Section 231.006, Family Code, the vendor or applicant certifies that the individual or business entity named in this contract, bid, or application is not ineligible to receive the specified grant, loan, or payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate."

At the time of contract execution and award, the LG must collect and maintain a list of all the names and social security numbers of the individuals, partners, shareholders or owners with an ownership interest of at least 25 percent for the successful bidder. If the LG determines that an individual or business entity holding a contract is ineligible to receive payment due to ineligibility, the contract may be terminated. In addition if the required certification listed above is shown to be false, the contractor is liable to the LG for attorney's fees, the costs necessary to complete the contract, including the cost of advertising and awarding a second contract, and any other damages provided by law or contract.

Federal Regulation

- a. No comparable statute

State Regulation

- b. Family Code 231.006 – Applies to recipients of state funds and state contracts.
 - i. Requires inclusion of a verbatim certification in bid documents.

- ii. Requires bidders to include the name and social security number of individuals with at least a 25% ownership.
- iii. Requires collection of the names and social security numbers of certain individuals with the successful bidder.

Required Practices

- a. All projects with federal and state funds must meet statutory requirements.

LG Responsibilities

- a. The LG must include the certification required by Family Code §231.006 in all bid documents. In addition, the LG must collect and maintain the name and social security number of all affected contractor owners of the successful bidder as required by Family Code §231.006.

TxDOT District Responsibilities

- a. For projects with state or federal funds, the District must assure that the certification is included in proposals and requests for proposals, as appropriate.
- b. There is no monitoring on projects without state or federal funds.

Claims

A claim is a continued demand for payment by a contractor if it has been previously denied under the LG's normal procedures for change approval. Both the LG and the contractor share in the responsibility for claims. Many claims could be avoided if reviews of the contract documents were more thorough, both in preparation of the project and in bidding the project. Problems occur most often when an LG rushes a project with incomplete or inadequate plans through the letting process.

If the LG is diligent and pursues resolution of a claim through the courts or arbitration boards (including appeals), consulting with and keeping TxDOT fully informed throughout the process, Federal funds may participate in the cost of settlement.

Federal funds can participate in interest associated with a claim if three conditions are met:

- ◆ The interest must be allowable by State statute or specification¹,
- ◆ The interest is not the result of delays caused by dilatory action of the LG, State or contractor, and
- ◆ The interest rate does not exceed the rate provided for by statute or specification.

Contractors' attorney fees are not eligible for Federal participation. The basis for this determination is that there is no statutory authority for the payment of attorney fees. However, the LG's administrative costs, including attorney fees related to the defense of

¹ Texas Government Code §2251.042 allows payment of interest involving a claim if the claim is resolved in favor of the contractor.

claims, are reimbursable. Such costs are reimbursable at the same participation rate as the related construction project.

The FHWA does not participate in anticipated profit because this is in the realm of the contractor's risk.

Government Code Chapter 2001 Subchapter C provides that each party involved in a claim must be afforded an opportunity for a hearing. The LG must provide the contractor with a written notice of a scheduled hearing involving a claim within a reasonable time, but not less than 10 days from the scheduled hearing date. Such written notice must include:

- ◆ A statement of the time, place, and nature of the hearing;
- ◆ A statement of the legal authority and jurisdiction under which the hearing is to be held;
- ◆ A reference to the particular sections of the statutes and rules involved; and
- ◆ A short, plain statement of the matters asserted.

Informal disposition of a claim may be made by stipulation, agreed settlement, consent order, or default. Hearings, if conducted, must be administered by the State Office of Administrative Hearings in conjunction with Government Code §2001.058.

Federal Regulations

- a. 23 CFR 635.124 Design-bid-build – Federal participation is determined on a case-by-case basis to the extent the claim is supported by the facts and is founded in the contract.
- b. Design-build – For design-build projects the likelihood of a claim is greatly reduced since the designer is also the constructor. (This is a matter of FHWA policy. See FHWA Contract Administration Core Curriculum Participant's Manual)

State Regulations

- a. Government Code Chapter 2001, Subchapter C – Procedures for contested cases. To be followed if the procedures in Transportation Code 201 do not result in satisfactory resolution. Applies to state agencies but not other entities.
- b. Transportation Code 201.112(a) – Allows Commission to establish rules for informal resolution of claims.
- c. Transportation Code 201.112(b) – Allows a person to file for formal resolution under Government Code Chapter 2001 if they are dissatisfied with the informal process.

Required Practices

- a. Claims on projects with federal or state funds must be approved by TxDOT to assure TxDOT participation. Failure to coordinate with TxDOT before settling the claim will jeopardize TxDOT participation. TxDOT participation in claims will be governed by the type and extent of TxDOT funding. Details will be covered in the funding agreement. There are several possible scenarios:

- i. TxDOT participates in a fixed amount based on a percentage of the estimated contract cost and additional TxDOT funding is not sought.
 1. If the contract price is less than estimated, TxDOT may approve claims for participation until their fixed amount is reached. The claim must be within the scope of the agreement with TxDOT. Subsequent claims do not require TxDOT approval since TxDOT participation limits have been reached.
 2. If the contract price is equal to or greater than estimated, claims do not require TxDOT approval.
- ii. TxDOT participates in a percentage of the contract and there is an upper limit to TxDOT financial participation.
 1. TxDOT may approve claims for participation until the upper limit is reached. Subsequent claims do not require TxDOT since TxDOT participation limits have been reached.
- iii. TxDOT participates in a percentage of the contract and there is no upper limit to TxDOT financial participation.
 1. TxDOT must approve all claims for participation.
- b. For projects with state and/or federal funds, TxDOT follows FHWA Texas Division policy guidance for participation. Participation in claims is NOT permitted for additional costs for delays in purchasing right-of-way or adjusting utilities. Participation is also not permitted for the cost to correct design errors. Further, claims must be supported by the facts, must have a basis in the contract, and be settled under applicable statutes.
- c. Claims on projects that do not have state or federal funds do not need to be submitted to TxDOT for approval.
- d. Design-build – For design-build projects the likelihood of a claim is greatly reduced since the designer is also the constructor.

LG Responsibilities

- a. Include language in the contract outlining conditions for which a claim may be filed.
- b. The LG must keep TxDOT involved in the process of settling claims if they anticipate requesting State or Federal participation in settlement costs.
- c. Any hearing associated with a contract claim must be conducted in accordance with Government Code Chapter 2001 Subchapter C (see TxDOT procedures).

TxDOT District Responsibilities

- a. For projects with state or federal funds, review the procurement documents for inclusion of conditions under which a claim may be filed.
- b. For projects with state or federal funds, work with the LG following notification of a pending claim to assure that the LG understands the requirements for maximum TxDOT participation.
- c. For projects with state or federal funds, review the claim and transmit with a recommendation for participation to CST.
- d. There is no monitoring on projects without state or federal funds.

Contract Time

General. The term of the contract is an important part of every construction project. Too little contract time may result in higher construction costs, while too much contract time may encourage inefficiencies, increased user costs, and potentially delays and inconvenience to the public.

The LG must have an acceptable procedure for determining contract time. This procedure should include a comparison of the actual construction time against the estimated completion time for several projects to ascertain whether their procedures result in appropriate contract times. The goal should be to strive for the least practical number and duration of traffic interruptions during highway construction.

Federal Regulation

- a. 23 CFR 635.121 – For federally funded projects on the National Highway System, recipients should have adequate procedures for determining contract time.

State Regulation

- a. No comparable state statutes specifically address contract time determination. Each entity has broad authority to determine procedures to deliver projects, including methods to determine contract time.

Required Practices

- a. Where required by federal regulations, the LG should gain TxDOT concurrence that their contract time determination process is adequate. This should occur prior to submission of the PS&E for TxDOT approval.
- b. For all other projects, the LG may follow local practice.

LG Responsibilities

- a. Gain TxDOT concurrence in time determination process.
- b. For design-build this is normally one factor in considering proposals.

TxDOT District Responsibilities

- a. For federally funded, design-bid-build projects on the National Highway System, review the LG's time determination process and concur that the process is adequate. If needed, request assistance from DES.
- b. There is no monitoring on all other projects.

Debarment Certification

General. Contractors are not allowed to participate in federally funded projects if they are suspended or debarred. The prime contractor is required to certify as to their current

eligibility status. Certification is also required of all prospective participants in lower tier transactions. This includes subcontractors, material suppliers, vendors, etc.

Each participant must certify:

"...that it and its principals are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency and that they have not been convicted or had civil judgment rendered within the past three years for certain types of offenses."

The General Services Administration (GSA) has the responsibility to compile, maintain, and distribute the list of suspended and debarred parties that are excluded from all Federal procurement and non-procurement programs. The GSA list is distributed to all FHWA field offices and is provided to TxDOT to assure that suspended or debarred parties are not awarded federal-aid highway projects. GSA's list of debarred firms (Excluded Parties List) may be accessed at <https://www.epls.gov/>.

Federal Regulation

- a. 49 CFR 29 – Contractors and subcontractors that are debarred by any federal agency are prohibited from participating in federally funded projects.

State Regulation

- a. Texas Administrative Code, Title 43 §9.106 – Provides for contractor sanctions by the Executive Director of TxDOT. May include contractors that are debarred by federal agencies. A current list of debarred contractors is listed on the TxDOT web site (pending update).
- b. Government Code 2155.077 – Allows the Texas Building and Procurement Commission to bar a vendor from participating in state contracts.

Required Practices

- a. For all projects, the LG must check the current list of debarred contractors and suppliers at both the federal Excluded Parties List System and the TxDOT web sites before awarding any contracts or approving any subcontracts.
- b. Bid documents for federally funded projects must include the verbatim certification required by the regulations.

LG Responsibilities

- a. The LG should insure that plans and specifications are not furnished to federal suspended or debarred bidders or TxDOT debarred bidders.
- b. The LG must include the certification in all bid documents for projects with federal funds.
- c. The LG must check for the contractor's certification as part of the bid opening process.
- d. Check proposed subcontractors against federal suspended or debarred and TxDOT debarred lists.

TxDOT District Responsibilities

- a. For design-bid-build and design-build projects with state or federal funds:
 - i. Check the bid proposal or the request for proposals to assure the certification is part of the package.
 - ii. Verify that the bidder to which the contract is to be awarded is not on the debarred bidders list.
 - iii. Spot check subcontractors on the project against the debarred bidders list. Submit questions and non-compliance issues to CST for action.
- b. There is no monitoring on projects without state or federal funds.

Designated Material Sources / Disposal Sites

General. The contractor must furnish all materials to be incorporated into the work. However, the LG can either furnish materials or require the contractor to use designated sources of materials under certain conditions. FHWA policy requires that the contractor must furnish all materials to be incorporated in the work, and 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 LG, with TxDOT's concurrence, that it is in the public interest to require the contractor to use materials furnished by the LG or from sources designated by the LG. The exception policy can best be understood by separating LG-furnished materials into the categories of manufactured materials and local natural materials.

Manufactured Materials. When the use of LG-furnished manufactured materials is approved based on a public interest finding, such use must be made mandatory. The optional use of LG-furnished manufactured materials is in violation of Federal policy prohibiting public agencies from competing with private firms. Manufactured materials to be furnished by the LG must be acquired through competitive bidding, unless there is a public interest finding for another method with which TxDOT has concurred.

Local Natural Materials. When the LG owns or controls a local natural materials source, such as a borrow pit or a stockpile of salvaged pavement material, the materials may be designated for either optional or mandatory use; however, mandatory use will require a public interest finding and TxDOT's approval. 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 LG, with the concurrence of TxDOT, 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 public interest finding.

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

Mandatory use of either requires that the LG develop a public interest finding and gains TxDOT's concurrence prior to advertising for receipt of bids. Mandatory use of either may be based on environmental considerations, where the environment will be substantially enhanced without excessive additional cost. Where the use is based on environmental considerations, the discussion in the environmental document may be used as the basis for the public interest finding.

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

Federal Regulation

- a. 23 CFR 635.407 – Use of materials made available by a public agency
 - i. Contractors must be permitted to select sources of materials. One exception is when there is a determination that it is in the public interest to require use of material from designated source.
 - ii. Material that meets specification requirements may be made an optional source without a public interest determination.
 - iii. Except for natural materials, designated materials must be acquired by competitive bidding as a condition of federal participation. Other procurement methods may be approved if there is an approved public interest determination.

State Regulation

- a. No comparable statute.

Required Practices

- a. For all federally funded projects and all projects on the state highway system, TxDOT approves all specifications for materials to be incorporated in the project regardless of funding source. This approval includes any mandatory materials sources and required disposal sites.
- b. For projects off the state highway system that do not have any federal or state funds, the LG may follow their own practices for material quality and sources.

LG Responsibilities

- a. If the LG wants to furnish material to a contractor, designate a source of material for the contractor, or require the contractor to use designated disposal sites, the LG must make a formal finding that it is in the public's interest to do so.
- b. The public interest determination must have TxDOT concurrence.
- c. Submit materials specifications to TxDOT for approval, including any designated source

TxDOT District Responsibilities

- a. For federally funded projects, transmit the LG's public interest request to DES for formal action.

- b. For projects on the state highway system, specifications will be submitted to DES for approval as part of the project development process. DES will review and approve all materials specifications.
- c. There is no monitoring on projects off the state highway system without state or federal funds.

Differing Site Conditions

General. In accordance with federal regulations, differing site or changed condition clauses must be included verbatim in the contract. Due to the nature of highway construction and the conditions under which work is performed, designers cannot always accurately determine and describe the conditions existing at project sites. Consequently, actual conditions encountered during construction may differ from those indicated in the contract documents, resulting in a change in construction costs. Also, situations may develop during construction that require the contracting agency to order the contractor to slow down or stop construction through no fault of the contractor. These slow downs or stoppages in the work may cause a change in construction costs.

There also may be situations encountered during construction that require the contracting agency to make alterations to the design. In addition to changing the amount of contract work, such alterations could significantly affect the contractor's production costs.

In theory, the use of the standardized changed condition clause takes the risk of differing subsurface conditions out of the bidding process. Bidders need not consider the cost and difficulty of taking their own borings and compare that with the risk of a differing site condition. They need not consider the amount of a contingency to be included in the bid. Theoretically, with a standardized changed condition clause, contractors will receive no windfalls nor suffer a disaster from a changed condition. The owner will benefit from more competitive bidding as the bidders will not inflate costs for risks that may not happen. And finally, the use of the standardized changed condition clause is meant to provide uniformity across state lines.

The standardized changed condition clauses in 23 U.S.C. 112(e) must be included verbatim in all contracts. The regulation requires the use of three different clauses:

1. Differing Site Conditions Clause - This clause provides for the adjustment of the contract terms if the contractor encounters:
 - Subsurface or latent physical conditions that differ materially from those indicated in the contract, or
 - Unknown physical conditions of an unusual nature that differ materially from those ordinarily encountered and generally recognized as inherent to the work.
2. Suspensions of Work Ordered by the Engineer [LG] - This clause provides for the adjustment of the contract terms if the performance of all or a portion of the work is suspended or delayed by the Engineer [LG], in writing, for an unreasonable period of time (not originally anticipated, customary, or inherent to the construction industry). The contractor is required to submit a request for adjustment, in writing, to the Engineer

[LG] within seven calendar days of receipt of the notice to resume work. Recovery of profit on costs resulting from suspensions of work is not allowed.

To qualify for an adjustment, suspensions must be for unreasonable periods and do not include brief, customary suspensions for reasons inherent to highway construction (i.e., material sampling and testing; approval of shop drawings, material sources, etc.; and other reasonable and customary suspensions necessary for the supervision of construction by the contracting agency). In addition, an adjustment under this clause is not allowed if the work is suspended for other reasons or if an adjustment is provided for, or excluded, under other terms or conditions of the contract.

3. **Material Changes in the Scope of the Work** - This clause provides for the adjustment of the contract terms if the Engineer [LG] orders, in writing, an alteration in the work or in the quantities that significantly change the character of work. The term "significant change" shall be construed to apply only to the following circumstances:
 - The altered character of the work differs materially from that of the original contract, or
 - A major item of work, as defined in the contract, is increased or decreased by more than 25 percent of the original contract quantity (adjustments shall apply only to that portion in excess of 125 percent of original contract quantity, or in case of a decrease, to the actual quantity performed).

This clause provides for adjustments resulting from formal change orders by the Engineer, in writing, to the extent that the impacted work is part of the contract. Both parties may initiate an adjustment and both must be in agreement before the work is performed. As with the suspension of work provision, this clause does not preclude the recognition of constructive suspensions or delays.

Federal Regulations

- a. 23 CFR 635.109 Design-bid-build
 - i. Requires specific language be incorporated verbatim into all construction contracts. The language covers: 1) differing site conditions, 2) suspensions of work ordered by the engineer, and 3) significant changes in the character of work. There are provisions for alternate language.
 - ii. A non-regulatory supplement to 23 CFR 635 Subpart A advises that the "differing site condition" clause must be made part of the contract unless prohibited by state law.
- b. 23 CFR 635.109(c) Design-build – Administering agencies are strongly encouraged to use “suspensions of work ordered by the engineer” clauses and may consider “differing site conditions” and “significant changes in the character of work” clauses appropriate for the risks and responsibilities shared with the private entity.

State Regulations

- a. Local Government Code 271.195.(1)(B) – On design-build projects the local government assumes the risks and costs associated with unknown or differing site

conditions unless otherwise provided for in the request for proposals and final contract.

Required Practices

- a. For all projects with federal or state funds, the LG will be required to follow the same procedures as for federally funded projects. This language minimizes risk to both the contractor and the administrator of the contract.
- b. For projects with no state or federal funds, use of this language is not mandatory.

LG Responsibility

- a. For design-bid-build projects, ensure that the contract language contained in CFR 635.109 is included verbatim in the bid document.
- b. For design-build projects, consider using applicable clauses appropriate to relative risk of all parties.

TxDOT District Responsibilities

- a. For state and federally funded design-bid-build projects, assure that the verbatim language is in the bid proposal.
- b. There is no monitoring on all other projects.

Disadvantaged Business Enterprises (DBE), Historically Underutilized Businesses (HUB), and Small Business Enterprises (SBE)

General. The DBE Program is the U. S. government's response to diversity in the highway construction industry.

All Federal-aid projects are subject to the DBE requirements. An LG has the option of operating under TxDOT's DBE program or submitting its own program through TxDOT and FHWA to the US Department of Transportation (USDOT) for approval. USDOT must approve each State's DBE program and its annual goals to ensure compliance with all DBE Program requirements. US DOT approval of an LG's DBE program is required before an LG can advertise a project for receipt of bids. LGs are encouraged to contact TxDOT's Office of Civil Rights (OCR) at (512) 486-5510 or the FHWA's Texas Division office at (512) 536-5900 to discuss these options. Guidance may also be found at the U. S. Department of Transportation (USDOT) Office of Small and Disadvantaged Business Utilization Office ([OSDBU](#)).

By regulatory definition, a DBE is

"... a for-profit small business concern" (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it".

The DBE participation requirements in Federal-aid highway contracts are contract provisions like any other contract provisions and should be administered as such. DBE administrative issues that will require review and attention may arise during a project. These issues will require the LG to have an adequate background of the DBE Program. The LG should solicit the advice of TxDOT in resolving these issues as needed.

If the LG decides to use their own program, the DBE Specifications and contract provisions must include the following:

- ◆ DBE Program Policy
- ◆ Definitions
- ◆ DBE Contract Goal
- ◆ Eligibility Criteria
- ◆ Good Faith Effort Provisions
- ◆ DBE Obligations
- ◆ Sanctions on Failure to Comply with DBE Requirements
- ◆ Determination Procedures on Counting DBE participation towards the DBE Goal
- ◆ Award Documentation and Procedures
- ◆ Post Award Compliance Provisions
- ◆ Records and Reporting Requirements

The US DOT on February 2, 1999 published in the *Federal Register* (Federal Register / Vol. 64, No. 21 / Tuesday) its final rule, 49 CFR Part 26, entitled "*Participation by Disadvantaged Business Enterprises in Department of Transportation Programs*". This final rule became effective on March 4, 1999. This rule implements a requirement that all Federal agencies "narrowly tailor" their affirmative action programs to "meet a compelling Government interest". The final rule contains a number of significant changes to the DBE program. Some of the more significant changes are described below.

- ◆ The rule changed the way recipients (any contracting agency receiving funds under the USDOT) set and attain DBE goals. Transportation agencies (including LGs) must set their goals based on local evidence of the actual availability of qualified DBEs.
- ◆ LGs must provide for a public participation process in establishing their overall goals. Once goals are established, LGs must maximize race-neutral methods, such as technical assistance and outreach, to meet as much of their overall goals as possible, the remainder of the overall goal will be met through race-conscious measures such as contract goals. There is no requirement that contract goals be applied to all contracts.
- ◆ To participate in the DBE program a businesses must not exceed small business size standards or individuals must not exceed \$750,000 personal net worth cap. To be seen as a small business, a firm must meet SBA size criteria as defined by current size standard(s) found in 13 CFR part 121 AND average annual gross receipts as defined by SBE regulations (see 13 CFR 121.402)

- ◆ One-stop shopping certification programs are to be established in Texas so that businesses may obtain certification as a DBE to apply for contracts in highway, transit and airport agencies. The [Texas Unified Certification Program \(TUCP\)](#) came into effect in October 2002. The Texas Unified Certification Program is a certification process for the Federal Disadvantaged Business Enterprise (DBE) Programs in Texas. A business' DBE certification is valid at any Texas entity that receives U.S. Department of Transportation (DOT) funds and has a DBE Program.
- ◆ Contractors will not be penalized if they fail to meet contract DBE goals as long as they "make good faith efforts to meet a DBE contract goal"
- ◆ Contractors who fail to meet DBE goals and fail to make a good faith effort may be penalized. The penalty may consist of
 - the termination of the contract,
 - the deduction of the dollar amount of DBE goal not accomplished,
 - or such other remedy or remedies as deemed appropriate.

Federal Regulations

- a. 49 CFR Part 26 Design-bid-build – The DBE program may not restrict competition or provide in-state or other local preference.
- b. 23 CFR 635.107(b) Design-build – The provisions of 49 CFR Part 26 and the receiving agency's approved DBE plan applies. If DBE goals are set, DBE commitments above the goal must not be used as a proposal evaluation factor in determining the successful proposer.

State Regulations

- a. Texas Administrative Code, Chapter 43, §9.54 – Requires that TxDOT establish overall HUB participation goals and assign individual project goals to achieve overall goal. Note that the Comptroller of Public Accounts (CPA) certifies HUBs and provides that the CPA recognize some TxDOT-certified DBEs as HUBs. Requires that provisions addressing HUBs be included in TxDOT contracts funded entirely with state and local funds. Does not apply to contracts with federal funds.
- b. Texas Administrative Code, Chapter 43, §9.55 - Requires that TxDOT establish annual SBE contracting goals. Notes that the TxDOT maintains an SBE directory and provides that TxDOT-certified DBEs and HUBs also meet SBE requirements without having to apply for SBE eligibility. Allows provisions addressing SBEs be included in TxDOT contracts funded entirely with state and local funds. The SBE requirements do not apply to contracts with federal funds.
- c. Texas Government Code 2161 – Historically Underutilized Business (HUB) program applicable to state agencies and institutions of higher learning. Includes certification of HUBs and maintenance of a directory of certified HUBs. Does not apply to local or other entities.
- d. Texas Government Code 2252 Subchapter E – Defines general requirements for a contractor (including a subcontractor) claiming status as a Disadvantaged or Historically Underutilized Business. Applies to all agencies and entities. No

language concerning requirements for agencies to consider DBEs or HUBs in contract administration.

- e. Texas Transportation Code 201.702 – Requires that TxDOT set goals for awarding state or federally funded contracts to disadvantaged businesses. The goals must approximate the federal requirement for federal funds.
- f. Texas Transportation Code 366.184 – Requires that Regional Tollway Authorities set goals for disadvantaged businesses consistent with general law.
- g. Texas Transportation Code 370.183 – Requires that Regional Mobility Authorities set goals for disadvantaged businesses consistent with general law.

Required Practices

- a. For projects with federal funds, if the LG does not adopt TxDOT's program, the LG must submit a DBE program through TxDOT to FHWA for submission to the USDOT for approval. The proposed program will cover issues such as goal setting, submission of commitments, counting DBE participation, commercially useful function, and final report submission. The LGs that adopt TxDOT's program must use the most current version of TxDOT DBE special provisions for federally funded projects.
- b. For projects with state funds, the LG will be required to follow the provisions of Transportation Code 201.701 and Texas Administrative Code, Chapter 43, §9.54 (HUB) and §9.55 (SBE). The LG must submit project goals to TxDOT for approval before advertising for receipt of bids. Contractors must select DBEs, HUBs, and SBEs from TxDOT-approved or maintained sources. The LG will report final accomplishments to TxDOT for credit to overall program goals.
- c. For projects with no state or federal funds, the LG must follow statutes for their particular program. LGs are encouraged to use DBEs, HUBs, and SBEs from TxDOT-approved or maintained sources. The LG must also report final accomplishments to TxDOT for credit to overall project goals.

LG Responsibilities

- a. The LG must develop their own program (in accordance with 49 CFR Part 26) and submit through TxDOT to FHWA and USDOT for approval. As an alternate, the LG may adopt TxDOT's approved DBE program.
- b. Establish project goal and include in bid document.
- c. Include DBE provisions in bid document.
- d. Ensure DBEs are certified under the Texas Unified Certification Program.
- e. Review DBE participation to ensure contract goals are satisfied in accordance with provisions in the bid document prior to contract award.
- f. Monitor progress during construction to assure goal is met or good faith efforts are made.
- g. For design-build projects, in addition to the above, do not consider commitments in excess of the specified goal in the evaluation of proposals.

TxDOT District Responsibilities

- a. DBE accomplishments on all projects will be credited to the TxDOT overall DBE goal. Submit final DBE accomplishment reports to OCR.

- b. For projects with federal funds, submit the LG's DBE Program to OCR for further submission to FHWA for USDOT approval.
- c. For projects with state or federal funds, the LG has primary monitoring responsibility, but the District will spot check compliance during periodic visits to the project. Submit questions and non-compliance issues to OCR for assistance.
- d. For projects with state or federal funds, assure that the applicable special provisions are included in procurement documents.
- e. Spot check the contractor's progress and commercially useful function during periodic inspections of projects with federal funds. Spot checks are not required on state funded projects.
- f. There is no additional monitoring on projects without state or federal funds other than reporting final DBE accomplishments to OCR.

Equal Employment Opportunity

General. The Texas Department of Transportation, as a contracting agency, has a responsibility to ensure that all Federal-aid contractors, subcontractors, vendors, and material suppliers do not discriminate in employment and contracting practices based on race, color, religion (in the context of employment), sex, national origin, age or disability.

As a recipient of federal funds, the department has the responsibility to ensure that required equal opportunity requirements are included in direct federal and federal-aid contracts and that contractors are in compliance with those requirements under the department's authority (The department has no authority under Executive Order 11246 to ensure compliance with or enforce Office of Federal Contract Compliance Programs (OFCCP) requirements).

A contractor's minimum equal opportunity requirements are set forth in the Required Contract Provisions Federal-aid Construction Contracts (FHWA-1273) and are applicable to contractors and subcontractors who hold Federal or Federal-aid contracts of \$10,000 or more. This is a standard document containing required federal EEO contract provisions and proposal notices physically required to be incorporated in each direct federal and federal-aid highway construction contract and subcontract (at any tier) of \$10,000 or more.

The department imposes specific nondiscrimination and affirmative action obligations on federal-aid highway contractors relating to their employment practices under the following authorities:

Federal Regulations

- a. Title VI of the Civil Rights Act of 1964
- b. The Civil Rights Restoration Act of 1987
- c. The Age Discrimination Act of 1973
- d. The Rehabilitation Act of 1973
- e. 23 U.S.C. Section 140-324

- f. 49 CFR Part 21: Nondiscrimination in Federally-Assisted Programs of the Department of Transportation
- g. 23 CFR Part 200: Title VI Program and Related Statutes – Implementation and Review Procedures
- h. 23 CFR Part 230: FHWA External Program Regulations
- i. 23 CFR Section 1.9 and 1.36
- j. 23 CFR Section 635.117(d) and (e): Labor and Employment
- k. Form FHWA – 1273
- l. FHWA Order 4710.8: Clarification of FHWA and State Responsibilities under Executive Order 11246 and Department of Labor Regulations in 41 CFR Chapter 60

State Regulations

- a. Texas Administrative Code, Title 43 §9.4 – Requires TxDOT to monitor recipients of federal funds for Title VI activities.
- b. Texas Labor Code, Title 2, Subtitle A, Chapter 21, Subchapter B – Prohibits employer discrimination on the basis of race, religion, sex, color, national origin, age or disability.

Required Practices

- a. To effectuate a sound and effective Equal Opportunity Contractor Compliance Program on Federal and Federal-aid projects, there must be cooperation, coordination and communication between the major partners: the Federal Highway Administration (FHWA), Texas Department of Transportation (TxDOT), the Local Government (LG), and the contractor(s). Each partner has a critical role to play and responsibility to ensure that Federal Equal Employment Opportunity, nondiscrimination, and Equal Opportunity objectives are achieved.
- b. The contractor has a fundamental role and responsibility to take all reasonable and necessary steps to ensure that the equal opportunity terms and conditions of its contract are fully met. This includes but is not limited to its employment policy and its selection and retention of subcontractors, material suppliers and vendors void of discrimination. The contractor is responsible for having in place and implementing an equal opportunity policy that ensures equal access to employment, training, and business opportunities to minorities and women.
- c. The contractor is required to fully cooperate with the LG, TxDOT and the FHWA in meeting the EEO requirements of the Federal and federally assisted contracts including providing ready access to all files and records and submitting all required and requested reports to assist them in determining compliance.
- d. All entities will ensure compliance with applicable provisions of the Civil Rights Act. For guidance in compliance matters, TxDOT's Office of Civil Rights may be contacted at 1-866-480-2518.

LG Responsibilities

- a. Adopt TxDOT's EEO program or submit alternate program proposal for Federal Highway Administration approval.
- b. Include federal EEO requirements language in bid document.
- c. In accordance with 23 CFR Part 230 and Form FHWA-1273, the LG must ensure that all Federal-aid construction contractors and subcontractors with contracts of \$10,000 or more do not discriminate and will take affirmative action to assure equal employment opportunity for all persons attendant to the contract. To assure nondiscrimination, the LG must do the following:
 - i. Ensure all contractors and subcontractors accept the following as their operating EEO policy verbatim:

"It is the policy of the Company to assure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, color or national origin, age or disability. Such action shall include: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, pre-apprenticeship, and/or on-the-job training."
 - ii. Ensure that all contractors and subcontractors designate and identify an EEO Officer.
 - iii. Ensure that all contractor and subcontractor personnel authorized to hire, supervise, promote and discharge employees are fully cognizant of, and will implement, the EEO policy.
 - iv. Ensure that all contractors and subcontractors, when recruiting for employees, include in all advertisements for employees the notation: "An Equal-Opportunity-Employer". Contractors and subcontractors must also implement additional recruitment efforts such as utilizing public and private employee-referral services and employee referrals.
- d. Monitor contractor compliance with program
- e. Ensure that the contractor displays the following federal posters and notices on project-site bulletin boards. The government referral line for questions regarding required posters is 1-800-688-9889.
 - i. Equal Opportunity is the Law required by 41 CFR 60-1.4(b)(1)
 - ii. EEOC-P/E-S (Spanish Version) or call 1-800-669-3362
 - iii. Contractor's EEO Policy statement required by Form FHWA-1273-EEO officer name and phone number.
- f. Ensure that all contractors and subcontractors submit annually, FHWA Form-1391 reflecting the racial and gender utilization of their workforce on their federal-aid highway construction projects. The report is a summary of laborers on their last payroll period before the end of July. The form is submitted each August for projects under construction during the month of July. The LG keeps copies of

the forms in its respective project file. The LG forwards the reports to the appropriate TxDOT district office.

- g. Provide technical assistance and training to contractor. This can consist of meeting with individual contractors to provide “one-on-one” assistance on developing an effective EO/EEO program or more specific areas such as recruiting and hiring minorities and women.

TxDOT District Responsibilities

- a. Ensure the LG includes approved EEO language in bid proposals or request for proposals.
- b. Distribute the Form 1391 to the LG for them to give to their contractors. The contractor must submit the completed original Form 1391 to the TxDOT district office by the established deadline. The district office will then submit the original Form 1391 to the TxDOT Office of Civil Rights. The LGs, contractors and district offices are required to maintain a copy of the Form 1391s for a period of three years past the project completion date.
- c. The Form 1391 data is to be compiled into the Form 1392 by the district office and the originals submitted to the Office of Civil Rights, Contract Compliance Section (OCR-CSS). The Form 1392 will be due as indicated in the memorandum sent to each district by the director of the Office of Civil Rights.
- d. Ensure that local let project inspectors are periodically checking Federal-aid project site bulletin board requirements for display of the above referenced federally required EEO posters and notices.

TxDOT Office of Civil Rights Responsibilities

- a. Conduct EO compliance reviews to ensure contractor compliance with federal contract EEO requirements.
- b. Serve as a resource for preferred EEO program practices.

Equipment Rental Rates

General. Federal regulations address participation in equipment owned or rented by the contractor and used in force account work. Specified cost accounting principals must be used to develop the rates. In 1986, an Office of the Inspector General (OIG) audit of rental rates found that a significant number of contractors were being reimbursed for equipment usage based on rates that included ineligible costs. Ineligible costs included use of contingencies, replacement cost escalator factors, and premium rental rates for rental periods less than one month.

Federal policy requires that actual costs be used to determine extra work payments; however, actual equipment costs are usually not readily available. Therefore, the FHWA permits an LG to specify the acceptable rate guides in construction contracts. The LG may also include any equipment rate schedules developed in conformance with the Federal cost principles and the FHWA policy.

The Federal cost principles applicable to rental rates for contractor furnished equipment are contained in 48 CFR, Part 31. The provisions in OMB Circular 87 apply when LG-owned equipment is used.

Rental Rate Guides: An LG may, subject to TxDOT concurrence, adopt the Blue Book or other industry rate guide, or it may develop its own guide. The LG must make the determination that the equipment rental rates developed or adopted fairly estimate a contractor's actual cost to own and operate the equipment within its jurisdiction. TxDOT must review and approve the LG's rates for compliance with the policy before including the rates in a contract proposal.

Adjustment Factors: Equipment is not expected to operate for 12 consecutive months. Maps at the beginning of each Blue Book equipment section indicate adjustment factors based on climate and regional costs. Rate adjustment tables indicate adjustment factors based on equipment age. The adjustment factors in the maps and tables are to be applied when determining the eligible rate.

Maximum Rate: The Blue Book adjusted rates cover all eligible equipment related costs. Therefore, they are considered to be the maximum eligible rates for Federal-aid participation purposes.

Hourly Rates: The developer of the Blue Book accumulates all contractor costs for owning a piece of equipment on an hourly basis. The monthly rate displayed in the rental guide is determined by multiplying the accumulated hourly costs by the monthly standard of 176 hours. Therefore, for periods of equipment use less than the standard 176 hours per month, Federal-aid participation shall be limited to the hourly rate obtained by dividing the monthly rate by 176. Premium rates contained in the rate guides shall not be used.

Standby Equipment Rates: The contractor continues to incur certain ownership costs when equipment is required to be on standby. The use of a standby rate is appropriate when equipment has been ordered to be available for force account work but is idle for reasons that are not the fault of the contractor. While an industry standard does not exist for standby rates, it has been the normal practice of the courts to reduce published ownership rental guide rates by 50 percent for standby rate usage. Therefore, the FHWA will accept 50 percent of the ownership rental rates of an approved guide as the standby rate in lieu of a contractor's actual standby costs. There should be no operating costs included in the rate used and standby time should not exceed 8 hours per day, 40 hours per week, or the annual usage hours as established by the rate guide.

Mobilization: The costs required to mobilize and demobilize equipment not available on the project are eligible for reimbursement. Standby rates should be used for equipment while being hauled to and from the project. This will be in addition to applicable rates for the hauling equipment. All costs associated with the assembly and disassembly of the equipment for transport should also be considered in the mobilization costs.

Overhead: Equipment overhead includes such items as insurance, property taxes, storage, licenses and record keeping. The Blue Book rates include all equipment overhead costs. Therefore, if a contractor proposes to apply project or home office overhead to a Blue Book

rate, the LG must assure that it contains no equipment overhead cost factors. TxDOT will determine the reasonableness of such a rate.

Profit: There is no provision for equipment rental profit in the Blue Book published rates. Federal regulations do not prohibit the addition of an amount for profit. If an LG has a policy for the payment of profit, it should be followed on Federal-aid contracts. If a profit amount is used, TxDOT will determine reasonableness based on experience.

Contractor Leased Equipment: When a contractor obtains equipment through a third party rental agreement for use in a force account situation, the cost will normally be the invoice cost. The invoice cost should be comparable with other rental rates of the area. The Associated Equipment Distributors (AED) Rental Rate and Specifications may be used to evaluate the costs for such equipment rental. Since rental agreements vary, the specific operating costs included in the rental agreement may need to be determined. The contractor may be reimbursed for additional eligible operating costs not covered by the agreement (i.e., fuel, lubrication, field repairs, etc); however, equipment standby time will not be reimbursed.

The AED book is not acceptable as a rate guide for contractor owned equipment. The AED rates are based on national averages of rates charged by equipment distributors and do not reflect the contractor's cost of owning and operating the equipment.

Federal Regulation

- a. Non-regulatory Supplement to 23 CFR 635.120 – Equipment Rental Rates
 - i. Requires actual costs be used for extra work payments.
 - ii. Allows predetermined rate guides be used for equipment rates for contractor-owned equipment in lieu of actual cost. Blue Book is acceptable guide.
 - iii. Allows reimbursement of reasonable rental cost if contractor leases equipment.

State Regulation

- a. Texas Administrative Code, Title 43, §26.33(g)(1) – Specifications for projects administered by a Regional Mobility Authority must conform to TxDOT Standard Specifications.
- b. Texas Administrative Code, Title 43, §27.56(C)(3)(A) – Specifications for projects administered by a Regional Toll Authority must conform to TxDOT Standard Specifications as a condition of state fund participation.

Required Practices

- a. Equipment rental rates for all projects with federal or state funds must comply with TxDOT standard specifications. (See Article 9, Section 5)
 - i. Develop rates and submit for TxDOT approval if state or federal funds sought for added work.
- b. The LG may use equipment rental rates in accordance with their own practices if federal or state funds are not sought for the added work.

- c. The LG may use equipment rental rates for projects with no federal or state funds in accordance with their own practices.

LG Responsibilities

- a. Adopt TxDOT specifications for equipment rental rates or develop procedures based on 48 CFR 31. If the LG develops their own rental rates, TxDOT must review and approve the rates for compliance with the policy before including the rates in a contract proposal.

TxDOT District Responsibilities

- a. For projects with state or federal funds, ensure that the LG advises potential bidders that Blue Book rates will be used for rental equipment in force account work. Verify that force account change orders use Blue Book rates.
- b. If the LG develops their own rental rates, TxDOT must review and approve the rates for compliance with the policy before including the rates in a contract proposal.
- c. There is no monitoring on projects without state or federal funds.

FHWA Final Rule on Temporary Traffic Control Devices

General. This Final Rule is intended to reduce the likelihood of fatalities and injuries to road users, and to workers who are exposed to motorized traffic (vehicles using the highway for purposes of travel) while working on Federal-aid highway projects.

Beginning December 4, 2008, the Final Rule will provide new and supplemental regulations concerning the use and payment of uniformed law enforcement officers, positive protection measures between workers and motorized traffic, and temporary traffic control devices on construction, maintenance, and utility work zones. The regulations apply to all Federal-Aid highway projects, but state agencies are encouraged to adopt these on other types of projects as well.

Agencies are to establish processes, procedures, and/or guidance to systematically consider the use of the following:

1. Positive protection devices to prevent the intrusion of motorized vehicles into the work space and other hazardous areas of the work zone. The use of positive protection devices must be based on an engineering study. An engineering study may be used to develop positive protection guidelines, or to determine appropriate measures for an individual project. The engineering study should be based on consideration of factors and characteristics such as:
 - Project scope and duration,
 - Anticipated traffic speeds through the work zone,
 - Anticipated traffic volume,

- Distance between traffic and workers, and extent of worker exposure,
 - Escape paths available for workers to avoid a vehicle intrusion into the work space,
 - Time of day (e.g., night work),
 - Etc.
2. Exposure control measures to avoid or minimize worker exposure to motorized traffic, and road user exposure to work activities. Exposure control measures should be considered to avoid or minimize exposure for workers and road users. Examples of exposure control measures include:
- Full road closures,
 - Ramp closures,
 - Median crossovers,
 - Full or partial detours or diversions,
 - Protection of work zone setup and removal using rolling road blocks,
 - Performing work at night or during off-peak periods,
 - Etc.
3. Uniformed law enforcement and other traffic control measures to reduce work zone crashes. Each agency, in partnership with the FHWA, shall develop a policy addressing the use of uniformed law enforcement on Federal-aid highway projects. The policy may consist of processes, procedures, and/or guidance. In general, the need for law enforcement is greatest on projects with high traffic speeds and volumes, and where the work zone is expected to result in substantial disruption to or changes in normal traffic flow patterns. In addition, if law enforcement is used, they must be trained as required in 23 CFR 630.1008(d). Specific project conditions should be examined to determine the need for or potential benefit of law enforcement, such as the following:
- Frequent worker presence adjacent to high-speed traffic without positive protection devices,
 - Traffic control setup or removal that presents significant risks to workers and road users,
 - Complex or very short term changes in traffic patterns with significant potential for road user confusion or worker risk from traffic exposure,
 - Night work operations that create substantial traffic safety risks for workers and road users,

- Existing traffic conditions and crash histories that indicate a potential for substantial safety and congestion impacts related to the work zone activity, and that may be mitigated by improved driver behavior and awareness of the work zone,
 - Work zone operations that require brief stoppage of all traffic in one or both directions,
 - Etc.
4. Safe exit and entry of work vehicles into and out of the work area from the travel lanes. The agency processes, procedures, and/or guidance should also address safe means for work vehicles and equipment to enter and exit traffic lanes and for delivery of construction materials to the work space, based on individual project characteristics and factors.

In addition to the preceding four traffic control considerations, the Final Rule also includes requirements for:

5. Payment for traffic control features & operations. Payment for traffic control features and operations shall not be incidental to the contract, or included in payment for other items of work not related to traffic control and safety. Separate pay items shall be provided for major categories of traffic control devices, safety features, and WZ safety activities. For method-based specs, unit price pay items, lump sum pay items, or a combination thereof may be used. Specs should include provisions to require and enforce compliance with implementation and maintenance of the project TMP and related traffic control items.
6. Traffic Control Quality guidelines. Each agency shall develop and implement quality guidelines to help maintain the quality and adequacy of the temporary traffic control devices for the duration of the project. A level of inspection necessary to provide ongoing compliance with the quality guidelines shall be provided.

Federal Regulations

- a. 23 CFR 630 Subpart K.
- b. 23 CFR 630.1008(d)

State Regulations

- a. No comparable statute.

Required Practices

- a. Requirements of 23 CFR 630 Subpart K applies to all projects with federal funds.

LG Responsibilities

- a. Adopt TxDOT's program or submit an alternate for approval.

- b. Include bid items for traffic control features and operations, and if used, law enforcement in the bid documents.
- c. If law enforcement is used, ensure they have the required training.
- d. Monitor contractor compliance with program.

TxDOT District Responsibilities

- a. If the LG submits an alternate to TxDOT's Temporary Traffic Control program, review the program for compliance with the applicable regulations.
- b. For projects with federal funds, review bid documents for required provisions.
- c. For projects with federal funds, ensure the LG's maintain the quality and adequacy of the temporary traffic control devices.
- d. There is no monitoring on projects without federal funds.

Form FHWA-1273

General. The Form FHWA-1273, Required Contract Provisions, is a convenient collection of contract provisions and proposal notices that are required by regulations promulgated by the FHWA and other Federal agencies. The provisions contained in Form FHWA-1273 are generally applicable to all Federal-aid construction projects and must be made a part of, and physically incorporated into, all contracts, as well as all appropriate subcontracts and purchase orders.

The LG is not permitted to modify the provisions of Form FHWA-1273. Minor additions covering other requirements may be included in a separate supplemental specification, provided they do not conflict with State or Federal laws and regulations and do not change the intent of the required contract provisions.

Federal Regulation

- a. 23 CFR 633 – Required contract provisions must be physically incorporated into all contracts and appropriate subcontracts and purchase orders.

State Regulation

- a. No comparable statute.

Required Practices

- a. Inclusion of Form FHWA-1273 is not required on projects with no federal funds.

LG Responsibilities

- a. The LG must include Form FHWA-1273 verbatim into all contracts and must insure that the prime contractor incorporates the provisions into all subcontracts and purchase orders.

TxDOT District Responsibilities

- a. For projects with federal funds, review bid proposals or requests for proposal for inclusion of Form FHWA-1273. For design-build and concessionaire projects, reference to Form FHWA-1273 in the local agency agreement will suffice and no further TxDOT monitoring is required as it is the LG's responsibility to assure inclusion in bid documents.
- b. There is no monitoring on projects without federal funds.

Liquidated Damages

General. Liquidated damages are required as a means of recovering, at a minimum, construction engineering costs from a contractor. Contract time is an essential element of the contract and it is important that the work be pressed vigorously to completion. The cost to the contracting agency for the administration of the contract, including engineering, inspection and supervision, increases as the contract time increases. Likewise, the road user costs also increase as the completion date of the contemplated facility is extended. The liquidated damages contract provision provides a mechanism for the contracting agency to recover these costs associated with the contract time overrun. TxDOT is required to have the LG incorporate liquidated damages provisions into their Federal-aid contracts as a condition of the project agreement.

Most of the contracting agencies use a liquidated damage rate schedule based on a range of contract amounts. However, some use a daily rate that is calculated specifically for the particular project. The LG is required to develop and maintain its own liquidated damages rates that will cover, as a minimum, the LG's average daily construction engineering (CE) costs attributable to a contract time overrun. The rates are subject to verification and approval by TxDOT. The LG must also review the rate every two years and adjust it if necessary.

In addition to CE costs, the LG may include the costs of project-related delays or inconveniences, to the LG or to the public, in their liquidated damage provisions. In such cases, costs recovered in excess of the actual CE costs shall be deducted from the construction costs in proportion to the Federal participation on the project. Costs recovered in excess of the actual CE costs shall be deducted from the construction costs. Incentive/disincentive amounts are to be shown separately from the liquidated damage amounts and are to be based on road user costs. In addition, the LG may include provisions for consequential damage when tolls are involved.

Additional guidance may be obtained from TxDOT's [Accelerated Construction Strategies Guideline](#).

Federal Regulation

- a. 23 CFR 635.127 – Overruns in contract time (applicable to projects on the National Highway System)
 - i. Requires entities to develop liquidated damage rates. As a minimum, the rate should include the average daily cost of construction engineering.
 - ii. Allows other costs to be included in liquidated damage rates.

- iii. Allows incentive/disincentive provisions to be included in the contract, but must be separate from liquidated damages.

State Regulation

- a. Transportation Code 223.012 – Requires that TxDOT develop a schedule of liquidated damages.
- b. Texas Administrative Code, Title 43, §26.33(g)(1) – Specifications for projects that connect to a state highway administered by a Regional Mobility Authority must conform to TxDOT Standard Specifications.
- c. Texas Administrative Code, Title 43, §27.56(C)(3)(A) – Specifications for projects administered by a Regional Toll Authority must conform to TxDOT Standard Specifications as a condition of state fund participation.

Required Practices

- a. For all projects with federal and/or state funds, the LG must follow TxDOT policy on liquidated damages and incentive/disincentive. The LG must develop liquidated damage rates based on the LG's anticipated construction engineering cost.
- b. For projects with no federal or state funds, the LG may follow their own practices.

LG Responsibilities

- a. The LG must develop liquidated damage rates that recover the cost of construction engineering. TxDOT will approve the rate.
- b. Submit liquidated damage schedule to TxDOT for approval.
- c. Submit other desired provisions, such as incentive/disincentive to TxDOT for approval.
- d. Include appropriate language in bid documents
- e. Assess damages in accordance with bid documents.

TxDOT District Responsibilities

- a. Design-bid-build
 - i. For projects with state or federal funds, review LG's liquidated damage schedule, incentive/disincentive rates, and implementing specifications for conformance with TxDOT policy. Submit to DES through CST for approval.
 - ii. Assure approved rates and provisions are included in bid proposals.
 - iii. Assure liquidated damages are properly assessed at final inspection.
 - iv. There is no monitoring on projects without state or federal funds.
- b. Design-build and concessionaire
 - i. For projects with state or federal funds, ensure the LG implements provisions of the request for proposals or the concessionaire agreement.
 - ii. There is no monitoring on projects without state or federal funds.

Lobbying Certification

General. Section 319 of Public Law 101-121 (31 USC 1352) prohibits Federal funds from being expended to influence, or attempt to influence, a Federal agency or Congress in connection with the award of any Federal contract or grant. This prohibition applies to all recipients, including lower tier subrecipients of a Federal contract or grant. Prior to receiving funds in excess of \$100,000 per contract/grant, the LG must submit to the TxDOT a certification that it has not and will not make any prohibited payments for lobbying. By signing a contract or subcontract, a prime contractor or subcontract is certifying that it will comply with lobbying restrictions.

The LG certification is to be retained by TxDOT. Likewise, lower tier certifications are to be retained by the next higher tier (i.e., prime contractors retain their subcontractors' certifications, etc.)

Any participant that has made, or agreed to make, payments for lobbying activities using non-Federal funds, is required to disclose such activities. Payments of non-Federal funds to regularly employed officers or employees of the agency or firm are exempt from the disclosure requirement.

Federal Regulation

- a. 23 CFR 635.112(g)
 - i. The administrating entity must include the lobbying certification in the bid documents (by virtue of putting Form FHWA-1273 into the contract).
 - ii. By signing a bid document that includes Form FHWA-1273, the bidder certifies that they meet lobbying requirements of 49 CFR 20.
 - iii. The prime contractor must include lobbying certification in all lower tier contracts in excess of \$100,000.
- b. 49 CFR 20 – New restrictions on lobbying
 - i. Requires recipients of federal funds in excess of \$100,000 to file a disclosure form with FHWA.
 - ii. Contains details of the certification.

State Regulation

- a. No comparable statutes.

Required Practices

- a. None

LG Responsibilities

- a. Include FHWA-1273 in bid document.
- b. Require contractor to include language in lower tier contracts.

TxDOT District Responsibilities

- a. For projects with federal funds, ensure the lobbying certification is included in all bid documents, including proposals, requests for proposals, and concessionaire agreements.
- b. There is no monitoring on projects without federal funds.

Local Hiring Preference

General. The LG may not include any contract provisions that require a contractor to give any preference in hiring. Some states and local public agencies have implemented policies that encourage or mandate the use of local employment or local contracting. In such cases, Federal-aid contracts (including invitations for bids or request-for-proposal documents) must contain specific provisions that state that such preferences are not applicable to contracts funded by FHWA. Compliance with local preference provisions will not be a condition of responsiveness in the consideration of bids or a condition of responsibility prior to the award of contract.

While the state and local governments are precluded from enacting such preference requirements, this requirement does not apply to the Federal Government. Therefore, Federal hiring preference requirements, such as EEO/Affirmative Action, Appalachian Preference, and Indian Preference are not in conflict with this policy.

Federal Regulation

- a. 23 CFR 635.117(b) – Prohibits including provisions in contract documents that requires or encourages that a contractor give preference in hiring on any project that includes federal funds. Compliance with local preference provisions will not be a condition of responsiveness in the consideration of bids or a condition of responsibility prior to the award of contract.

State Regulation

- a. Transportation Code 223.043 – For projects on the state highway system, TxDOT may require that a citizen of the United States and of the county in which the project is being proposed be given preference in employment to perform manual labor.

Required Practices

- a. No hiring preferences will be allowed on any projects that includes federal funds.
- b. For any projects with state funds, the LG must gain TxDOT approval before using contract or agreement language mandating hiring preference.
- c. For any projects with no state or federal funds, the LG may follow their own practices on hiring preferences.

LG Responsibilities

- a. For projects with federal funds, do not include any State or local hiring preferences in bid documents or request for proposals.

- b. For projects with state funds but no federal funds, request TxDOT approval to require hiring preferences if desired

TxDOT District Responsibilities

- a. For projects with federal funds, review all bid proposals, requests for proposals, and concessionaire agreements to ensure hiring preference language is not included.
- b. For projects with state funds, submit the LG's request to use hiring preference clauses to CST.
- c. There is no monitoring on projects without state or federal funds.

Materials

General. Plans and specifications need to clearly define the types, locations construction requirements in detail to facilitate the construction, the contract control and the estimation of construction costs of the project. The estimate must reflect the anticipated cost of the project in sufficient detail to provide an initial prediction of the financial obligations to be incurred by the LG, State or FHWA and to permit an effective review and comparison of the bids received.

Federal Regulation

- a. 23 CFR 630.205 – The plans and specifications must describe construction requirements in sufficient detail to facilitate construction.
- b. 23 CFR 636B – Solicitations for design-build projects describe evaluation factors, which may include particular material quality requirements or design performance criteria (i.e., pavement design life).
- c. 23 CFR 637B describes a program to determine specification compliance for materials incorporated into the project. See the project requirement “Quality Assurance Program” for more details.

State Regulation

- a. Local Government Code 262.025 – A notice for receipt of competitive bids must include specifications describing the item to be purchased. This applies to counties.
- b. Local Government Code 271.025 – Governmental entity advertising for competitive bids must include information that describes the work.
- c. Local Government Code 271.188 – For design-build projects, the LG must provide or contract for material engineering, testing and verification testing that is independent from the design-build firm.
- d. Texas Administrative Code, Title 43, §26.33(g)(1) – Specifications for projects that connect to a state highway administered by a Regional Mobility Authority must conform to TxDOT Standard Specifications.
- e. Texas Administrative Code, Title 43, §27.56(C)(3)(A) – Specifications for projects administered by a Regional Toll Authority must conform to TxDOT Standard Specifications as a condition of state fund participation.

- f. Transportation Code 221.003(d) – A County Commissioners Court may not make improvements to the state highway system until the plans and specifications have been approved by TxDOT.
- g. Transportation Code 366.185 – Contracts by Regional Tollway Authorities must be procured by a competitive bid procedure.
- h. Transportation Code 370.306 – A Regional Mobility Authority that uses a Comprehensive Development Agreement for procurement must publish criteria used to evaluate proposals. The criteria may include materials requirements.

Required Practices

- a. For projects with state or federal funds and projects on the state highway system, TxDOT must approve the plans and specifications prior to advertising for competitive bids or a request for proposals. The LG must either adopt TxDOT's Standard Specifications or develop alternate specifications and submit to TxDOT for approval. For alternate specifications, the material requirements must fulfill the purpose of the approved design and must be in general conformance with TxDOT material quality standards. Proposed changes to material requirements must have TxDOT approval before the LG implements the change.
- b. For projects off the state highway system and no state or federal funds, the LG may use their own material requirements without TxDOT approval.
- c. If a concessionaire agreement includes long-term maintenance (40 years or more), the concessionaire may use any material that meets performance requirements of the project at their discretion without TxDOT approval.

LG Responsibilities

- a. Adopt TxDOT Standard Specifications or submit alternate, comparable specifications to TxDOT for approval.
- b. Request TxDOT approval of changes to material specifications before implementation.
- c. For design-build, submit evaluation criteria to TxDOT before issuing request for proposals

TxDOT District Responsibilities

- a. For projects with state or federal funds and all projects on the state system, review proposed specifications and evaluation criteria for conformance to TxDOT material specifications. Submit questions and clarification concerns to CST for final determination.
- b. There is no monitoring on projects without state or federal funds or concessionaire projects with a long-term maintenance component.

Method of Construction (or Method of Bidding)

General. Construction contracts are to be awarded by competitive bid. One of the most basic tenets of Federal-aid contracting is that construction contracts are to be awarded

competitively to the contractor that submits the lowest responsive bid. This mandate is set forth in 23 U.S.C. 112 and reinforced by 23 CFR 635.114(a) which requires that:

"Federal-aid contracts shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting the criteria of responsibility as may have been established by the STD [TxDOT]"

The act of an LG negotiating with an apparent low bidder prior to award is defined as "bid rigging in reverse" and is expressly prohibited by 23 CFR 635.113(a). Adding alternates may be considered after bids are opened only if the contract contains the priority order in which alternates are to be considered.

There may be situations that support the use of a contracting method other than competitive bidding. Noncompetitive construction contracting or other unusual methods of construction may be approved under one of two conditions:

- ◆ The option is proven to be more cost effective, or
- ◆ An emergency exists and time is a critical factor.

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

A cost effectiveness finding is required for the TxDOT approval of any LG proposal to use a non-competitive method of contracting. Title 23 CFR 635.205 cites the following situations as possible reasons for the use of noncompetitive construction contracting:

- ◆ When the rights or responsibilities of the community are so affected as to require a special course of action, including situations where there is a lack of competition or unreasonable bids, it may be determined to be cost effective to use force account.
- ◆ 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 additional documentation is required.

Force account work using LG forces is discussed in 23 CFR 635 Subpart B and is defined as:

"...the direct performance of highway construction work by an LG by use of labor, equipment, materials, and supplies furnished by them and used under their direct control".

Force account contracts with a private contractor are an exception to normal construction contracting procedures and should rarely be approved.

Circumstances that justify a negotiated construction contract should be even more of an exception, making approvals of such contract methods extremely rare.

Federal Regulation

- a. 23 CFR 635.104 – Construction work must be performed by competitive bids unless some other method is more cost effective or an emergency exists.
- b. 23 USC 112(b)(3) – Allows design-build as an acceptable contracting method for federally funded projects.
- c. 23 CFR 636 – Implementing language on design-build contracting.

State Regulation

- a. Local Government Code 252.021 – Municipalities must use competitive sealed bids for contracts in excess of \$50,000.
- b. Local Government Code 262.023 – Counties must use competitive bidding procedures for purchases over \$25,000.
- c. Local Government Code 271.006 – A municipality must comply with the requirements of Chapter 252 and a county must comply with the requirements of Subchapter C, Chapter 262.
- d. Local Government Code 271.192 – For design-build projects the LG must select a design-build firm using a combination of technical qualifications and cost.
- e. Transportation Code 223.201 – TxDOT may enter into agreements for a comprehensive development agreement with a private entity to design, develop, finance, construct, maintain, repair, operate, extend roadways.
- f. Transportation Code 366.185 – Contracts let by a Regional Tollway Authority must be let by a competitive bidding procedure.
- g. Transportation Code 370.185 – Contracts let by a Regional Mobility Authority may be let by a competitive bidding procedure.
- h. Transportation Code 370.305 – A Regional Mobility Authority may use a comprehensive development agreement with a private entity.

Required Practices

- a. For projects with state or federal funds, the LG must obtain TxDOT approval for any procurement method other than competitive bidding unless the alternate procurement method is allowed by state or federal statute. If competitive bidding is the method used, the LG must submit their process to TxDOT for approval. The process must meet the requirements of Transportation Code 223.
- b. For projects with no state or federal funds, the LG may use their own procurement methods without prior TxDOT approval.

LG Responsibilities

- a. Submit competitive bidding process to TxDOT for approval or written cost-effective justification or emergency condition if procurement other than competitive bidding is desired.
- b. For design-build projects, include language in RFP outlining selection criteria based on technical qualifications and cost.
- c. For concession projects, follow terms of agreement with TxDOT

TxDOT District Responsibilities

- a. General – The agreement between TxDOT and the LG will indicate whether the project will be procured through a design-bid-build, design-build, or concessionaire process. The District will work with the LG during project development to assure that procurement meets the terms of the agreement.
- b. For design-bid-build projects with state or federal funds, forward the LG's request to deviate from the competitive sealed bid process to CST for coordination with other Divisions and TxDOT approval. Include the LG's cost-effective or emergency justification if the project has federal funds.
- c. For design-build projects ensure the LG procures the design-build firm based on technical qualifications and cost.
- d. There is no monitoring on projects without state or federal funds.

Non-collusion Statement

General. The submission of a non-collusion statement protects the integrity of the Federal-aid highway program by serving as a deterrent to bid rigging activities. The certification also becomes evidence in prosecuting cases involving construction contract bid rigging. A non-collusion statement is required from all bidders and is to be submitted as part of the bid proposal package. Failure to submit the required certification will result in the bid being considered as non-responsive and ineligible for award consideration.

The LG must include provisions in the bidding proposals that require all bidders to include a non-collusion statement with their bid. The FHWA, in consultation with the U. S. Department of Justice (USDOJ), has concluded that the non-collusion statement may be either an unsworn declaration made under penalty of perjury under the laws of the United States, or a sworn affidavit executed and sworn before a person who is authorized to administer oaths by the laws of the State.

All non-collusion certifications shall be retained by the LG in accordance with the retention policy of 49 CFR 18.42. These certifications could serve as important evidence in the event that collusion or bid rigging is discovered at a later date.

If for any reason, a person feels that fraud has occurred, they should contact the nearest USDOT Office of Inspector General (OIG) office. The OIG maintains a fraud hotline at 1-800-424-9071 or <http://oig.state.gov/hotline/>. This may be based on a suspicion or actual evidence of fraud, waste and abuse in any project funded by FHWA.

Federal Regulation

- a. 23 CFR 635.112(f) – For all projects with federal funds, a non-collusion statement is required from each bidder and is to be submitted as part of the bid package. If not submitted, the bid is non-responsive.

State Regulation

- a. No comparable state statute.

Required Practices

- a. The LG must comply with federal statutes.

LG Responsibilities

- a. The LG must insure that all bidders submit a non-collusion statement. If a bidder fails to submit the statement, their bid may not be opened, read and considered for contract award.
- b. Include non-collusion statement in bid package or in the request for proposal for design-build projects.
- c. Assure statement is submitted before reading bid.
- d. Retain statement for all bidders.

TxDOT District Responsibilities

- a. For projects with federal funds, ensure that the non-collusion statement is included in the bid proposal, request for proposals, or concessionaire agreement, as applicable.
- b. There is no monitoring on projects without state or federal funds.

Non-discrimination against Persons with Disabilities

General. Discrimination on the basis of disability by public entities is prohibited. The prohibition extends to all activities of state and local governments participating in federally assisted programs. There are three federal laws that require accessible planning, design and construction, and actions to integrate people with disabilities into mainstream society. The Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities in all aspects of life, including transportation, public services, employment, housing, public accommodations, education, communication, worship, recreation and health services, regardless of funding source. Section 504 of the Rehabilitation Act of 1973 (as amended by the Civil Rights Restoration Act of 1987) addresses compliance with Federal design standards for accessibility. The Architectural Barriers Act of 1968 requires access to facilities designed, built, altered, or leased with federal funds.

In addition, the Texas Architectural Barriers Act of 1969, as amended, requires that each building and facility subject to the Act be accessible to and functional for persons with disabilities. Subject facilities include facilities used by the public that are constructed, renovated, or modified, regardless of funding source. The law requires compliance with the

Texas Accessibility Standards and the rules promulgated by the Texas Department of Licensing and Regulation (TDLR) in Title 16, Texas Administrative Code, Chapter 68.

LG must ensure that accessibility for individuals with disabilities is provided in the construction of all new transportation facilities. When altering existing transportation facilities, the LG must also ensure that the alterations are made in such a way as to provide access and utilization by individuals with disabilities.

49 CFR 37.3 defines a facility as:

"...all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located".

Federal Laws and Regulations

- a. 29 USC 794, et seq.—Section 504 of the Rehabilitation Act of 1973 (as amended by the Civil Rights Restoration Act of 1987).
- b. 42 USC 3, et seq. 12111 – Americans with Disabilities Act (Title II).
- c. 28 CFR Part 35 – Nondiscrimination on the Basis of Disability in State and Local Government Services.
- d. 49 CFR Part 27 – Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance. .
- e. Public Law 100-259; 102 Stat. 28 – Civil Rights Restoration Act of 1987.
- f. 23 CFR Part 652 – Pedestrian & Bicycle Accommodations and Projects.
- g. 23 CFR Part 1235 – Uniform System for Parking for Persons with Disabilities.
- h. 23 CFR 450.220(a) (4) – ADA Requirements to be Certified into Statewide Planning.
- i. 23 CFR 450.316(b)(3) – ADA Requirement for Metropolitan Planning.
- j. 23 CFR 771.105(f) – ADA Requirements for NEPA.
- k. Public Law 109-59 – Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) of 2005.

State Regulations

- a. Texas Occupations Code, Chapter 51 – Establishes the Texas Department of Licensing and Regulation (TDLR).
- b. Texas Government Code 469 – Ensures that public buildings and facilities are accessible to and functional for persons with disabilities.
 - i. Section 469.105 – Requires inspection of buildings and facilities covered by the statute by TDLR or Registered Accessibility Specialist.

Preferred Practices

- a. All projects must comply with the provisions of the cited statutes.
- b. The LG is responsible for coordination of TDLR inspection and for paying all fees assessed by TDLR.

LG Responsibilities

- a. Ensure all new and existing transportation facilities are designed and constructed to comply with the provisions of all cited statutes
- b. Request final inspection from TDLR
- c. Implement ADA Program to include:
 - i. Notice of Nondiscrimination requirements – The LG will inform the public that they do not discriminate on the basis of disability in their programs, services and activities.
 - ii. Methods of Notification of Nondiscrimination Requirements- The LG will post their notice in local papers, magazines, bulletins, announcements, handbooks, pamphlets, brochures recruitment materials, application forms and any other publication they distribute.
 - iii. Self-Evaluation – The LG will conduct a self-evaluation to ensure their policies and practices comply with ADA.
 - iv. Transition Plan – If the LG employs 50 or more persons, the LG will develop a transition plan for making structural changes to existing facilities so that they are accessible to individuals with disabilities. The transition plan must meet the requirements of 28 CFR 35.150(d).
 - v. Designation of an ADA/504 Coordinator – The LG will designate at least one employee to coordinate ADA/504 programs. Contact information will be made available to the general public.
 - vi. Provision of Reasonable Accommodations for Employment – The LG will comply with the provisions of Title I and II of the ADA.
 - vii. Adopting Grievance/Complaint Procedures for Disability Discrimination Complaints – The LG will adopt a grievance procedure to address all complaints dealing with ADA/504 provisions.
 - viii. Provision of Accessible Programs, Services and Activities – The LG will ensure that no individual with a disability is excluded from any service, program or activity.
 - ix. Provision of Accessible Communications – The LG will provide auxiliary aids and services to ensure that all communications with individuals with disabilities is effective.
 - x. Monitoring/Enforcement – The LG will maintain all program records and make them available for review by federal officials.
 - xi. Maintenance of Accessible Features – The LG will ensure that facilities are properly maintained and readily accessible to individuals with disabilities.
 - xii. Other Program Requirements – The LG will comply with the “Pedestrian and Bicycle Accommodations and Projects” and the “Uniform System for Parking for Persons with Disabilities.”

TxDOT District Responsibilities

- a. For projects with state or federal funds and all projects on the state highway system, the LG will submit a certification sealed by an engineer licensed in Texas that construction standards have been met (see Inspection). The District will conduct a final inspection before issuing final payment to the LG (see Progress Payment). The District should make the LG aware of any accessibility concerns noted during periodic inspections during construction.

- b. The District must verify that TDLR has conducted their final inspection and has approved the project. If the TDLR inspection noted any deficiencies, obtain the LG's certification that the deficiencies were corrected before recommending TxDOT final acceptance of the project. If state or federal funds are used, final payment to the LG will not be made until TDLR has inspected the project and all issues noted have been corrected.
- c. There is no monitoring on projects without state or federal funds off the state system.

Non-resident Bidder and Texas Preference

General. State laws that provide a bidding preference for resident bidders are not applicable to federal-aid contracts.

For state funded projects, the Legislature enacted statute regarding non-resident bidders. Government Code §2252.002 states:

"A governmental entity may not award a governmental contract to a non-resident bidder unless the non-resident underbids the lowest bid submitted by a responsible resident bidder by an amount that is not less than the amount by which a resident bidder would be required to underbid the non-resident bidder to obtain a comparable contract in the state in which the non-resident's principal place of business is located."

The department refers to this law as the "Reciprocity Requirement." Information about States that have bidding preference laws may be obtained from the Texas Secretary of State's Office.

Federal Regulation

- a. 23 CFR 635.110(b) – There may not be any procedures which prohibit consideration of a bid by any responsible contractor, whether a resident or non-resident of a state in which the work will be performed.
- b. 23 CFR 635.110(f)(1) – For design-build projects, there may not be any procedures that give geographical preference in the selection process.

State Regulation

- a. Government Code 2252.002 – Prohibits governmental entities from awarding a contract to a non-resident bidder unless the non-resident bidder underbids the lowest resident bidder by a reciprocal percentage.

Required Practices

- a. For projects with federal funds, non-resident preference provisions will not be allowed.
- b. For projects with no federal funds, the LG must follow the state statute.

LG Responsibilities

- a. The LG will need to contact the Texas Secretary of State's Office to obtain a list of States with a preference requirement.
- b. The Texas bidding preference statute is not applicable to federal-aid projects.
- c. For projects with no federal funds:
 - i. Include language to implement Texas statute in bid document, request for proposals, or concessionaire agreement.
 - ii. Obtain list of states with reciprocity statutes from Texas Building and Procurement Commission web site.
 - iii. Apply reciprocity in contract award if applicable.
 - iv. Inform the department in the request for award concurrence if a bidding preference was applied in the determination of contract award.

TxDOT District Responsibilities

- a. For projects with federal funds, review bid proposals, requests for proposals, and concessionaire agreements to ensure there are no resident preference provisions.
- b. For projects with state funds, review bid proposals, requests for proposals and concessionaire agreements to ensure provisions to implement Texas statute are included.
- c. There is no monitoring on projects without state or federal funds.

Non-Responsive Bid

General. The subject of a non-responsive bid is briefly discussed under the Bid Opening and Tabulation section. A list of reasons for a bid to be considered non-responsive must be included in the bid document in conjunction with 23 CFR 635.112(h). The reasons must be clearly defined.

Careful thought should be given in determining the reasons for not accepting a bid. The FHWA has determined that the reasons for a bid being non-responsive listed in the proposal cannot be "waived." Therefore, common provisions allowing an LG to waive technicalities determined to be in its best interest cannot be invoked regarding a non-responsive bid.

The inclusion of reasons that a bid "may" be declared non-responsive must not be included. The FHWA has stressed that the use of potential subjective reasons must be eliminated; the bid is either responsive or non-responsive.

Federal Regulation

- a. 23 CFR 635.112(h) – Bid documents must contain requirements with which a bidder must comply to make the bid responsive. Failure to comply with these requirements makes the bid non-responsive and not eligible for award.

State Regulation

- a. Local Government Code 271.0245 – A county must provide all bidders with the opportunity to bid on the same items on equal terms and have bids judged according to the same standards as set forth in the specifications.
- b. Texas Administrative Code, Title 43, §26.33(g)(1) – Specifications for projects that connect to a state highway administered by a Regional Mobility Authority must conform to TxDOT Standard Specifications.
- c. Texas Administrative Code, Title 43, §27.56(C)(3)(A) – Specifications for projects administered by a Regional Toll Authority must conform to TxDOT Standard Specifications as a condition of state fund participation.
- d. Transportation Code 370.306(c) – For projects acquired by Comprehensive Development Agreement, a Regional Mobility Authority must include criteria used to evaluate proposals in the request for proposals.

Required Practices

- a. For projects with state or federal funds, the LG must adopt Article 2.7 of TxDOT’s Standard Specifications or submit alternate definitions of a “non-responsive bid” for TxDOT approval.
- b. For projects with no state or federal funds, the LG should follow their statutes and practices. TxDOT approval is not required.

LG Responsibilities

- a. On design-bid-build, adopt Article 2.7 of TxDOT Standard Specification or submit alternate for TxDOT approval.
- b. On design-build, gain TxDOT approval of reasons that make a proposal non-responsive and list in request for proposals
- c. List reasons that make a bid non-responsive in bid documents or in the request for proposal in design-build projects.
- d. Check submitted bids or proposal for compliance with reasons.
- e. Do not consider non-responsive bids for award.
- f. List reasons that make a proposal non-responsive in request for proposals.
- g. Do not consider non-responsive proposals.
- h. For concession projects, require concessionaire to include appropriate language in any competitive bidding the concessionaire may pursue.

TxDOT District Responsibilities

- a. Design-bid-build
 - i. Ensure that the bid proposal contains either TxDOT Specification Article 2.7 or comparable language that defines conditions under which a bid will not be considered. Submit questions and non-compliance issues to CST for final determination.
 - ii. Attend bid opening and spot check bid proposals to verify that LG does not read non-responsive bids.

- b. Design-build
 - i. Review requests for proposals for inclusion of language that makes a proposal non-responsive.
 - ii. Spot check proposals for compliance with the language in the request for proposals.
- c. Concessionaire – If there are federal funds, spot check proposals for proposed contracts to be let by concessionaire for compliance with the contract language.
- d. There is no monitoring on projects without state or federal funds.

Non-segregated Facilities

General. The contractor cannot discriminate against any person by having segregated facilities. By entering into the contract, the contractor certifies that they maintain non-segregated facilities that conform to the requirements of 41 CFR 60.1.8. This certification is included in Form FHWA 1273. The prime contractor is required to obtain a similar certification from each subcontractor and supplier, as applicable.

One exception to the non-segregated facilities provision is for the disabled when the demands for accessibility override (e.g., disabled parking). In addition, single-user or separate bathrooms or dressing facilities are also allowable for privacy purposes.

Federal Regulation

- a. 23 CFR 633A –Contractors and subcontractors must certify that they do not discriminate by providing segregated facilities or prohibiting minorities access to facilities. Does not prohibit providing access to the disabled and single-user or separate bathrooms or dressing facilities for privacy.
- b. 41 CFR 60.1.8 – Provides the basis for the non-segregated facilities certification.

State Regulation

- a. No comparable statutes.

Required Practices

- a. LGs must comply with the federal statute on all projects with federal funds.

LG Responsibilities

- a. Include Form FHWA 1273 in bid documents.
- b. Advise potential bidders that submission of a bid constitutes the certification.
- c. Assure the contractor gets a certification from all subcontractors and materials suppliers more than \$10,000

TxDOT District Responsibilities

- a. For projects with federal funds, review bid proposals, requests for proposals, and concessionaire agreements to ensure they contain certification language.
- b. There is no monitoring on projects without federal funds.

On-the-Job Training (OJT)

General. Within the areas of construction and trade employment, several important laws have been passed to improve workforce equality, including Title VII of the Civil Rights Act of 1964. In conjunction with this important federal law, FHWA regulations have also focused on improving workforce equality. The first FHWA regulation to address equal employment opportunity in the external workforce was introduced in 1975 under Title 23 Code of Federal Regulations, Highways, Part 230. This regulation addresses special requirements for on-the-job training (OJT) as well as supportive services that support such training programs.

The objective of the OJT program is to develop skill improvement programs to provide opportunities for unskilled workers, particularly minorities, women and disadvantaged persons to acquire training in the skilled construction trades.

Federal Regulation

- a. 23 CFR 230
 - i. Requires compliance with the Federal-Aid Highway Act of 1968 [23 U.S.C. §140].
 - ii. Mandates implementation of a program to develop skill improvement opportunities to assure the increased participation of minorities, women, and disadvantaged persons in all phases of the highway construction industry.
 - iii. OJT program requirements apply to all federal-aid projects.

State Regulation

- a. No comparable statute.

Required Practices

- a. While the TxDOT Office of Civil Rights (OCR) has overall training program oversight responsibility, the LG should designate an EEO officer with adequate authority and responsibility to ensure training program compliance through interviews with trainees, maintenance and submittal of records and reports to TxDOT upon request.

LG Responsibilities

- a. Adopt TxDOT's OJT program or submit an alternate program proposal for approval by the Department of Labor.
- b. Include TxDOT's OJT Program Training Special Provision 000---1001 (or latest version) in the selected Federal-aid project's bid document.
- c. On federal-aid projects, the LG must monitor the progress of any identified trainee formally enrolled in a training program to ensure contractor compliance with the training program.

- d. The LG may request a copy of TxDOT's OJT program manual by contacting the TxDOT Office of Civil Rights at 866-480-2518.

TxDOT District Responsibilities

- a. For projects with federal funds:
 - i. Submit questions and non-compliance issues to OCR for clarification and resolution.
- b. There is no monitoring of OJT on projects with no federal funds.

TxDOT Office of Civil Rights Responsibilities

- a. For selected projects with federal funds, ensure federal-aid bid documents include the OJT special provision 000---1001 (or latest version).

Patented / Proprietary Products

General. Federal funds may not participate in a premium or royalty on any patented or proprietary product. However, there are provisions that allow specifying brand names under certain conditions. The following are conditions under which FHWA may participate in payment for patented or proprietary materials, specifications or processes specifically set forth in the plans and specifications:

- ◆ The item is purchased or obtained through competitive bidding with equally suitable unpatented items,
- ◆ The LG certifies either that the proprietary or patented item is essential for synchronization with the existing highway facilities or that no equally suitable alternative exists, or
- ◆ The item is used for research or for a special type of construction on relatively short sections of road for experimental purposes.

The primary purpose of the policy is to have competition in selection of materials and allow for development of new materials and products. The policy further allows that materials and products that are judged to be equal may be bid under generic specifications. If only patented or proprietary products are acceptable, they must be bid as alternatives with all, or at least a reasonable number, of acceptable materials or products listed.

Trade names are generally the key to identifying patented or proprietary materials. Products identified by their brand or trade name may not be specified without an "or equal" phrase. Further, all, or at least a reasonable number, of acceptable "equal" materials or products must 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.

Below are examples of conditions under which patented or proprietary materials may be used on Federal-aid projects.

Case I. The item is identified by the contract specifications along with a listing of other acceptable products and the list includes a reasonable number of acceptable products. Federal funds may then participate in the cost of a patented or proprietary item since it is acquired competitively.

Case II. The LG certifies, and TxDOT agrees, 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 that is not compatible with any other 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. Upon TxDOT's concurrence, the item may be specified.

Case III. The LG certifies that there is no equally suitable alternate. TxDOT must reasonably verify this situation. Based on a public interest finding, with TxDOT's concurrence, the item may be specified.

Case IV. Products appear from time to time that are new and innovative (i.e. research item or experimental feature). Based on the developer's claim, manufacturer's claim, or because of certain local conditions, there may be sufficient justification to evaluate the product in actual highway usage. The LG may then elect to submit a detailed plan of research and evaluation (work plan) for the product. The work plan may also be used to develop specifications in order to provide a basis for future competition with other materials. TxDOT must approve the work plan with, or prior to, PS&E approval. The specifications may then require the proprietary item.

Federal Regulation

- a. 23 CFR 635.411 – With a few exceptions, federal funds cannot participate in premiums or royalties for patented or proprietary products. Brand names cannot be used in plans and specifications unless either a public interest determination is approved or a reasonable number of equal product names are listed.
- b. 23 CFR 635.411(e) – For design-build projects, brand names cannot be specifically set forth on the Request for Proposals

State Regulation

- a. Government Code 2155.067 – A written justification must be provided to the Texas Building and Procurement Commission for products that are proprietary to one vendor.

Required Practices

- a. LGs must comply with the federal statute for projects with federal funds.
- b. For projects with state funds, the LG must submit a written justification for TxDOT approval before specifying proprietary products.
- c. For projects with no state or federal funds, the LG may use their own practices.

LG Responsibilities

- a. The LG must not specify patented or proprietary products in their contracts without prior written approval from TxDOT.
- b. For design-build projects, the LG prepares the RFP, and the RFP cannot have patented or proprietary items unless supported by an approved public interest finding as per 23 CFR 635.411(a). However, once the design-build firm is selected, the successful design-builder can require patented or proprietary products and not be in violation of the regulations

TxDOT District Responsibilities

- a. For projects with state or federal funds, submit LG-developed public interest determinations to DES for approval.
- b. There is no monitoring on projects without state or federal funds.

Prequalification

General. An LG may include provisions for prequalification in invitations for receipt of bids. The American Association of State Highway and Transportation Officials (AASHTO) defines prequalification as a means of predetermining job experience and work capacity and to identify individuals and organizations from whom the agency may accept a bid. The AASHTO has also encouraged the use of prequalification procedures in its 1981 Suggested Guidelines for Strengthening Bidding and Contract Procedures.

Generally, prequalification consists of an evaluation of the contractor's experience, personnel, equipment, financial resources and performance record. The evaluation is normally performed annually. The information required for prequalification may be extensive, however, the prequalification process should be relatively short so that it may be completed during the project advertising period. An LG's prequalification process should not be used to limit competition or discourage the submission of a bid by an otherwise responsible contractor.

AASHTO recommends the following information be required for prequalification:

- ◆ Detailed financial statement,
- ◆ Resident agent,
- ◆ Capacity and control classification,
- ◆ Experience and performance,
- ◆ Ownership or control,
- ◆ Equipment, and
- ◆ Updated information when there is corporate or affiliate change or reduction of 10 percent or more of the firm's assets.

The FHWA does not require that an LG implement procedures or requirements for prequalification on federal-aid projects. However, if an LG has these procedures or

requirements, they must conform to the FHWA competitive bidding policy and not restrict competition.

The procedures and requirements an LG proposes to use for qualifying and licensing contractors and determining who may bid, be awarded, or perform Federal-aid contracts shall be submitted to TxDOT for advance approval. Only those procedures and requirements so approved shall be effective with respect to Federal-aid highway projects. Any changes in approved procedures and requirements shall likewise be subject to approval by TxDOT.

No procedure or requirement for prequalification, qualification or licensing of contractors shall be approved which, in the judgment of TxDOT, may operate to restrict competition, prevent submission of a bid, or prohibit consideration of a bid submitted by any responsible contractor, whether resident or nonresident of the State or local area.

No contractor shall be required by law, regulation, or practice to obtain a license before a submission of a bid or before the bid may be considered for award of a contract. Contractor prequalification may be required as a condition for submission of a bid or award of contract only if the period between the date of issuing a call for bids and the date of opening of bids affords sufficient time to enable a bidder to obtain the required prequalification rating. However, an LG may require licensing of contractors after the bids are opened if the requirement is consistent with competitive bidding principles. In other words, the requirement must be applied uniformly to all contractors.

The FHWA regulations on licensing do not specifically address subcontractor-licensing issues.

Although an LG may have a compelling reason (e.g., State or local law) to utilize a procedure that differs from acceptable Federal-aid practice, the procedure may not be applied to a Federal-aid project. 23 CFR 635.112(d) specifically requires that the LG must inform bidders of contract provisions which do not apply to Federal-aid projects. This information must be included in the advertisement, specifications, special provisions or other governing documents as appropriate.

An example of an inappropriate provision would be a State or local preference clause in the standard specifications. Since the clause provides some competitive advantage for in-state or local contractors, the clause violates the Federal open competition requirements and therefore, could not be applied to a Federal-aid project. Other examples would be a restriction on products or services from specific foreign countries; a requirement to provide insurance for domestic partners; or small business set-asides.

Please refer to TxDOT's Letting Manual for further guidance related to contractor prequalification and bonding.

Federal Regulations

- a. 23 CFR 635.110 Contains the following provisions.
 - i. For design-bid-build projects
 1. It is not allowed to restrict competition or provide in-state preference.

2. It is not allowed to require that a contractor be licensed before submitting a bid or before consideration of a bid. However, an entity may require licensing of the successful bidder if the requirement is consistent with competitive bidding practices; i.e. it is applied uniformly to all contractors.
- ii. For design-build projects
 1. Geographic location may not be part of the selection criteria.
 2. It is allowed to require successful offeror to establish a local office after award.

State Regulations

- a. Texas Administrative Code 43, Part 1, Rule 9.12 – Requires potential bidders to be prequalified by TxDOT as a condition of submitting a bid. Includes waiver provisions for small projects, maintenance projects, and specialty projects.
- b. Local Government Code 271.189 – For design-build projects a LG must solicit qualifications outlined in this Section.

Required Practices

- a. For projects with state or federal funds, the LG must require that potential bidders be prequalified by TxDOT. This policy also applies to projects on the state system with no state or federal funds. If the LG wants to use qualification criteria in addition to those prescribed by TxDOT, the criteria must be approved by TxDOT before becoming part of the bid documents.
 - i. Design-bid-build – The bidder must send a letter to the LG allowing TxDOT to release “available bidding capacity” to the LG. The LG will forward the letter to TxDOT. TxDOT will respond and the bidder may then submit a bid.
 - ii. Design-build and concessionaire – This provision does not apply.
- b. For projects off the state system and with no state or federal funds, the LG is encouraged to use TxDOT-prequalified contractors but may use their own qualification process.

LG Responsibilities

- a. For projects with federal or state funds, require that bidders be prequalified by TxDOT.
 - i. Submit any additional, desired qualifying / licensing procedures to TxDOT for approval.
 - ii. Do not include a requirement for a contractor to obtain a license as a condition of submitting a bid.
 - iii. May require the successful bidder to obtain a license if applied across the board.

TxDOT District Responsibilities

- a. General

- i. For projects with state or federal funds and all projects on the state system, assure that the LG has access to TxDOT's current list of prequalified contractors.
 - ii. If the LG wants to use an alternate qualifying procedure or additional qualification criteria, forward the criteria through DES to CST for approval. Submit questions and non-compliance issues to CST (CL&CP) for final determination. Return approved criteria to the LG.
 - iii. For design-bid-build projects, coordinate submission of the request for TxDOT to release available bidding capacity with CST.
 - iv. For design-build projects review the LG's solicitation for compliance with Local Government Code 271.189.
 - v. There is no monitoring on projects without state or federal funds not on the state system.
- b. Design-build – For projects with federal funds, review evaluation criteria to assure that in-state preference is not one of the evaluation factors.

Prevailing Minimum Wage

General. The payment of predetermined minimum wages for certain job classifications used on Federal-aid contracts is derived from the Davis-Bacon Act of 1931 (40 U.S.C. Section 276a et seq.) (40 USC 3141) and is prescribed by 23 U.S.C. 113. The Davis-Bacon Act requires the payment of locally prevailing wages and fringe benefits to laborers and mechanics employed on Federal contracts in excess of \$2,000 for construction, alteration, or repair (including painting and decorating) of public buildings or public works. Davis-Bacon was enacted as a means to prevent contractors from importing cheap labor from outside the area, thereby, keeping capital at home with the local labor force where it would do the most good. Davis-Bacon provisions are covered in Form FHWA-1273 as discussed in the following sections:

- ◆ Section IV.1. This section sets forth the general requirements for the contractor, and subcontractors, to pay employees working at the site at least the minimum wage rate and fringe benefits specified for the classification of work performed. The LG is responsible for incorporating the applicable wage rate decision into each Federal-aid contract. The US Department of Labor (DOL) requires that an amendment for a general wage rate determination be incorporated into a Federal-aid contract if notification of the change is published in the Federal Register 10 days or more prior to the opening of bids.
- ◆ Section IV.2. All employees covered by Section IV are to be classified in conformance with the wage rate determination. If an additional classification is deemed appropriate, either DOL approval or a DOL determination for the classification is required. In this case, the LG should submit Standard Form SF-308 - "Request For Wage Determination and Response to Request." Detailed procedures for submitting this form to the US DOL are provided on their web page.
- ◆ Section IV.3. This section sets forth requirements for paying fringe benefits.
- ◆ Section IV.4. The provisions of this section set forth the requirements for paying less than the full specified wage rate for employees who are registered in USDOL approved apprenticeship and trainee programs or for those who are classified as helpers.

- ◆ Section IV.5. This section clarifies that the US Department of Transportation apprenticeship and trainee programs are not subject to the DOL program provisions stated in Section IV.4.
- ◆ Section IV.6. The LG has authority to withhold funds from the contractor, as may be determined necessary, to pay employees of the contractor the full amount of wages required by the contract. Withholdings are maintained by the LG until restitution is evidenced. These withholding provisions also apply to wage underpayment by a subcontractor; however, the actual withholding is taken from progress payments to the prime contractor.
- ◆ Section IV.7. The contractor is required to pay overtime at the rate of one-and-one-half times the employee's basic pay rate for all hours worked in excess of 40 hours per week.
- ◆ Section IV.8. This section provides for the assessing and withholding of liquidated damages for days on which the contractor did not pay overtime in accordance with Section IV.7. This withholding is a liability assessment against the contractor or subcontractor of \$10 per day for each employee that was underpaid. The liquidated damages are furnished to the DOL for its overall enforcement activities. Liquidated damages should be forwarded through TxDOT to FHWA for deposit into the United States Treasury.
- ◆ Section IV.9. The LG has authority to withhold funds from the contractor, as may be determined necessary, to pay the liquidated damages and to pay employees of the contractor the overtime wages required by Section IV.8.
- ◆ Section V.2. Each contractor and subcontractor must furnish the LG copies of payrolls each week during which work was performed. Payrolls must include the following information for each employee:
 - Name;
 - Social security number;
 - Address;
 - Work classification;
 - Hourly rate of pay;
 - Daily and weekly number of hours worked;
 - Deductions made; and
 - Actual wages paid

Payrolls submitted must conform to the requirements of USDOL form WH-347, including the required "Statement of Compliance" outlined in Form FHWA-1273 Section V.2.d. Contractors and subcontractors must maintain the payrolls and related documents associated with the contract a minimum of three years from the date of project completion. All project payroll records must be available to LG, TxDOT, FHWA or USDOL representatives for inspections, copying or transcription.

The submission of subcontractor payrolls is the responsibility of the prime contractor. If the prime contractor or subcontractor fails to submit the required weekly payrolls or make such

records available for review, the LG, TxDOT, FHWA or USDOL may, after written notice to the contractor, suspend further payment under the contract. Furthermore, failure to submit the required payrolls or make such records available for review may be grounds for debarment in accordance with 29 CFR 5.12.

The USDOL has responsibility for enforcing these statutes and determining the prevailing wage rates. The USDOL establishes the prevailing wage rates by either a determination, based on an in-house review of payroll data, or by a survey based on wage data from active projects. Notices of wage rate decisions are published in the Federal Register. After many years of operating a subscription service for the publication of prevailing wage rates, the USDOL is now posting this information on the Internet. As of March 2, 2001, Davis-Bacon wage rates are available electronically at the USDOL web site (see Davis-Bacon).

Applicability of Davis-Bacon - Site of Work. The Davis-Bacon Act limits coverage to laborers and mechanics " ...employed directly upon the site of the work." Since 1972, the DOL and the courts have been addressing various aspects of the applicability of Davis-Bacon requirements to site-of-work facilities.

The USDOL's implementing regulation, 29 CFR 5.2(l)(2), extends coverage to off-site facilities that are dedicated exclusively and in proximity to the actual construction site

29 CFR 5.2 (l)(1) states:

"The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project"

One example would be a casting or fabrication yard for a segmental concrete bridge which is specifically established for a project after the award of contract. The LG should contact the USDOL Regional Offices regarding a determination of what percentage of the work would constitute a "significant portion" and the potential coverage of such sites. If a significant portion of the work is to be constructed offsite, the LG should attempt to include the wage determinations covering potential offsite location in the bid proposal.

29 CFR 5.2 (l)(2) also indicates other work areas not located on the site of permanent construction (job headquarters, tool yards, batch plants, borrow pits, etc.), may be part of the site of the work ".... provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work." Permanent, previously established facilities are not covered, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of the contract.

29 CFR 5.2 (j)((1)(iv) provides that transportation between locations which are included in the "site of the work" are covered. This includes transportation between the permanent location of construction and covered sites where a "significant portion" of the work will be accomplished or covered sites that are dedicated exclusively and adjacent or virtually adjacent to the site of the work.

The USDOL has made the determination that when transportation will take place in more than one wage determination area, the applicable wage determination will be the wage determination for the area in which the construction will remain when completed. This determination will apply to all bidders, regardless of where they propose to construct significant portions of the project.

FHWA has taken the position that while this is the USDOL's program, it is inappropriate for FHWA to provide guidance in this area. FHWA encourages LGs to work jointly with TxDOT and the FHWA division office and the USDOL regional offices to resolve "site of work" issues.

Applicability of Davis-Bacon to Specific Work Types. Additional discussion on the following can be found in the USDOL's Field Operations Handbook (FOH). This handbook is available from FHWA's Office of Program Administration (202-366-1558).

Exploratory drilling services - Subsurface utility engineering or utility location services are considered to be exploratory drilling services. These contracts provide the location of utilities for engineering or planning purposes. Davis-Bacon does not cover them. See USDOL FOH 15d03(b).

Ferryboat Projects - The building, alteration, and repair of ships under government contracts is work performed upon 'public works' within the meaning of the Davis-Bacon Act. Wage determinations are issued only if the location of contract performance is known when bids are solicited. See DOL FOH 15d08. If Davis-Bacon is not included in a ferryboat project, the USDOL requires that the contract provisions include:

- ◆ A statement clause that explains why the wage rate determinations are not included,
- ◆ A reminder that the contractor must pay at the very least the Federal minimum wage rate,
- ◆ A reminder that the contractor must submit weekly certified payroll statements, and
- ◆ A reminder that the contractor must comply with all other DOL labor standards.

Flaggers - The DOL has determined that the duties of flaggers are manual or physical in nature and therefore are covered by the Davis-Bacon Act. See USDOL FOH 15e09(a). Employees of traffic service companies that rent equipment and perform only incidental functions at the work site in conjunction with the delivery of equipment are not covered. See USDOL FOH 15e09(b).

Force Account Work by Public Agencies - In some circumstances, an LG may be authorized to perform the construction work using their own forces. Davis-Bacon provisions do not apply to governmental agencies and states. Public agencies are not considered "contractors" or "subcontractors" within the meaning of the Davis-Bacon Act. See USDOL FOH 15b05(a). However under Government Code §2258.021, workers employed by the LG, or other public entity, are covered and must be paid the appropriate prevailing wage rates stipulated by Government Code Chapter 2258.

Helpers - Helpers are permitted on covered contracts if the helper classifications are specified in the applicable wage rate determinations. See USDOL FOH 15e04.

Inspectors - The contractor's employees who make inspections for quality and contract compliance (including quality control or quality assurance) are not usually considered to be laborers or mechanics and therefore, are not covered. See USDOL FOH 15e13.

Materialmen and Suppliers - The manufacturing and delivery of supply items such as sand, gravel and ready-mixed concrete at the work site, when performed by companies serving the general public, are generally not activities covered by Davis-Bacon. See USDOL FOH 15e15.

Owner-operators of Trucks and Other Hauling Equipment - As a matter of policy, the DOL exempts truck owner-operators from Davis-Bacon coverage. The contractor's certified payrolls should show the names of the truck owner-operator with the notation "Owner-operator" but need not list hours worked or rates paid. This policy does not pertain to owner-operators of other equipment such as bulldozers, scrapers, backhoes, etc. See USDOL FOH 15e16.

Project Engineers - The contractor's project engineers are generally not considered to be laborers or mechanics and therefore are not covered. See USDOL FOH 15e06.

Railroad and Utility Adjustments - Davis-Bacon provisions are not applicable to: 1) the relocation work done by a public utility or railroad forces, or 2) the relocation done by a contractor engaged by the utility or railroad. This has been a long-standing FHWA policy and has a basis in a May 15, 1985 legal opinion from FHWA's Chief Counsel. However, Davis-Bacon provisions apply when utility relocation work is part of a highway construction project to be performed by the highway construction contractor and/or subcontractor.

Summer Youth - The USDOL has strict requirements for the employment and payment of summer youth. See USDOL FOH 15e03.

Survey Crews - The actual duties of the survey crewmembers must be considered. Generally speaking, instrument persons, party chiefs and rod persons are not considered laborers or mechanics and therefore are not covered. However, a crewmember that primarily does manual work (clearing brush) is covered for the time so spent. See USDOL FOH 15e19.

Transportation Enhancement (TE) Projects - Davis-Bacon only applies to projects located on highways functionally classified as Federal-aid highways (not local roads, rural minor collectors or projects not located on a highway system). Therefore, Davis-Bacon does not apply to TE projects that are not on Federal-aid highways unless they are tied to a Federal-aid highway project. Further guidance is available from FHWA's Transportation Enhancements Overview. However, please be aware that under Government Code §2258.021, workers employed by the LG, or other public entity, are covered and must be paid the appropriate prevailing wage rates stipulated by Government Code Chapter 2258.

Truck Drivers (not truck owner operators) - After 10 years in the courts, in May 1991, the Court of Appeals for the District of Columbia reached a final decision in the case of the

Building and Construction Trades Department vs. Midway. The regulation in question, 29 CFR 5.2(j), included the "transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor" in the definition of work covered by the Davis-Bacon Act. The Court ruled that this regulation is inconsistent with the Act and that it conflicts with the statutory objective of the Act. In the Court's view, the Act covers only mechanics and laborers who work on the site of the Federally-funded projects and does not cover those employed off-site, such as suppliers and material delivery truck drivers. In its review of the legislative history of the Act, the Court concluded that Congress clearly intended the Act to apply only to on-site workers. Thus, the Court ruled that truck drivers who come onto the site of the work to drop off construction materials are not covered by the Act, even if the contractor employs them.

Warranty Work - Davis-Bacon coverage applies to warranty or repair work if it is provided for in the original construction contract. This is true regardless of whether there is a pay item for the work. If an employee spends more than 20% of his/her time in a workweek engaged in such activities on the site of the original work, he/she is covered for all time spent on the site. The contract minimum wage rates apply regardless of whether the work is done five, ten or even 20 years after the contract execution.

Federal Regulation

- a. 23 USC 113 – Requires that laborers and mechanics be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor. This provision applies to all projects with federal funds that are on roadways functionally classified above a Rural Minor Collector.
- b. 40 USC 3141 – Davis-Bacon Act of 1931
- c. 40 USC 276(c) – Copeland Act, workers are protected from paying "kickbacks" to employers for the "privilege" of being employed.
- d. 23 CFR 633.102 – Form FHWA-1273 must be included in all construction contracts that have federal funds.
- e. 23 CFR 635.309(f) Minimum wage rates determined by the Department of Labor in accordance with the provisions of 23 U.S.C. 113, are in effect and will not expire before the end of the period within which it can reasonably be expected that the contract will be awarded.
- f. 23 CFR 636.119 – Projects developed under a public-private partnership must comply with all non-procurement provisions of 23 USC.
- g. 29 CFR 1,2,5 Procedures for Predetermination of Wage Rates, Copeland Act and enforcement provisions.

State Regulation

- a. Government Code 2258.021 – Requires that a worker employed on a public work by or on behalf of the state or a political subdivision of the state shall be paid:
 - i. not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed; and

- ii. not less than the general prevailing rate of per diem wages for legal holiday and overtime work.
- b. Government Code 2258.022(a) – The public body must determine the general prevailing rate of per diem wages in the locality in which the public work is to be performed for each craft or type of worker needed to execute the contract and the prevailing rate for legal holiday and overtime work.
- c. Government Code 2258.023 – Provides for penalties assessed a contractor or subcontractor who violates the statute.
- d. Government Code 2258.024 – Specifies records to be maintained by the contractor and subcontractor.
- e. Government Code 2258, Subchapter C – Describes enforcement actions for violations of the statute.

Required Practices

- a. For federally funded projects functionally classified above Rural Minor Collector, the LG must use US Department of Labor wage rates.
- b. For federally funded projects functionally classified Rural Minor Collector or Local Road, and for all projects with state funds, the LG must use TxDOT-published wage rates or submit wage rates for TxDOT approval that were developed in accordance with state statutes.
- c. For projects with no state or federal funds, the LG must comply with state statutes, but may follow their own procedures. TxDOT approval of wage rate determinations is not required.

LG Responsibilities

- a. Include FHWA-1273 provisions, including Davis-Bacon wage rates in contract, request for proposals, or concessionaire agreement
- b. Assure provisions are included in all contracts and subcontracts exceeding \$2,000.00
- c. Assure wage rates are posted at the site of work
- d. Request additional classifications as necessary
- e. Assure workers are paid appropriate wage for work classification
- f. Assure contractor pays overtime for work in excess of 40 hours in a work week
Work with USDOL to resolve any violations

TxDOT District Responsibilities

- a. General – For projects with state or federal funds, review the LG’s proposed process to assure compliance with the applicable statutes. Submit questions and non-compliance issues to CST for approval.
- b. There is no monitoring on projects without state or federal funds.
- c. For projects with federal funds:
 - i. Review bid proposals, requests for proposals, and concessionaire agreements to ensure Form FHWA-1273 and appropriate wage rates are included.
 - ii. Assist the LG in obtaining additional wage classifications if requested.

- iii. Spot check that wage rates are posted at the job site during routine inspections.
- d. For projects with state funds, review bid proposals, requests for proposals, and concessionaire agreements to ensure the appropriate wage rates are included.

Prison Produced Materials

General. There are limitations on using materials produced by convict labor in a Federal-aid Highway project. Materials produced after July 1, 1991 by convict labor may only be incorporated in a Federal-aid highway construction project if:

- ◆ Such materials have been produced by convicts who are on parole, supervised release, or probation from a prison; or
- ◆ Such material has been produced in a qualified prison facility (e.g. prison industry, with the amount produced during any 12-month period) for use in Federal-aid projects, not exceeding the amount produced, for such use, during the 12-month period ending July 1, 1987. Texas does not have a qualified prison facility meeting the requirements of the regulation.

Federal Regulation

- a. 23 CFR 635.417 – Materials produced in a prison facility or by prison labor may not be used on federally funded projects for roadways functionally classified above a Rural Minor Collector.

State Regulation

- a. No comparable state statute.

Required Practices

- a. The LG must follow the federal statute.

LG Responsibilities

- a. Develop contract language that prohibits use of prison-produced materials and include the contract language in bid documents.

TxDOT District Responsibilities

- a. For projects with federal funds on roadways functionally classified above a Rural Minor Collector, review bid proposals, requests for proposal, and concessionaire agreements to ensure that they do not contain language allowing material produced in a prison facility.
- b. There is no monitoring on federally funded projects on roadways functionally classified Rural Minor Collector or Local Road, and on all projects without federal funds.

Publicly-owned Equipment

General. Equipment owned by the LG may not compete with privately owned equipment. Publicly owned equipment is:

"... equipment previously purchased or otherwise acquired by the public agency involved for use in its own operations".

Publicly owned equipment should not normally compete with privately owned equipment on a contracted project. However, in exceptional cases, a showing that it would clearly be cost effective to use publicly owned equipment may be justified. When supported by a public interest finding, TxDOT may approve the LG's proposal to use publicly owned equipment.

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; and
- ◆ 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 LG cannot benefit from the rental of its own equipment by virtue of a Federal-aid contract. Accordingly, the rental rates must reasonably represent the cost of providing the equipment or there shall be a lump sum credit to Federal reimbursement on the project equal to the amount of profit on rental that the agency receives.

Federal Regulation

- a. 23 CFR 635.106 – Prohibits publicly-owned equipment from competing with privately-owned equipment on a project to be let to contract. There are limited exceptions when justified in writing as being in the public interest.

State Regulation

- a. No comparable statute.

Required Practices

- a. On projects with Federal funds, the LG may not require that a contractor use equipment owned by the local government. Limited exceptions may be granted by TxDOT in unusual circumstances.
- b. On projects with no federal funds, the LG is not bound by the federal statute.

LG Responsibilities

- a. Do not include contract provisions requiring use of LG equipment unless approved in writing by TxDOT.

TxDOT District Responsibilities

- a. For projects with federal funds, review bid proposals, requests for proposals, and concessionaire agreements to ensure they do not contain language requiring use of equipment owned by the LG.
 - i. Transmit LG request to CST for action.
- b. There is no monitoring on projects without federal funds.

Railroad Insurance Provision

General. Contractors are required to purchase railroad protective liability insurance when work under the contract is located in whole or in part within railroad right-of-way. The insurance is for the benefit of the railroad. The requirement to provide the insurance is located at 23 CFR 646.107. The standards for railroad protective insurance established at 23 CFR 646.109 and 646.111 must be adhered to the extent permitted by the insurance laws of the State.

Listed below are the types of coverage required by 23 CFR 646.109:

- (a) Coverage shall be limited to damage suffered by the railroad on account of occurrences arising out of the work of the contractor on or about the railroad right-of-way, independent of the railroad's general supervision or control, except as noted in Sec. 646.109(b) (4).
- (b) Coverage shall include:
 1. Death of or bodily injury to passengers of the railroad and employees of the railroad not covered by State workmen's compensation laws;
 2. Personal property owned by or in the care, custody or control of the railroads;
 3. The contractor, or any of his agents or employees who suffer bodily injury or death as the result of acts of the railroad or its agents, regardless of the negligence of the railroad;
 4. Negligence of only the following classes of railroad employees:
 - (i) Any supervisory employee of the railroad at the job site;
 - (ii) Any employee of the railroad while operating, attached to, or engaged on, work trains or other railroad equipment at the job site which are assigned exclusively to the contractor; or
 - (iii) Any employee of the railroad not within (b)(4) (i) or (ii) who is specifically loaned or assigned to the work of the contractor for prevention of accidents or protection of property, the cost of whose services is borne specifically by the contractor or governmental authority.

The amounts of coverage required by 23 CFR 646.111 is as follows:

- (a) The maximum dollar amounts of coverage to be reimbursed from Federal funds with respect to bodily injury, death and property damage is limited to a combined amount of \$2 million per occurrence with an aggregate of \$6 million applying separately to each annual period except as provided in paragraph (b) of this section.

- (b) In cases involving real and demonstrable danger of appreciably higher risks, higher dollar amounts of coverage for which premiums will be reimbursable from Federal funds shall be allowed. These larger amounts will depend on circumstances and shall be written for the individual project in accordance with standard underwriting practices upon approval of TxDOT.

Federal Regulation

- a. 23 CFR 646 – Requires that a construction contractor carry public liability and property damage insurance when working on railroad right-of-way.

State Regulation

- a. No comparable statutes.

Required Practices

- a. On projects with federal funds, the LG must follow the federal statute. In addition, the LG must coordinate work on railroad right-of-way and include those provisions in the contract.

LG Responsibilities

- a. Coordinate with railroad.
- b. Include provision for contractor's railroad liability insurance and other railroad provisions in bid documents, request for proposals, or concessionaire agreement.
- c. Assure liability insurance is in force and is maintained.

TxDOT District Responsibilities

- a. For design-bid-build projects with federal funds, review bid proposals for inclusion of the insurance provision.
- b. There is no monitoring on design-build or concessionaire projects with federal funds and all projects without federal funds.
- c. While the railroads require insurance, TxDOT will not monitor insurance or other provisions the railroad may require of the LG or their contractor.

Retainage

General. Chapter 223.010 of the Transportation Code allows five percent of the contract price to be retained until the entire improvement has been completed and accepted. However, Federal concerns over prompt pay (49 CFR 26.29) for subcontractors require that one the following three options be used if Federal funds are utilized. These options are:

- (1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.
- (2) You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. The 30 days are changed to 10 days by Government

- Code Chapter 2251.022. The federal government allows states to be more restrictive. Therefore the 10 day requirement prevails.
- (3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days (Changed to 10 days by Government Code Chapter 2251.022.) after your payment to the prime contractor.

If retainage is kept, the contractor may request that the amount retained be deposited under a trust agreement with a state or national bank selected by the contractor that has its main office or a branch office in this state. The LG and the comptroller must approve the request.

The LG will provide a trust agreement, approved by TxDOT that protects the interests of the LG and the state.

The bank selected by the contractor will act as an escrow agent. The contractor may instruct the bank to reinvest the retained amount in a certificate of deposit, bank time deposit, or other similar investment prescribed by the trust agreement. A state or national bank that has its main office or a branch office in this state must issue the certificate of deposit.

Interest earned under the trust agreement is paid to the contractor unless specified otherwise under the trust agreement.

The bank is responsible under the trust agreement for all investments and amounts resulting from the deposits of the retained amount until released.

The contractor is responsible for paying all expenses incident to the deposit and all charges made by the bank for custody of the securities and forwarding of interest on those securities. Expenses or charges paid may not be applied to the contract or the state.

Federal Regulation

- a. While there is no federal statute that addresses retainage, FHWA policy allows recipients of federal funds to set retention rates from progress payments to protect the federal interest.
- b. 49 CFR 26.29 – As part of the DBE program, there must be a contract clause to require that prime contractors pay all subcontractors for satisfactory performance of their contracts no later than 30 days (Changed to 10 days by Government Code Chapter 2251.022.) from receipt of each payment you make to the prime contractor. Retainage may only be withheld if the contract provides for incremental acceptance of work with retainage paid to the prime contractor based on this partial acceptance. The prime must then pay all retainage to the subcontractor within 30 days (Changed to 10 days by Government Code Chapter 2251.022.) after the prime contractor receives payment for satisfactory completion of the accepted work.

State Regulation

- a. Texas Administrative Code, Title 43, Chapter 26.33(g)(1) – A Regional Mobility Authority must use specifications that conform to the latest TxDOT Standard Specifications on projects that connect with the state highway system.
- b. Texas Administrative Code, Title 43, Chapter 27.56(c)(3) – A Regional Tollway Authority must use specifications that conform to the latest TxDOT Standard Specifications on projects with state fund participation.
- c. Government Code 2252.032 – Requires that a governmental entity deposit retainage in an interest-bearing account for contracts that exceed \$400,000 and have a retainage clause of more than 5%. The interest must be paid to the contractor.
- d. Transportation Code 223.009 – Allows partial payments to a contractor.
- e. Transportation Code 223.010 – Allows but does not requires a 5% retainage until a project is complete and accepted. Provides for deposit of the retained amount be deposited under a trust agreement if requested by the contractor and approved by TxDOT and the Comptroller.

Required Practices

- a. For projects with federal or state funds, the LG must adopt Article 9.6 of the TxDOT Standard Specifications with the applicable special provision approved by FHWA or submit an alternate option complying with 49 CFR 26.29 to TxDOT for approval by FHWA.
- b. For projects with no state or federal funds, the LG may follow agency practice.

LG Responsibilities

- a. If retainage is not kept, adopt TxDOT spec Article 9.6 including FHWA-approved special provision and include in bid documents, request for proposals, or concessionaire agreement.
- b. If retainage is kept, make incremental final acceptance of subcontracted work.
- c. Follow retention schedule including release of retainage.

TxDOT District Responsibilities

- a. For projects with state or federal funds, if retainage is not kept, review bid documents to assure applicable TxDOT specifications and latest approved special provisions are included.
- b. For projects with state or federal funds, if retainage is kept, review bid documents to assure incremental final acceptance of subcontracted work will be done.
- c. For projects with state or federal funds, have the LG investigate complaints from sub-recipients of failure to release retainage. Submit questions and non-compliance issues to CST for final determination.

Safety: Accident Prevention (OSHA)

General. Provisions of the Occupational Safety and Health Administration (OSHA) apply. The administration of the national program for occupational safety and health rests with the Occupational Safety and Health Administration (OSHA) of the USDOL.

The FHWA is required by law to ensure compliance with construction safety standards. Section VIII.3. of Form FHWA-1273 specifically grants USDOL representatives right of entry to projects that use Federal-aid funds. Specific subsections of the Form FHWA-1273 include:

- ◆ Section VIII.1. The provisions of this section require the contractor to comply with all applicable Federal, State and local laws governing safety, health and sanitation. The contractor is required to provide all safeguards, safety devices and protective equipment and is required to take such actions, as deemed necessary, to protect the life and health of employees and the safety of the public and property.
- ◆ Section VIII.2. The contractor or subcontractor may not require or permit a laborer or mechanic to perform work under conditions that are unsanitary, hazardous or dangerous to health or safety as determined by construction safety standards.
- ◆ Section VIII.3. This section sets forth the right of entry of USDOL representatives to any site of contract performance for the inspection or investigation of compliance with OSHA standards.

The LG has enforcement responsibilities of any applicable State standards. In addition, the LG should cooperate with and alert other responsible agencies regarding serious violations and provide full cooperation and assistance as required.

Federal Regulation

- a. 23 CFR 635.108 – Contracts must include provisions to insure full compliance with all applicable Federal, State, and local laws governing safety, health and sanitation and to require that the contractor provide all safeguards, safety devices, and protective equipment. This is implemented in Section VIII of Form FHWA-1273.
- b. 29 USC Chapter 15 – Describes establishment and implementation of standards employers are to follow for the safety of their employees.
- c. 29 CFR 1910 and 1926 – Contains health and safety standards for construction.

State Regulation

- a. Labor Code 411.103 – Requires employers to:
 - i. Provide and maintain employment and a place of employment that is reasonably safe and healthful for employees;
 - ii. Install, maintain, and use methods, processes, devices, and safeguards, including methods of sanitation and hygiene, that are reasonably necessary to protect the life, health, and safety of the employer's employees; and
 - iii. Take all other actions reasonably necessary to make the employment and place of employment safe.

Required Practices

- a. All private employers are to follow OSHA standards.

LG Responsibilities

- a. Include provisions in contract to implement OSHA
- b. Cooperate with OSHA as necessary

TxDOT District Responsibilities

- a. For projects with state or federal funds, review bid proposal, request for proposal, or concessionaire agreement for language requiring compliance with OSHA.

State or Local Preference

General. There cannot be any contract provisions that give bidders from a State or other political subdivision preference in bidding projects. The LG shall not impose any requirement or enforce any procedure that operates to require the use, or provides a price differential in favor, of articles or materials produced within a State or other political subdivision. This includes requirements that prohibit, restrict or discriminate against the use of articles or materials shipped from or prepared, made or produced in any State, territory or possession of the U.S.

Materials produced within a designated area shall not be favored to the exclusion of comparable materials produced outside of the area. State and local preference clauses give particular advantage to the designated source and thus restrict competition. Therefore, preference provisions shall not be used on any Federal-aid construction projects.

This policy also applies to preference actions against materials of foreign origin, except as otherwise permitted by Federal law. Thus, the LG cannot give preference to in-State material sources over foreign material sources. Under the Buy America provisions, the state or LG is permitted to expand the Buy America restrictions provided that the state or LG is legally authorized under State law to impose more stringent requirements.

Federal Regulation

- a. 23 CFR 635.409 – There may not be any contract provisions which require the use of or provide a price differential in favor of articles or materials produced within the State.

State Regulation

- a. Government Code 2155.444 – State agencies must give preference to goods produced in Texas if the cost and quality are equal.
- b. Government Code 2155.449 – State agencies must give preference to goods produced in economically depressed or blighted areas if the cost and quality are equal.
- c. Transportation Code 223.045 - provides that contracts for the state highway system without federal funds must contain the same preference provisions for

steel and steel products that are required under federal law for an improvement made with federal funds.

Required Practices

- a. For projects with federal funds, the LG must comply with federal statute.
- b. For projects with state funds, but no federal funds, bid documents must contain provisions to assure compliance with Government Code 2155.444 and 2155.449. Use of contract requirements with preference for local materials must be approved by TxDOT.
- c. For projects with no state or federal funds, the LG may follow their own procedures.
- d. For projects with no federal funds but with state funds, the same preference provisions for steel and steel products that are required under federal law for an improvement made with federal funds.

LG Responsibilities

- a. If federal funds are used, the LG must assure there are no State or local preference provisions in their contracts.
- b. If state funds are used:
 - i. Send contract provisions to implement TGC 2155 for TxDOT concurrence.
 - ii. Request TxDOT approval of local material preference if desired.

TxDOT District Responsibilities

- a. For projects with federal funds, review bid proposals, requests for proposals, and concessionaire agreements to ensure they do not contain language giving state or local material preference.
- b. For projects with state funds, transmit LG contract provisions implementing state statutes to DES for approval.
- c. There is no monitoring on projects without state or federal funds.

Subcontracting

General. Federal regulations impose limitations on the amount of work than can be subcontracted. This provision prohibits a prime contractor from "brokering" (subletting all contract work). Subcontracting limitations are included in Form FHWA-1273. The following sections address the various parts of the regulation:

- ◆ Section VII.1. The contractor is required to perform work amounting to not less than 30 percent of the original contract amount, excluding specialty items, with his own organization. Specialty items are to be designated by the LG and include items that require highly specialized knowledge, abilities or equipment. These items require highly specialized knowledge, abilities or equipment not ordinarily available in the type of contracting organization qualified and expected to bid on the contract.

- ◆ Section VII.2. This section clarifies that the contract amount indicated in Section VII.1. includes the cost of materials and manufactured products that are purchased or produced by the contractor.
- ◆ Section VII.3. The provisions of this section require the contractor to provide competent supervision of the project. The contractor must employ a superintendent or foreman who will have full authority to direct the work and be in charge of the operation.
- ◆ Section VII.4. No portion of the work may be sublet, assigned or otherwise subcontracted without the written consent of the LG. Subcontract approval shall be based on satisfactory evidence that each subcontract is in writing and contains all the pertinent provisions, including insuring that the provisions of FHWA-1273 are physically a part of each subcontract. The approval of a subcontract does not relieve the contractor of responsibility for fulfillment of the contract.

Employee lease agreements have raised some issues. When a contractor enters an agreement with a firm to lease employees, does this constitute a subcontract and thus be subject to the 30% subcontract limitation? Employee lease arrangements are acceptable for Federal-aid projects if the leased employees are under the direct supervision and control of the contractor's superintendent and/or supervisor. Leased employees may be considered to be part of the prime's "own organization" if:

1. The prime contractor maintains control over the supervision of the day-to-day activities of the leased employees;
2. The prime contractor remains responsible for the quality of the work of the leased employees;
3. The prime contractor retains all power to accept or exclude individual employees from work on the project; and
4. The prime contractor remains ultimately responsible for the payment of predetermined minimum wages, the submission of payrolls, statements of compliance and all other Federal regulatory requirements.

The key issue is supervision and control of any leased personnel. If the leased personnel are treated as employees of the prime contractor and would be considered as such but for their actual employment by a leasing agency, then for purposes of 23 CFR Section 635.116(a) they should be considered employees of the prime contractor's organization.

The FHWA requires each subcontract to be approved in writing by the LG. This allows some control to screen subcontractors that are not qualified or that may be ineligible (e.g., debarred). It also assures that all Federal and State requirements will be included in the subcontract. In order to reduce the amount of paper flow, the FHWA Division Administrator may permit the LG to satisfy the subcontract approval requirement by instituting a certification process. This process must require the contractor to certify that each subcontract arrangement will be in the form of a written agreement containing all the pertinent provisions and requirements of the prime contract. The LG must demonstrate that it has an acceptable plan for monitoring such a certification.

Federal Regulation

- a. 23 CFR 633 – Contractors are required to include Form FHWA-1273 in all subcontracts.
- b. 23 CFR 635.116
 - i. Contractors must perform at least 30% of the work on a contract.
 - ii. Subcontractors are not allowed to perform work on a project until the subcontract has been approved in writing by the contracting entity.
- c. 23 CFR 635.116(d) – Applies to design-build contracts
 - i. The contracting entity may establish a percentage of work that must be performed by the design-builder. The 30% limitation does not apply.
 - ii. The only goals that maybe prescribed are those relating to the DBE program.

State Regulation

- a. Texas Administrative Code, Title 43, Chapter 26.33(g)(1) – A Regional Mobility Authority must use specifications that conform to the latest TxDOT Standard Specifications on projects that connect with the state highway system.
- b. Texas Administrative Code, Title 43, Chapter 9.54(c)(6)(A) - A HUB contractor or subcontractor may not subcontract more than 75% of a contract. The HUB shall perform not less than 25% of the value of the contract work.
- c. Texas Administrative Code, Title 43, Chapter 27.56(c)(3) – A Regional Mobility Authority must use specifications that conform to the latest TxDOT Standard Specifications on projects with state fund participation.
- d. Local Government Code 271.185 – A local governmental entity may use the design-build method for the construction, rehabilitation, alteration, or repair of a civil works project.

Required Practices

- a. For all projects with federal funds, the LG must adopt the TxDOT Standard Specification Article 8.8, including 30% limitation, Form FHWA-1273, prompt pay, and other policies. The LG will include TxDOT's "Contractor's Assurance" document in all contract documents.
- b. For all projects with state funds, the 30% subcontracting limitation is reduced to 25% for HUB firms.
- c. For projects with state or federal funds, the LG may not approve subcontracts with firms on the state or federal debarred list.
- d. For design-build projects, the 30% subcontracting limitation does not apply.
- e. For projects with no state or federal funds, the LG may follow their own procedures.

LG Responsibilities

- a. Adopt TxDOT Standard Specification Article 8.8
- b. Include FHWA-1273 in contract
- c. Include Contractor's Assurance in bid documents
- d. Approve subcontracts in writing

- e. Assure subcontractor is not debarred
- f. Monitor 30% or 25% limitation

TxDOT District Responsibilities

- a. For projects with state or federal funds:
 - i. Review bid proposals for design-bid-build projects to ensure all applicable contract requirements are included.
 - ii. Spot check LG's subcontract approvals for compliance with subcontracting limitation and debarred status. Submit questions and non-compliance issues to CST for final determination.
- b. There is no monitoring on projects without state or federal funds.

Termination of Contract

General. Federal-aid contracts exceeding \$10,000 must contain suitable provisions for termination by the LG. The provisions must identify the manner by which the termination will be effected and the basis for settlement. Termination is an action taken by the contracting agency to cancel a contract. There may be a number of grounds to warrant termination, including termination for cause, termination for convenience and termination for default.

Prior to termination of a Federal-aid contract for which TxDOT concurred in the award, the LG shall consult with and receive the concurrence of TxDOT. Federal-aid participation in a terminated contract is decided by the individual merits of the particular case. However, in no instance will Federal funds participate in any allowance for anticipated profits on work not performed.

If the LG awards a contract for completion of a Federal-aid contract previously terminated for default, FHWA policy limits the amount eligible for Federal participation. The amount eligible is the lesser of the original contract or the sum of the new contract plus the payments made under the original contract.

Termination for Cause or Convenience. Terminations for cause or for convenience are for circumstance beyond the contractor's control. AASHTO lists the following conditions as grounds for termination for cause:

- ◆ Executive orders of the President for war, national defense or national emergency,
- ◆ Restraining orders or injunction obtained by third party action, or
- ◆ "Acts of God".

Grounds for termination for convenience include circumstances for which it is in the best interest of the contracting agency to cancel the contract.

In terminating a contract for cause or for convenience, the LG gives written notice to the contractor, relieving him or her from further contractual obligation. The contractor will be

paid for completed work, for work necessary to preserve and protect the completed work and for materials stockpiled for the project.

Termination for Default. Terminations for default are for circumstances that are deemed to be under the contractor's control. The AASHTO guide specifications include the following as circumstances for termination for default:

- ◆ Failure to begin work under the contract within the time specified in the "Notice to Proceed",
- ◆ Failure to perform the work with sufficient workmen and equipment or sufficient materials to assure the prompt completion of the project,
- ◆ Performance of the work not in conformance with the contract requirements or refusal to remove or replace rejected materials or unacceptable work,
- ◆ Discontinuance of the work,
- ◆ Failure to resume work which has been discontinued within a reasonable period of time after notice to resume,
- ◆ Committal of any act of bankruptcy or insolvency,
- ◆ Allowing any final judgment to remain unsatisfied,
- ◆ Making an assignment for the benefit of creditors, or
- ◆ Failure to comply with contract requirements regarding payment of minimum prevailing wages or EEO.

The specifications typically require notice to the contractor and surety of default considerations by the LG. The notice gives the contractor and the surety a specified period of time, such as 10 days, to respond or to proceed with the work. If that period expires without response, the LG may declare the contractor in default and notify the contractor and surety that the contractor is in default and the contract is void. The surety is then liable under conditions of the performance bond and must provide funds to complete the project, up to the full value of the bond. To avoid paying the bond, the surety may elect to assign another contractor to complete the work. However, if the surety is unable or unwilling to assign another contractor, the funds will be transferred to the LG.

If the surety awards a second contract, no action is required of FHWA or TxDOT since the surety's contract is considered an extension of the original contract. However, if the LG awards a contract to complete the work covered by a defaulted Federal-aid contract, normal Federal-aid procedures for PS&E advertising and award must be followed. The Federal-aid funding for the project will be limited to the lesser of the original contract value or the amount spent under the defaulted contract plus the second contract.

Federal Regulation

- a. 23 CFR 635.125 - Contracts exceeding \$10,000 must contain provisions for termination of a contract, including the manner by which the termination will be effected and the basis for settlement. In addition, such contracts must describe conditions under which the contract may be terminated for default as well as

conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

- b. 23 CFR 635.125 – Termination of a contract requires prior FHWA concurrence.

State Regulation

- a. Texas Administrative Code, Title 43, Chapter 26.33(g)(1) – A Regional Mobility Authority must use specifications that conform to the latest TxDOT Standard Specifications on projects that connect with the state highway system.
- b. Texas Administrative Code, Title 43, Chapter 27.56(c)(3) – A Regional Mobility Authority must use specifications that conform to the latest TxDOT Standard Specifications on projects with state fund participation.

Required Practices

- a. All projects with state or federal funds must have termination language in the contract to protect the state or federal interest. The LG must adopt TxDOT Standard Specification Article 8.7 or submit alternate contract language for TxDOT approval.
- b. For project with no state or federal funds, the LG may use agency procedures.

LG Responsibilities

- a. Adopt Article 8.7 of TxDOT Standard Specs or develop comparable contract language for termination of contract and include in bid documents, request for proposals, or concessionaire agreement.
- b. Request TxDOT approval of any termination action.

TxDOT District Responsibilities

- a. For projects with state or federal funds:
 - i. Transmit LG's alternate contract language to CST for approval.
 - ii. The LG will take the termination action. Transmit LG's request to terminate a contract to CST for concurrence and determination of extent of participation.
- b. There is no monitoring on projects without state or federal funds.

Time Extensions

General. Contract time extensions granted by an LG that affect project costs or liquidated damages shall be subject to the concurrence of TxDOT and will be considered in determining the amount of Federal participation.

Events that are normally considered to be under the control of the contractor and, therefore, do not warrant a time extension includes:

- ◆ Shutdowns for maintenance,
- ◆ Breakdowns,

- ◆ Suspensions or stop work orders for violation of safety or pollution regulations,
- ◆ Shutdowns for construction accidents, and
- ◆ Material delays.

The FAPG (Non-regulatory Supplement 23 CFR 635A) provides further guidance on materials delays. The contractor is responsible for the timely order and delivery of materials for the project. A delay in delivery of materials does not in itself generally support an extension of contract time. However, if an unusual market condition (i.e., an industry-wide strike, natural disaster or area-wide shortage) occurs, a time extension may be in order.

Delays due to inclement weather should be expected and should generally not be the basis for a change in contract time. Weather should be factored into the original contract time determination.

Federal policy also covers granting time extensions due to utility, railroad and right-of-way (ROW) clearance delays. Because of the assurances required from the LG prior to TxDOT project authorization, the policy generally does not permit participation in time extensions for such delays. Whenever the railroad or utility is permitted to adjust its facilities coincidentally with contract operations, such activities must be clearly addressed in the contract provisions. All parties should understand that any interference by the railroad or utility to the contractor's operations generally would not constitute an allowable delay. In general, an extension of contract time due to ROW delays is very unusual and is the exception rather than the rule.

Federal Regulation

- a. 23 CFR 635.121 – Time extensions for projects on the National Highway System are subject to approval by the FHWA and will be considered in the extent of federal participation.

State Regulation

- a. No comparable state statutes

Required Practices

- a. For federally funded projects on the National Highway System (NHS), the LG must have TxDOT approval of time extensions before granting the extension to the contractor.
- b. For all other projects, the LG may follow agency practice.

LG Responsibilities

- a. Gain TxDOT concurrence in time extensions.
- b. For concession projects, follow terms of agreement with TxDOT.

TxDOT District Responsibilities

- a. For projects with state and federal funds on the NHS, review and approve time extension requests.
- b. There is no monitoring on all other projects.

Title VI Compliance

General. Title VI of the Civil Rights Act of 1964 is the federal law that states “No person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.” Additional regulations and statutes broadened non-discrimination to include religion, sex, age, retaliation and disability.

The two main authorities enabling Title VI implementation, compliance and enforcement are the Civil Rights Act of 1964 and the Civil Rights Restoration Act of 1987. Various other statutes, laws and regulations, executive orders and the United States Constitution provide guidance for the effective execution of the objectives of Title VI. These include, but are not limited to the:

- ◆ Federal-Aid Highway Act of 1973
- ◆ Section 504 of the Rehabilitation Act of 1973
- ◆ Americans with Disabilities Act of 1990
- ◆ Age Discrimination Act of 1975
- ◆ Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
- ◆ Executive Order 13166: Improving Access to Services For Persons With Limited English Proficiency

Pursuant to Title VI of the Civil Rights Act of 1964, as amended, the Restoration Act of 1987 and other nondiscrimination authorities, it is the policy of the Texas Department of Transportation that discrimination based on race, color, national origin, sex, age or disability shall not occur in connection with any of its programs or activities. Any recipient or sub-recipient receiving Federal financial assistance shall adopt this assurance or provide one in accordance with 49 CFR Part 21.7 and follow all applicable laws, regulations and guidance including 49 CFR Part 21 and 23 CFR Part 200.

Federal Regulations

- a. 49 CFR Part 21: Nondiscrimination in Federally-Assisted Programs of the Department of Transportation
- b. 23 CFR Part 200: Title VI Program and Related Statutes – Implementation and Review Procedures

State Regulations

- a. Texas Administrative Code, Title 43 §9.4: Civil Rights--Title VI Compliance

Required Practices

- a. Pursuant to 23 USC 302, the FHWA's primary recipient is the State Highway Transportation Agency. In Texas, TxDOT is that primary recipient. TxDOT and its subrecipients and contractors, irrespective of tier, are required to prevent discrimination and ensure nondiscrimination in all programs and activities whether they are federally funded or not.
- b. Subrecipients of federal financial assistance include, but are not limited to cities, counties, contractors, consultants, suppliers, universities, colleges and planning agencies. TxDOT and/or the FHWA will address any discovered instance of discriminatory distribution of program access to or use of services and benefits. Program, facility, and records access shall be granted at any time to TxDOT, the State Auditor's Office, the USDOT and other federal agencies to assure compliance with these regulations.
- c. A Title VI complaint may be filed by any individual or individuals who allege they have been subjected to discrimination or adverse impact under any TxDOT program or activity based on race, color, national origin, sex, age, religion or disability. The complaint must be filed within 180 days of the date of the alleged act of discrimination. A "Discrimination Complaint Form" may be obtained online by visiting http://www.txdot.gov/services/civil_rights/ or by contacting the TxDOT Office of Civil Rights at 866-480-2518.

LG Responsibilities

LG recipients should provide methods of administration designed to ensure that they and all subrecipients comply with Title VI and remedy any existing compliance problems. The minimum components of this requirement are:

- a. Develop specific outreach plan for notifying subrecipients through meetings, written documents of the Title VI requirements that apply to the federally-funded State program.
- b. Provide training for local program staff, subrecipients in the Federal agency's nondiscrimination policies and procedures.
- c. Establish procedures for processing complaints, notifying TxDOT and the FHWA, and informing beneficiaries of their right to file an external complaint of discrimination.
- d. Develop a program to assess and report on the status of their Title VI compliance.
- e. Establish plans for bringing discriminatory programs into compliance within a specified time period.
- f. Assist the TxDOT Office of Civil Rights in the Title VI review of the LG and subrecipient contractor program areas and activities. Revise where applicable, policies and procedures and directives to include Title VI requirements.
- g. Distribute policy statement which expresses the LG's commitment to the nondiscrimination provisions of Title VI. The policy statement shall be circulated throughout the recipient's organization and to the general public. Such information shall be circulated where appropriate in languages other than English.
- h. Take affirmative action to correct any deficiencies found by the Federal Highway Administration within a reasonable time period, not to exceed 90 days, in order to implement Title VI compliance.

- i. Process complaints of discrimination consistent with the LG’s procedures. External complaints of discrimination shall be forwarded to TxDOT’s Office of Civil Rights for investigation. Investigations shall be conducted by the Office of Civil Rights personnel trained in discrimination complaint investigations.
- j. Collect statistical data (race, color, national origin, sex, age, disability) of participation in, and beneficiaries of the programs and activities conducted by the recipient.
- k. Participate in training program on Title VI and related statutes.
- l. Prepare a yearly report of Title VI accomplishments for the past year and goals for the next year.
- m. Distribute Title VI information for dissemination to the general public and when appropriate, in languages other than English.
- n. Establish procedures to identify and eliminate discrimination when found to exist.
- o. Provide LG’s program to TxDOT for review.

TxDOT District Responsibilities

- a. TxDOT may perform compliance reviews to determine if the LG is adequately adhering to the conditions set forth under 23 CFR 200.9.

Trench Safety

General. According to OSHA, dozens of people are killed each year and hundreds are injured. OSHA has established several trench safety requirements such as:

- Trenches 5 feet deep or more require a trench protection system.
- Trenches 20 feet deep or more require that the trench protection system be designed by a registered professional engineer.
- Allowable trench protection systems include:
 - i. Sloping protects workers by cutting back the trench wall at an angle inclined away from the excavation.
 - ii. Shoring protects workers by installing aluminum hydraulic or other types of supports to prevent soil movement.
 - iii. Shielding protects workers by using trench boxes or other types of supports to prevent soil cave-ins.
- OSHA standards require that trenches be inspected daily and as conditions change by a competent person prior to worker entry to ensure elimination of excavation hazards.

To assure that trench safety receives the attention it deserves, Health and Safety Code, § 756 outlines several construction project requirements.

Federal Regulation

- a. No comparable statute. There is no federal requirement for there to be a bid item for trench safety. However, various trench safety measures are required by OSHA. Refer to the contract requirement “Safety: Accident Prevention (OSHA).”

State Regulation

- a. Health and Safety Code, § 756.022. Trench Excavation in State requires that any bid documents (if bid documents are used) and the construction contract contain the following provisions for any trench excavation exceeding a depth of 5 feet.
 - i. A reference to the Occupational Safety and Health Administration standards for trench safety,
 - ii. A copy of special shoring requirements, if any, of the state or of a political subdivision in which the construction project is located, with a separate pay item for the special shoring requirements,
 - iii. a copy of any geotechnical information that was obtained by the LG for use in the design of the trench safety system; and
 - iv. a separate pay item for trench excavation safety protection.
- b. Health and Safety Code, § 756.023. Trench Excavation for Political Subdivision requires the same bid and contract provisions as § 756.022 plus additional requirements for cities and counties.

Required Practices

- a. Requirements of Health and Safety Code, § 756.022 applies to all projects with state or private funding whether on-system or off-system.
- b. Requirements of Health and Safety Code, § 756.023 applies to all projects with city or county funding whether on-system or off-system.
- c. Impose Health and Safety Code, § 756.022 regardless of funding.

Responsibilities

- a. Include the required provisions in the bid documents.

TxDOT District Responsibilities

- a. Review bid documents for required provisions.

Warranties and Warranty Clauses

General. With certain limitations, warranties may be specified. Prior to 1991, the FHWA had a longstanding policy that restricted the use of warranties on Federal-aid projects to electrical and mechanical equipment. The rationale for the restriction was that such contract requirements may indirectly result in Federal-aid funds participating in maintenance costs. The use of Federal-aid funds for routine maintenance is prohibited by law.

On August 25, 1995, FHWA published an Interim Final Rule (IFR) for warranties related to projects on the National Highway System. The IFR states that warranty provisions shall be for a specific construction product or feature. Routine maintenance items are still ineligible. The warranty Final Rule was published in the April 19, 1996 Federal Register and became 23 CFR 635.413.

The LG may include warranty provisions in NHS construction contracts in accordance with the following:

- ◆ Warranty provisions shall be for a specific construction product or feature. A general warranty for the entire project is unacceptable since the contractor does not control the design process or make decisions during that phase.
- ◆ Warranties may not cover items of maintenance ineligible for Federal participation. An example of this might be a warranty for guardrail construction where it would be inappropriate to warrant routine damage done to the guardrail by vehicle impacts.
- ◆ Contractors are not to be required to warrant items over which they have no control. An example of this might be a warranty for asphaltic concrete pavement. It would be appropriate for the contractor to warrant the smoothness of the pavement or the rutting performance, but inappropriate to warrant reflective cracking that might occur due to preexisting underlying layers regardless of how well the contractor constructs the new pavement.
- ◆ All warranty requirements and subsequent revisions shall be submitted to TxDOT for advance approval.
- ◆ The LG may follow TxDOT procedures regarding the inclusion of warranty provisions in non-NHS Federal-aid contracts.

Currently the regulations do not restrict the duration of the warranty. However, practical experience has shown that two to five year warranties are common, and warranties beyond five years may not be as cost effective due to bonding and/or surety concerns. Warranty provisions have been used for asphalt concrete pavements, bridge painting, traffic striping and bridge expansion joints.

Federal Regulation

- a. 23 CFR 635.413 – For projects on the National Highway System, warranty provisions may be used for a specific product or feature. Warranties for the entire project are not acceptable. Contractors may not be required to warrant items over which they do not have control.
- b. 23 CFR 635.413(e) – For design-build projects on the National Highway System, regulatory changes are appropriate:
 - i. General project warranties may be used with limitations.
 - ii. Contracting entities may allow proposers to submit alternate warranty proposals for determination of best value.

State Regulation

- a. No comparable state statute.

Required Practices

- a. For projects with state or federal funds, the LG must submit warranty procedures, including contract language, for TxDOT approval.
- b. For projects with no state or federal funds, the LG may use agency procedures.

LG Responsibilities

- a. Submit warranty procedures to TxDOT for approval.
- b. For concessions, follow terms of agreement.

TxDOT District Responsibilities

- a. For design-bid-build and design-build projects with state or federal funds, submit the LG's warranty process and contact language to CST for approval.
- b. There is no monitoring on projects without state or federal funds and concessionaire projects.

B. LETTING AND AWARD

Addenda

General. All bidders must bid the project on the same or comparable basis, so that no particular advantage or disadvantage accrues to any potential bidder or to the LG. Since an addendum issued during an advertisement period could have a profound impact, not just on bid prices, but also on the basis for bid comparisons, all prospective bidders must be made aware of any addendum as expeditiously as possible.

The definition of "expeditious," in terms of an adequate time frame to get an addendum out to all prospective bidders prior to the bid opening, is subjective. Each case should be judged on the complexity of the addendum. The most important consideration in an addendum process is to give all potential bidders enough time to fully evaluate the effect of the changes and to adjust their bid accordingly. The LG should develop policy guidance that identifies an adequate time frame.

Since an addendum constitutes a deviation from the TxDOT-approved PS&E, the obligation of Federal-aid funds may be impacted by the change. Therefore, TxDOT must approve an addendum prior to release to the prospective bidders. Any approval or concurrence will be based on the LG's assurance that all potential bidders will receive the approved addendum.

Federal Regulation

- a. 23 CFR 635.112(c)
 - i. Addenda which contain a major change to the plans and/or specifications must be approved by FHWA/TxDOT prior to release to prospective bidders.
 - ii. Minor addenda must be identified prior to, or with the request for concurrence in award.
 - iii. Addenda must be sent to all bidders.
 - iv. Bidders must acknowledge receipt of all addenda. Failure to acknowledge addenda renders a bid non-responsive.
- b. 23 CFR 635.112(i)(3) – design-build
 - i. Addenda that result in major changes to the Request for Proposals must be approved by FHWA/TxDOT prior to release to offerors.

- ii. Addenda must be sent to all offerors.
 - iii. The LG must provide assurance that all offerors received all addenda prior to requesting concurrence in award.
- c. CFR 635.114 (b)
 - i. FHWA must formally concur in the award of all Federal-aid contracts. This is a prerequisite to Federal participation in construction costs and is considered as authority to proceed with construction, unless specifically stated otherwise. Concurrence in award shall be formally approved and shall only be given after receipt and review of the tabulation of bids.

State Regulation

- a. Local Government Code 271.0065 - All bidders must have the opportunity to bid on the same items on equal terms. (Applies to municipalities, counties, and other local governments)
- b. Transportation Code 366.185 – A Regional Tollway Authority must develop competitive bidding procedures to award contracts to the lowest responsible bidder that complies with the authority's criteria.
- c. Transportation Code 370.184 and .185 – A Regional Mobility Authority must adopt rules governing award of contracts. A contract may be let by a competitive bidding procedure to the lowest responsible bidder that complies with the authority's criteria.

Required Practices

- a. For projects with federal funds, TxDOT must concur in the award.
- b. For all projects on the state system, projects with federal or state funds, or projects administered by a Regional Mobility Authority, all addenda must have TxDOT approval prior to award of the contract. “Major” addenda must be approved by TxDOT prior to release to prospective bidders/offerors. “Minor” addenda may be approved by TxDOT after release to bidders but prior to award of contract. Minor addenda includes minor quantity changes and correction of obvious errors, but does not include changes to geometric features, approved specifications, or safety appurtenances. The LG should verbally advise TxDOT of any proposed addenda before release to prospective bidders/offerors to avoid potential participation issues.
- c. For projects that do not have state or federal funds, are not on the state system, the LG should follow their own procedures. The LG does not have to get TxDOT approval of addenda.
- d. For concessionaire projects that include long-term maintenance by the concessionaire (20 years or more), major addenda do not have to be approved by TxDOT prior to release. All addenda must be approved by TxDOT before award of contract.

LG Responsibilities

- a. Request formal concurrence in award from TxDOT. The request must include the tabulation of bids.

- b. Secure TxDOT approval of “major” addenda prior to release.
- c. Assure all addenda available to all bidders/offerors.
- d. Secure TxDOT approval of “minor” addenda prior to contract award.

TxDOT District Responsibilities

- a. For project with federal finds, forward the LG’s request for concurrence in the award to the Design Division.
- b. For all projects requiring TxDOT approval of addenda, reach agreement with the LG on the process to submit addenda to the District. This process should be understood by both the District and the LG before advertising for bids or issuing a request for proposals.
- c. Fax or e-mail addenda to DES as soon as practical following receipt from the LG.
- d. There is no monitoring on projects that do not require TxDOT approval of addenda.

Advertising

General. An advertisement is the official announcement inviting bids for construction work. Certain requirements must be fulfilled before the official advertisement is issued. In Texas, advertisement of a contract proposal legally takes the form of a classified advertisement. Advertisements must be in the county in which the work is to take place and in two other newspapers, and run weekly at least two weeks prior to bid opening. If the contract is estimated to involve less than \$300,000, notice may be published in only two successive issues of a newspaper published in the county in which the improvement is to be made. Other forms to announce upcoming projects may include advertisements in trade journals, bulletins and mailed notices to potential bidders. These other forms of advertisement can attract greater attention and, thereby, enhance competition. However, the notice in a newspaper is considered the legal advertisement.

The LG may only advertise a project following TxDOT’s approval of the PS&E package. TxDOT authorization will be based on the assurances prescribed in 23 CFR 635.309, which include:

- ◆ PS&E approval;
- ◆ Assurances that all right-of-way clearances (including encroachments on the right-of-way), utility, and railroad work have been completed, or that arrangements have been made for coordination during construction with proper notice provided in the bid proposal;
- ◆ Assurances for relocation of individuals and families, when applicable;
- ◆ Assurances that the public hearing process and location and design approval requirements have been met; and
- ◆ Assurances, where applicable, that required area-wide agency reviews have been accomplished.

The LG's advertising policy and practices must assure free and open competition. This policy includes issues concerning licensing, bonding, prequalification, and bidding, as well as, the announcement itself in relation to Title VI Nondiscrimination, with regard to age, race, religion, color, sex, national origin, disability, etc.

The minimum advertisement period is three weeks. With approval by TxDOT, exceptions are permitted where circumstances warrant. For large or complex projects, the advertisement period should be greater than three weeks to permit prospective bidders adequate time to prepare a responsive bid proposal. Scheduling a pre-bid meeting to address prospective contractors concerns and questions is considered good industry practice.

The LG shall continue to accept bids or proposals or other applicable expressions of interest for the contract for at least 21 calendar days after the date the LG first posted notice of the contract in accordance with the requirements listed above, or 14 calendar days after the date the LG first posted the entire bid or proposal solicitation package. The minimum posting requirements do not apply in an emergency requiring the LG to make the procurement more quickly to prevent a hazard to life, health, safety, welfare or property or to avoid undue additional cost.

The Transportation Code §223.002 stipulates that notice of the time and place at which bids will be opened for a contract and the contract awarded be published in a newspaper published in the county in which the improvement is to be made once a week for at least two weeks before the time set for awarding the contract and in two other newspapers that the LG may designate. If the LG estimates that the contract involves an amount less than \$300,000, notice may be published in two successive issues of a newspaper published in the county in which the improvement is to be made; no further advertisement is needed. If a newspaper is not published in the county in which the improvement is to be made, notice shall be published in a newspaper published in the county nearest the county seat of the county in which the improvement is to be made; and in which a newspaper is published.

The Government Code §2155.083 requires that all contracts involving more than \$25,000 be posted in the in Electronic State Business Daily maintained by the Office of the Comptroller. The LG must post in the business daily either the entire bid or proposal solicitation package or a notice that includes all information necessary to make a successful bid, proposal, or other applicable expression of interest for the procurement contract, including at a minimum the following information for each procurement that the state agency will make that is estimated to exceed \$25,000 in value:

- ◆ A brief description of the goods or services to be procured and any applicable state product or service codes for the goods and services;
- ◆ The last date on which bids, proposals, or other applicable expressions of interest will be accepted;
- ◆ The estimated quantity of goods or services to be procured;
- ◆ If applicable, the previous price paid by the state agency for the same or similar goods or services;
- ◆ The estimated date on which the goods or services to be procured will be needed; and

- ◆ The name, business mailing address, and business telephone number of the state agency employee a person may contact to inquire about all necessary;
- ◆ Information related to making a bid or proposal or other applicable expression of interest for the contract.

Federal Regulation

- a. 23 CFR 635.112 contains the following requirements:
 - i. Projects may not be advertised for receipt of bids until a Letter of Authority is issued by the FHWA.
 - ii. The advertisement and the approved PS&E must be available a minimum of three weeks before bid opening.
 - iii. For design-build, FHWA's approval of the Request for Proposals has the same significance as PS&E approval.

State Regulation

- a. Local Government Code 252.041 (municipalities) - The Municipality must place a weekly advertisement in a newspaper published in the municipality at least two weeks before bid opening.
- b. Local Government Code 262.025 (counties) – The County must place a weekly advertisement in a newspaper of general circulation in the county at least two weeks before bid opening.
- c. Local Government Code 271.025 (municipalities, counties, and other local governments) – Governmental entities must advertise for bids. If no other law prevails, the advertisement must be published in a newspaper of general circulation in the area at least twice on or before the tenth day before the first date bids may be submitted..
- d. Local Government Code 271.184 – Design-build projects must be advertised including time and place of bid opening according to any manner prescribed by law.
- e. Government Code 2155.083 – Procurements over \$25,000 by all state agencies must be placed on the Comptroller's Electronic State Business Daily web site a minimum of 21 days prior to bid opening.
- f. Transportation Code 223.002 – For projects let by TxDOT. This statute does not apply to other entities.
 - i. Advertise the place and time bids are to be opened and read.
 - ii. For contracts estimated at \$300,000 or above, advertisements in newspapers need to be in the county in which the work is to take place, and in two other newspapers (total of three newspapers). For contracts estimated to be less than \$300,000, advertisements should be published twice in the county where the work is to take place.
 - iii. The newspaper advertisements must be placed at least two weeks prior to bid opening and run each week.
 - iv. If a newspaper is not published in the county in which the work is to be done, advertisements need to be published in a newspaper published in the county:

1. Nearest the county seat of the county in which the work is to be done; and
 2. In which a newspaper is published.
- g. Transportation Code 223.203(c) – For design-build, TxDOT must publish a notice advertising a request for competing proposals and qualifications in the Texas Register. This Regulation does not apply to other entities.
 - h. Transportation Code 366.185(b) – Regional Tollway Authorities must adopt rules governing award of contracts through competitive bidding.
 - i. Transportation Code 370.184 – A Regional Mobility Authority must adopt rules governing award of contracts.

Required Practices

- a. For projects with state or federal funds, the LG may not advertise for receipt of bids until so authorized by TxDOT. If the project has federal funds, authorization from TxDOT will be after FHWA issues a Letter of Authority.
- b. For projects with federal or state funds, the LG is encouraged to follow the provisions of Transportation Code 223 and Government Code 2155.083. (Electronic State Business Daily, number and location of newspapers)
- c. For projects with no federal or state funds, the LG may follow their own advertising procedures. The LG is encouraged to use the Electronic State Business Daily.
- d. Concessionaires will follow TxDOT practices on projects where TxDOT is the administrator.

LG Responsibilities

- a. Advertising must be after TxDOT authorization.
- b. Advertise a minimum of 3 weeks in advance of bid opening.
- c. Use three newspapers and consider using the Electronic State Business Daily.
- d. For design-build follow provisions in the approved solicitation.

TxDOT District Responsibilities

- a. General
 - i. For projects with state or federal funds, review the LG's process for advertising for compliance with the applicable statutes and policy statements. Submit questions and non-compliance issues to CST for final determination.
 - ii. For projects with state or federal funds, check that the advertisement is not listed in the Electronic State Business Daily, newspapers, or other advertising medium before the LG receives authorization from TxDOT.
 - iii. There is no monitoring on projects without state or federal funds.
- b. Design-bid-build – For projects with state or federal funds, spot check newspaper advertisements for compliance with statutes (content of advertisement, number of newspapers, and area of circulation).
- c. Concessionaire – Monitor advertising for compliance with the concessionaire agreement.

Bid Analysis and Contract Award

General. Bid analysis is the basis for justifying contract award or rejection of the bids. A proper bid analysis helps to ensure that funds are being used in the most effective manner. Contract award is the commitment to go forward with the project.

Bid Analysis. The engineer's estimate is part of the PS&E. One of the purposes of the estimate is to serve as a guide to analyze bids. The estimate should be accurate, credible and based on realistic data. TxDOT maintains written procedures for justifying the award of a contract, or rejection of the bids, when the low bid appears excessive or rejection is being considered for other reasons (please refer to TxDOT's Letting Manual for more information).

The bid analysis process, pursuant to 23 CFR 635.114(c), is an examination of the unit bid prices for reasonable conformance with the engineer's estimated prices. Beyond the comparison of prices, other factors that a bid analysis may consider include:

- ◆ Number of bids,
- ◆ Distribution or range of the bids,
- ◆ Identity and geographic location of the bidders,
- ◆ Urgency of the project,
- ◆ Unbalancing of bids,
- ◆ Current market conditions and workloads,
- ◆ Comparison of bid prices with similar projects in the letting,
- ◆ Justification for significant bid price differences,
- ◆ Potential for savings if the project is re-advertised, and
- ◆ Other factors as warranted.

Not all of these factors need to be considered for bids that indicate reasonable prices or show good competition. However, when the low bid differs from the engineer's estimate by an unreasonable amount, a thorough analysis of all bids should be undertaken to justify award of the contract. In order to justify award of a contract under these circumstances, the following questions should be considered:

- ◆ Was competition good?
- ◆ Is the timing of the project award critical?
- ◆ Would deferral be contrary to the public interest?
- ◆ Would re-advertisement result in higher or lower bids?
- ◆ Was there an error in the engineer's estimate?

Unbalanced Bids. Perform an analysis of the tabulations and the project estimate to determine the presence of unbalanced bids. As defined in 23 CFR 635.102, the two types of unbalanced bids are:

- ◆ A mathematically unbalanced bid is a bid that contains lump sum or unit bid items that do not reasonably reflect the actual costs (plus reasonable profit, overhead costs, and other indirect costs) to construct the item, while
- ◆ A materially unbalanced bid is a bid that generates reasonable doubt that award to that bidder would result in the lowest ultimate cost to the Government. A materially unbalanced bid should not be awarded.

The LG must obtain TxDOT concurrence on the determination of whether or not a bid is unbalanced.

To detect mathematical unbalancing, the unit bid items will be evaluated for reasonable conformance with the engineer's estimate and compared with the other bids received. There are no definitive parameters (e.g., an amount or percent of variance from the engineer's estimate) that constitute an unbalanced bid. The degree of unbalancing of a bid may depend on the reason for the unbalancing.

There may be situations where the quantity of an item could vary due to inaccuracies in the original quantity or cost estimating, errors in the plans, changes in site conditions or design, etc. In these situations, the bids will be further evaluated to determine if the low bidder would ultimately yield the lowest cost. If unbalancing creates reasonable doubt that award would result in the lowest ultimate cost, the bid is materially unbalanced and TxDOT will recommend rejection or other steps to be taken to protect the government's interest.

Additional information related to unbalanced bid determination is available in TxDOT's Letting Manual.

Transportation Code §223.0041 stipulates that award of a contract must be made to the lowest bidder. This award is however, subject to the federal Buy America provisions in accordance with Transportation Code §223.045.

Concurrence in Award. Concurrence in contract award is not just a formality; it is the authorization to proceed with construction. The LG must formally request concurrence by TxDOT in the award of contracts. The basic policy is explained in 23 CFR 635.114(a):

"Federal-aid contracts shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting the criteria of responsibility as may have been established by the STD [LG] in accordance with 23 CFR 635.110. Award shall be within the time established by the STD [LG] and subject to the prior concurrence of the Division Administrator [TxDOT]."

The regulations, 23 CFR 635.114(b), further state that:

"Concurrence in award ...is a prerequisite to Federal participation in construction costs and is considered as authority to proceed with construction, unless specifically stated otherwise."

TxDOT's concurrence shall be formally documented in writing and shall include any qualifying statements concerning the concurrence. Verbal concurrence in award must be avoided and should only be used in unusual circumstances. Verbal concurrence must be

documented and should be followed by a written concurrence in award that reflects the date of verbal concurrence.

When the LG determines that the lowest bidder is not qualified, 23 CFR 635.114(f) requires that:

"If the SDT [LG] determines that the lowest bidder is not responsive or the bidder is not responsible, it shall so notify and obtain the Division Administrator's [TxDOT's] concurrence before making an award to the next lowest responsible bidder."

23 CFR 635.114(h) covers the situation when the LG makes a decision to reject all bids:

"Any proposal by the STA [LG] to reject all bids received for a Federal-aid contract shall be submitted to the Division Administrator [TxDOT] for concurrence, accompanied by adequate justification."

To insure the sanctity of the low-bid system, the FHWA Contract Administration Core Curriculum states "The act of a contracting agency negotiating with an apparent low bidder prior to award is defined as "bid rigging in reverse," and is expressly prohibited by 23 CFR 635.113(a)."

Add Alternates. Many architectural projects use the concept of "add or deductive alternates". This concept allows the owner to maximize available funding. While the concept is not normally associated with Federal-aid Highway projects, it may be used if the alternates are listed in the proposal in priority order, with an explanation to all bidders of how the alternates will be used to determine the low bidder and contract award.

Federal Regulation

- a. 23 CFR 635.113(a)
 - i. Negotiation with contractors, during the period following the opening of bids and before the award of the contract shall not be permitted.
- b. 23 CFR 635.114
 - i. Contracts must be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting the criteria of responsibility as may have been established in accordance with Sec. 635.110.
 - ii. Award is subject to the prior concurrence of FHWA (TxDOT may act on behalf of FHWA on certain projects). Prior concurrence is a condition of federal participation.
 - iii. Bids shall be evaluated for conformance with the engineer's estimate. Extreme variations and obvious unbalancing shall be thoroughly evaluated to assure good competition and the lowest possible price was received.
 - iv. The request to concur in award of an unbalanced bid must be supported by written justification.
 - v. Decisions to either award to other than the low bidder or reject all bids must be have prior FHWA (TxDOT) concurrence.
- c. 23 CFR 635.114(k) – Design-build contracts shall be awarded in accordance with the Request for Proposals.

- d. 23 CFR 636 – Design-Build
 - i. Subpart B lists acceptable procedures for selection and award of design-build projects.
 - ii. Award is based on “best value” evaluated using the criteria established in the Request for Proposals.

State Regulation

- a. Texas Administrative Code Title 43, §9.15(e) – Requires that TxDOT examine low bids for reasonable conformance with TxDOT’s estimate. Bidders found to have submitted a materially and mathematically unbalanced bid will not be allowed to submit future bids on the same project.
- b. Texas Administrative Code Title 43, §26.33(g) – Requires that a Regional Mobility Authority use TxDOT specifications or approved alternate specifications for projects that connect to, or are on, the state highway system.
- c. Texas Administrative Code Title 43, §27.56(c)(3) – Requires that requestors use TxDOT specifications or approved alternate specifications for toll projects that include state funds. TxDOT may consider alternative specifications, including if a project is not intended to become part of the state highway system or otherwise under TxDOT jurisdiction.
- d. Transportation Code 223.0041 – TxDOT contracts shall be awarded to the lowest bidder.
- e. Transportation Code 223.209 – TxDOT must develop rules governing selection of a developer for a comprehensive development agreement.
- f. Local Government Code 252.043 – Requires a municipality to award a contract to the bidder that provides the best value. Includes factors that may be considered in “best value” determination.
- g. Local Government Code 252.0435 – Allows a municipality to consider a bidder’s safety record if:
 - i. The governing body has adopted a written definition and criteria for accurately determining the safety record of a bidder;
 - ii. The governing body has given notice to prospective bidders in the bid specifications that the safety record of a bidder may be considered in determining the responsibility of the bidder; and
 - iii. The determinations are not arbitrary and capricious.
- h. Local Government Code 252.0436 – Allows a municipality to refuse award of a contract to a bidder indebted to the municipality.
- i. Local Government Code 262.027 - Requires a County commissioner’s court to award contract to “lowest and best” bid or reject all bids and publish a new notice.
- j. Local Government Code 262.0271 – Allows a County to give preference to a bidder who provides health insurance comparable to health insurance for county employees.
- k. Local Government Code 262.0275 – Allows a County to take into account the safety record of the bidder if:
 - i. The commissioners court has adopted a written definition and criteria for accurately determining the safety record of a bidder;
 - ii. Prospective bidders are given notice in the bid specifications; and
 - iii. The determinations are not arbitrary and capricious.

- l. Local Government Code 262.0276 – Allows a County to refuse award of a contract to a bidder indebted to the county.
- m. Local Government Code 262.0305 – Allows a County to negotiate modifications after award if in the best interest of the county.
- n. Local Government Code 271.0065 – Requires a County to provide potential bidders the opportunity to have their bid judged to the same standards.
- o. Local Government Code 271.027 – Requires a County to award contracts to the lowest responsible bidder. Also allows a bidder to demonstrate responsibility after opening and before award to another bidder.
- p. Local Government Code 271.192 - For design-build projects the LG must select a design-build firm using a combination of technical qualifications and cost.
- q. Transportation Code 366.185 – A Regional Tollway Authority must award contracts by a competitive bidding procedure where the contract is awarded to the lowest responsible bidder that meets the Authority’s criteria.
- r. Transportation Code 370.184 – A Regional Mobility Authority must adopt rules governing award of contracts.
- s. Transportation Code 370.312 – A Regional Mobility Authority must adopt rules governing selection of private partnerships.

Required Practices

- a. For all projects with federal and/or state funds and all projects on the state highway system, the LG must have TxDOT concurrence in award before awarding a contract. Since TxDOT does not reimburse on Pass-Through Finance projects (also called Pass-Through Toll projects) until the project is open and it is accepted at completion, TxDOT concurrence is not required. If an issue occurs at letting, the LG should be informed the issue jeopardizes reimbursement and therefore the LG should remedy the issue.
- b. For all projects with federal and state funds, the LG must develop specific criteria for determining a “responsible / responsive bidder”. The language must address statutory options, such as “best bid”, “best value”, and “safety record”. TxDOT approval of the criteria is required and the criteria must be included in bid documents. In addition, the LG must have a procedure satisfactory to TxDOT to determine and evaluate “materially and mathematically unbalanced bids”.
- c. For projects with federal and state funds, the provisions of Local Government Code 271.027 allowing a bidder to demonstrate responsibility after bid opening does not apply since 3.b. provides for developing contract language before advertising a contract for receipt of bids.
- d. For projects with no federal or state funds, the LG may award contracts without prior TxDOT concurrence following their applicable procedures.

LG Responsibilities

- a. Develop definition of responsible / responsive bidder for TxDOT approval and include in bid documents.
- b. Establish low bid criteria if add alternates are used.
- c. Evaluate bids.
- d. Determine lowest responsible / responsive bidder.

- e. Obtain TxDOT concurrence on the determination of whether or not a bid is unbalanced.
- f. Request concurrence in award (except for Pass-Through Finance projects).
- g. Proceed with contract execution after notification of concurrence
- h. For design-build, submit procurement procedures to TxDOT for approval.
- i. For design-build, evaluate offers for compliance with rules.
- j. Request TxDOT concurrence in award.
- k. For off-system projects with no federal or state funds, follow local procedures.

TxDOT District Responsibilities

- a. General
 - i. For projects with state or federal funds, review the LG's process for bid analysis and contract award for compliance with the applicable statutes and policy statements. Submit questions and non-compliance issues to CST for final determination.
 - ii. For projects with state or federal funds and for projects on the state system, the LG must request TxDOT concurrence in award prior to awarding a contract (except for Pass-Through Finance projects). The District must review the LG's request and forward to CST for formal TxDOT concurrence.
 - iii. There is no monitoring on projects with local or private funds that are not on the state highway system.
- b. Design-bid-build
 - i. Assure that definitions for "responsible/responsive bidder", "best value", "best bid", and "safety record" are acceptable and are included in the bid proposal. In addition, review the LG's process for determining "materially and mathematically unbalanced bids" is acceptable and appropriate language is in the bid proposal. Submit questions and non-compliance issues to CST for final determination.
 - ii. Notify the LG of the TxDOT Administration's concurrence or rejection.
- c. Design-build
 - i. Assure that the proposal evaluation factors comply with the applicable state and policy statements.
 - ii. Notify the LG of the TxDOT Administration's concurrence or rejection.
- d. Concessionaire
 - i. Review the concessionaire's procurement process for compliance with statutes and policy statements.
 - ii. Notify the LG of the TxDOT Administration's concurrence or rejection.

Bid Opening and Tabulation

General. The bid opening is a public forum for the announcement of all bids, and is that point in time where the bids are opened and read aloud. Bid tabulations provide a means of evaluating bids and as a mechanism for tracking construction costs.

Bid opening. FHWA policy requires all bids to be opened publicly and read aloud either item-by-item, or by total amount.

Reasons for not reading a bid include the bid itself being unresponsive, often called "irregular", or the bidder is determined not responsible. The differences between a responsive bid and responsible bidder are as follows:

- ◆ A responsive bid is one that meets all the requirements of the advertisement and proposal, while
- ◆ A responsible bidder is one who is physically organized and equipped with the financial wherewithal to undertake and complete the contract.

Some reasons for not reading a bid due to bidding irregularities may include:

- ◆ Failure to sign the bid,
- ◆ Failure to furnish the required bid bond,
- ◆ Failure to include a unit bid price for each item,
- ◆ Failure to acknowledge all addenda,
- ◆ Failure to include a total amount for the bid,
- ◆ Failure to submit a non-collusion affidavit,
- ◆ Failure to commit to the achievement of the DBE contract goals or demonstrate good faith efforts to do so, or
- ◆ Inclusion of conditions or qualifications not provided for in the specifications.

The above examples do not include all possible bidding irregularities. The LG's specifications will define what constitutes a bidding irregularity. Therefore, the LG's bidding documents must clearly identify those requirements with which the bidder must comply to have a responsive bid.

Just as the bid may be rejected for being irregular or unresponsive, an apparent low bid may also be rejected on the grounds that the bidder is not a responsible bidder. A bidder may be deemed not responsible because of past unsatisfactory performance, as evidenced by failure to meet the LG's qualification requirements, or because of State or Federal suspension/debarment action. A determination of non-responsibility by the LG should be documented in writing and the contractor should be given "due process" to respond to such charges. A determination of non-responsibility should be done prior to the receipt of bids. While 49 CFR 29.510(b)(2) indicates that participants may not be required to check the [Excluded Parties List System](#), the LG is highly encouraged to develop a procedure for verifying the eligibility of participants prior to the award of the contract.

Additional guidance related to unresponsive and irregular bid determination may be obtained in TxDOT's Letting Manual.

In summary, a successful bid opening should identify the responsible bidder submitting the lowest, responsive bid.

While FHWA does not have specific policies on how a bid opening should be conducted, the competitive bidding policy relies on the phrase in 23 CFR 635.113 that "... all bids ... shall be publicly opened and announced ...". In common terms, "publicly opened" means being opened in front of the "public" - particularly those people who are stakeholders in the letting. The specific details of the advertisement and bid opening procedures are governed by State statute.

Bid tabulations. As a basis for tracking current construction costs and forecasting future construction costs, the LG must provide bid tabulation data to TxDOT.

Combined Certifications/Signature Sheets. Frequently, bids are rejected as non-responsive because the contractor inadvertently failed to sign one of the many certifications required. In an effort to maximize competition, some entities use either a combined certification sheet or include in the bid proposal packet a detailed listing of the certifications that are required and their location within the packet.

Transportation Code §223.004 requires that all bids be sealed and filed with the LG. The bids must be opened in a public meeting allowing attendance by all interested bidders. All bids must be opened in the presence of any interested bidders.

Federal Regulation

- a. 23 CFR 635.113 – design-bid-build
 - i. All bids received must be publicly opened and read. If a bid is received and not read, the bidder's name must be identified and the reason for not reading the bid must be announced.
 - ii. Negotiating with contractors between bid opening and contract award is prohibited.
 - iii. For projects on the National Highway System, a tabulation of bids must be submitted to FHWA.
- b. 23 CFR 635.113 – design-build
 - i. All proposals received must be opened and reviewed in accordance with the terms of the solicitation.
 - ii. For projects on the National Highway System, a post-award tabulation of proposal prices must be submitted to FHWA.

State Regulation

- a. Local Government Code 252.041 – A municipality must publish a notice that contains the time and place bids will be publicly opened and read.
- b. Local Government Code 252.0415 – A municipality may receive bids electronically if the municipality adopts rules to assure confidentiality until opening.
- c. Local Government Code 262.025 – A county must publish a notice that contains the time and place bids will be received and opened. (Does not mention public opening).
- d. Local Government Code 262.026 – A county official must open bids on the date specified in the notice. All bids must be opened at the same time.

- e. Local Government Code 271.026 – A county may open bids only at a public meeting or in a County office.
- f. Local Government Code 271.184 – Design-build projects must be advertised including time and place of bid opening according to any manner prescribed by law.
- g. Local Government Code 271.192 – For design-build projects the LG must select a design-build firm using a combination of technical qualifications and cost.
- h. Texas Administrative Code Title 43, §26.33(g) – Requires that a Regional Mobility Authority use TxDOT specifications or approved alternate specifications for projects that connect to, or are on, the state highway system.
- i. Texas Administrative Code Title 43, §27.56(c)(3) – Requires that requestors use TxDOT specifications or approved alternate specifications for toll projects that include state funds. TxDOT may consider alternative specifications if a project is not intended to become part of the state highway system or otherwise under TxDOT jurisdiction.
- j. Transportation Code 223.004 – TxDOT must open bids at a public meeting.
- k. Transportation Code 223.154 – TxDOT must open proposals in a manner that does not disclose their contents to competing offerors during negotiations.
- l. Transportation Code 366.184 – Regional Tollway Authorities must adopt rules governing award of contracts through competitive bidding.
- m. Transportation Code 370.184 – Regional Mobility Authorities must adopt rules governing award of contracts.
- n. Transportation Code 370.185 – A Regional Mobility Authority may award contracts using a competitive bidding
- o. Transportation Code 370.306 – For Comprehensive Development Agreements, a Regional Mobility Authority must evaluate proposals based on criteria in the notice.

Required Practices

- a. For all projects with federal or state funds using other than a design-build process, the LG must open and read bids in a public forum.
- b. For all design-build projects with federal or state funds, the LG must open proposals in accordance with the solicitation.
- c. For all projects with federal and/or state funds and all projects on the state highway system, the LG must submit bid tabulation (post-award tabulation of proposed prices for design-build) to TxDOT as part of a request for TxDOT to concur in award.
- d. For projects with no federal or state funds, the LG may use their own procedures for opening bids and proposals.

LG Responsibilities

- a. Submit procedure to assure public opening of bids.
- b. Open and read bids in public forum.
- c. Submit bid tab to TxDOT.
- d. For design-build, open proposals in accordance with solicitation.
- e. For design-build, forward post-award tabulation to TxDOT.

TxDOT District Responsibilities

- a. General
 - i. For projects with state or federal funds, the LG must submit a bid tabulation to the District. The District will use the bid tabulation as part of their recommendation to CST to concur in award.
 - ii. There is no monitoring on projects without state or federal funds.
- b. Design-bid-build and concessionaire – The District must attend the public bid opening and monitor the process for compliance with the regulations.
- c. Design-build – The District is not required to monitor receipt and evaluation of responses to Requests for Proposals, but must assure that the LG submits a tabulation of proposed prices. If the project is performed by a Regional Mobility Authority, forward the tabulation to TTA.

Distribution of Bid Documents

General. The advertisement and approved plans and specifications must be available to bidders a minimum of three weeks prior to opening of bids in accordance with 23 CFR 635.112. Shorter periods may be approved by TxDOT's in special cases when justified.

Federal Regulation

- a. 23 CFR 635.112 – Design-bid-build
 - i. Bid documents must be available to bidders a minimum of 3 weeks before bid opening.
 - ii. Shorter periods may be approved in special cases where justified.
- b. 23 CFR 635.112 – Design-build
 - i. FHWA's approval of the Request for Proposals constitutes approval to release the document.
 - ii. The administering entity may determine the appropriate distribution schedule.

State Regulation

- a. Local Government Code 262.025 (counties) – The advertisement must include a statement where specifications may be obtained.
- b. Local Government Code 271.025 (municipalities, counties, and other local governments) – The advertisement must state the location where bid documents may be examined.
- c. Local Government Code 271.184 – Design-build projects must be advertised including time and place of bid opening according to any manner prescribed by law.
- d. Texas Administrative Code, Title 43, §9.13 – TxDOT must give bid documents to bidders meeting prequalification requirements on request of the bidder.
- e. Government Code 2155.083 (state agencies) – Part of the notice in the Electronic State Business Daily must include all information necessary for a bidder to make a successful bid.
- f. Transportation Code 366.185 – Regional Tollway Authorities must adopt rules governing competitive bidding.

- g. Transportation Code 370.184 – Regional Mobility Authorities must adopt rules governing procurement of projects.

Required Practices

- a. Distribution of bid documents will be to all prequalified bidders in accordance with the advertisement or request for proposals.

LG Responsibilities

- a. Assure approved bid documents are available at least 3 weeks before bid opening.
- b. For design-build, follow approved Request for Proposals.
- c. For concessions, follow provisions of agreement with TxDOT.

TxDOT District Responsibilities

- a. For projects with state or federal funds, conduct spot checks to ensure required procedures are followed.
- b. There is no monitoring on projects without state or federal funds.

C. CONTRACT EXECUTION

Workers Compensation Insurance

General. Government Code §406.906 requires that contractors and subcontractors performing on a building or construction contract with a governmental entity must provide written certification that workers' compensation insurance coverage is provided for each individual employed on the public project.

Federal Regulation

- a. No provision

State Regulation

- a. Labor Code 406.096 - A governmental entity that enters into a building or construction contract shall require the contractor to certify in writing that the contractor provides workers' compensation insurance coverage for each employee of the contractor employed on the public project.

Required Practices

- a. For all projects, LG must require the contractor to provide written certification the workers' compensation insurance coverage.

LG Responsibilities

- a. Prior to contract execution, the LG must require the contractor to provide written certification that workers' compensation insurance coverage is provided to each contractor and subcontractor employee working on the project.

TxDOT District Responsibilities

- a. For all projects in which TxDOT must concur in award, ensure that the required certification is received before recommending concurrence in the award.
- b. There is no monitoring during construction as this is the LG's responsibility.

See the following project requirements from Bid Document Preparation section:

- ◆ Bonding
- ◆ Child Support Documentation
- ◆ Disadvantaged Business Enterprises (DBE), Historically Underutilized Businesses (HUB), and Small Business Enterprises (SBE)
- ◆ Railroad Insurance

D. CONTRACT ADMINISTRATION

Americans with Disabilities Act

General. The Americans with Disabilities Act (ADA) is codified at United States Code (USC) Title 42 Chapter 126 and requires equal opportunity for individuals with disabilities. Title II of the ADA governs public facilities including roads and sidewalks. Such opportunity prohibits discrimination against individuals with disabilities in government services, public accommodations, transportation and telecommunications. Further, "reasonable accommodation" must be provided to qualified individuals with disabilities.

Federal regulation located at 49 CFR 37.41 provides that the construction of any new transportation facility shall afford ready accessibility and utilization by individuals with disabilities. 49 CFR 32.43 also requires that when altering any existing transportation facility, the LG must ensure that the alterations are made in such a way as to afford maximum opportunity to provide ready access and utilization by individuals with disabilities. 49 CFR 37.3 defines a facility as:

"...all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located".

Technical assistance concerning Title II's requirements may be obtained from the U. S. Department of Justice and the U. S. Access Board.

Federal Regulation

- a. 28 CFR 35 – Prohibits discrimination on the basis of disability by public entities. It extends the prohibition of discrimination in federally assisted programs established by section 504 of the Rehabilitation Act of 1973 to all activities of State and local Governments, including those that do not receive Federal financial assistance.
- b. 49 CFR 37 – Prohibits discrimination against an individual with a disability in connection with the provision of transportation services. It also provides requirements placed on the Construction or Alteration of transportation facilities by public entities. Applies to federally funded projects.

State Regulation

- a. Occupations Code, Chapter 51 – Establishes the Texas Department of Licensing and Regulation (TDLR).
- b. Government Code 469 – Ensures that public buildings and facilities are accessible to and functional for persons with disabilities.
 - i. Section 469.101 – Requires plan and specification approval by TDLR for buildings and facilities covered by the statute when the estimated construction cost is in excess of \$50,000.
 - ii. Section 469.105 – Requires inspection of buildings and facilities covered by the statute by TDLR or Registered Accessibility Specialist.

Required Practices

- a. All projects on public right-of-way with in excess of \$50,000 in pedestrian elements, the LG must submit plans to TDLR for review and approval.
- b. All projects on public right-of-way must comply with the provisions of the cited statutes.
- c. The LG is responsible for coordination of TDLR inspection and for paying all fees assessed by TDLR.

LG Responsibilities

- a. Ensure all transportation facilities with in excess of \$50,000 in pedestrian elements are in compliance.
- b. Submit plans to TDLR
- c. Request final inspection from TDLR

TxDOT District Responsibilities

- a. For projects with state or federal funds and all projects on the state highway system, the LG will submit a certification sealed by an engineer licensed in Texas that construction standards have been met (see Inspection). The District will conduct a final inspection before issuing final payment to the LG (see Progress Payment). The District should make the LG aware of any ADA concerns noted during periodic inspections during construction.

- b. The District must verify that TDLR has conducted their final inspection and have the LG's certification before recommending TxDOT final acceptance of the project and final payment to the LG (if state or federal funds are used).
- c. There is no monitoring on projects without state or federal funds off the state system.

Contractor Purchase of Equipment for LG

General. Equipment, as defined in 49 CFR 18.3, means "tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit." All other tangible personal property is considered to be "supply". When an LG must purchase equipment to adequately meet the construction engineering requirements of a Federal-aid project, how the equipment is purchased (e.g. by the LG directly or by a construction contractor with ownership transferred to the LG) is irrelevant to Federal-aid participation. A LG has two options for requesting Federal-aid participation for eligible program costs. Most costs incurred by LGs are eligible for Federal-aid reimbursement either as a direct cost or an indirect cost. Indirect cost rates must be approved by TxDOT prior to reimbursement. Please refer to FHWA memorandum dated September 24, 1998 for more information.

LGs requesting federal participation in direct costs must amortize the equipment's cost over its useful life. Federal-aid funds will participate only in that portion of the amortized cost attributable to the time the equipment is used on a specific Federal-aid project(s).

Federal Regulation

- a. 23 USC 302 – States (and other governmental agencies) must be suitably equipped to discharge their duties.
- b. 23 CFR 140 – States (and other governmental agencies) may be reimbursed for eligible construction engineering costs, railroad and audit work.

State Regulation

- a. No comparable statute.

Required Practices

- a. FHWA issued a policy memorandum on May 5, 1993 clarifying federal participation in equipment purchased by the contractor for the LG to discharge their construction engineering responsibilities. Federal participation is limited to the cost of the equipment amortized for the time it is used on the project.
- b. As a matter of policy, TxDOT will limit state fund participation in accordance with FHWA policy.
- c. On projects with no federal or state funds, the LG may follow their own practices.

LG Responsibilities

- a. Submit amortization schedule to TxDOT for approval.

TxDOT District Responsibilities

- a. For projects with state or federal funds, review the LG's amortization schedule and concur if the schedule is reasonable.
- b. There is no monitoring on projects without state or federal funds.

Convict (Inmate) Labor

General. There are limitations on using convict labor on a Federal-aid Highway project. FHWA's regulation states:

"No construction work shall be performed by convict labor at the site or within the limits of any Federal-aid highway construction project from the time of award of the contract or the start of work on force account until final acceptance of the work by the State Transportation Agency (TxDOT) unless it is labor performed by convicts who are on parole, supervised release, or probation."

This same principal applies to projects administered by an LG.

The principle behind the prohibition of convict labor is that use of convict labor restricts competition since convict labor can be furnished at rates well below market labor costs or force account rates.

The terms "parole, supervised release, or probation" refer to the status of a person who has completed the condition of imprisonment. "Supervised release" does not include inmates currently serving their imprisonment terms while performing supervised work either inside or outside the walls of the incarcerating facility. Thus it is not acceptable to have inmates who are currently serving the terms of their incarceration performing work on a project where convict labor is prohibited.

Federal Regulation

- a. 23 CFR 635.117(a) – Prohibits the use of convict labor for projects on roadways functionally classified above a rural minor collector.

State Regulation

- a. Transportation Code 223.044 – Allows TxDOT to contract with a criminal justice agency for the provision of inmate labor on a state highway improvement project.

Required Practices

- a. The LG must gain TxDOT concurrence before allowing convict or inmate labor in the following conditions:
 - i. Federal funds on a roadway functionally classified as rural minor collector or local road and on the state system.
 - ii. State funds on the state system.
- b. The LG may use their own practices in the following conditions:
 - i. Federal funds on a roadway functionally classified as Rural Minor Collector or Local Road and off the state system.

- ii. State funds off the state system.
- iii. Projects with no federal or state funds.

LG Responsibilities

- a. For projects on all functional classes above Rural Minor Collector, ensure that the contractor does not use convict labor.
- b. For all functional class of rural minor collector, local road, if state funds are used on-system, gain TxDOT concurrence for use of convict (inmate) labor if on state system.

TxDOT District Responsibilities

- a. For federally funded projects on roadways functionally classified above a Rural Minor Collector, review the PS&E, Request for Proposal, or Concessionaire Agreement to assure there are provisions to prohibit convict labor.
- b. If the LG wants to require or allow convict labor in the following conditions, transmit the LG's request to CST for concurrence:
 - i. Federal funds on a roadway functionally classified as Rural Minor Collector or Local Road and on the state system.
 - ii. State funds on the state system.
- c. There is no monitoring on the following projects:
 - i. Federal funds on a roadway functionally classified as Rural Minor Collector or Local Road and off the state system.
 - ii. State funds off the state system.
 - iii. Projects with no federal or state funds.

Environmental Concerns

General. Environmental commitments are often made during the environmental process. These commitments must be carried forward to the construction plans. For more information, please refer to the Environmental Module of the LGPP Manual.

Federal Regulation

- a. 23 CFR 635.309(j) – The authorizing entity must make a determination that appropriate measures have been included in the bid documents to ensure that conditions and commitments made to mitigate environmental harm are implemented.
- b. 23 CFR 771.109(b) – Commitments made during the environmental process must be implemented.
- c. 23 CFR 636.109 – For design-build projects, the Request for Proposals must address how environmental commitments and mitigation measures will be implemented.

State Regulation

- a. Texas Administrative Code, Title 43, §2.1 – TxDOT policy statement on the environment.
- b. Texas Administrative Code, Title 43, §2.1(e) – Transportation projects using state funds must comply with applicable state and federal environmental laws.
- c. Texas Administrative Code, Title 43, §26.35 – For projects on the state highway system, the Regional Mobility Authority must agree to be responsible for implementing all environmental commitments.
- d. Texas Administrative Code, Title 43, §27.3 – For projects on the state highway system, proposers under a comprehensive development agreement must comply with NEPA.
- e. Texas Administrative Code, Title 43, §27.44 – For projects on the state highway system, Regional Tollway Authorities must comply with Texas Administrative Code, Title 43, Chapter 2, Subchapter C.

Required Practices

- a. All projects will comply with TxDOT policy to protect, preserve and, when practicable, enhance the environment.

LG Responsibilities

- a. Include environmental commitments in bid documents.
- b. Evaluate environmental commitments before approving changes to contract.
- c. For design-build include environmental commitments in RFP.
- d. For concession projects follow as outlined in agreement with TxDOT.

TxDOT District Responsibilities

- a. All projects must have environmental clearance from TxDOT before starting construction. For projects requiring TxDOT approval of bid documents or requests for proposals, ensure that all environmental commitments are included.
 - i. Design-bid-build – Environmental clearance is prior to letting.
 - ii. Design-build – Environmental clearance before construction. Requests for proposals may be issued before environmental clearance if specifically approved by FHWA.
 - iii. Concessionaire – Refer to concessionaire agreement.
- b. For projects requiring TxDOT approval of change orders, check the environmental document to ensure that the changed work is part of the approved environmental document.
- c. Submit questions and non-compliance issues to ENV for final determination.

False Statements

General. The following notice is contained in 23 CFR 635.119 and must be posted on each Federal-aid highway project in one or more places where it is readily available to and viewable by all personnel concerned with the project.

Notice to All Personnel Engaged on Federal-Aid Highway Projects

United States Code, Title 18, Section 1020, which reads as follows:

Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the costs thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction of any highway or related project submitted for approval to the Secretary of Transportation; or

Whoever, knowingly makes any false statement, false representation, false report, or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or

Whoever, knowingly makes any false statement or false representation as to a material fact in any statement, certificate, or report submitted pursuant to the provisions of the Federal-aid Road Act approved July 11, 1916 (39 Stat. 355), as amended and supplemented, Shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Federal Regulation

- a. 23 CFR 635.119 – Requires that a False Statements notice be posted on all federally funded projects. Form FHWA-1022.

State Regulation

- a. No comparable statutes

Required Practices

- a. Posting the notice is not required on projects with no federal funds.

LG Responsibilities

- a. Ensure Form FHWA-1022 is posted on job site.
- b. Report to TxDOT incidents involving False Statements.

TxDOT District Responsibilities

- a. For projects with federal funds, spot check posting the False Statements poster during routine project inspections.
- b. There is no monitoring on projects without federal funds.

Inspection

General. The LG and TxDOT have certain inspection responsibilities. All Federally funded projects must be completed in accordance with the approved plans, specifications and authorized changes. FHWA has the responsibility of assuring proper stewardship of Federal funds. Projects must meet minimum design standards before Federal funds can be authorized. This is one function of the PS&E approval process. Once authorized, the project must be built to follow the PS&E. Any changes must be approved before Federal funds can participate.

Some projects have direct FHWA involvement, meaning that FHWA is part of all approval actions. For the majority of Federal-aid projects, TxDOT assumes FHWA's approval authority. One approval action required on all projects is acceptance of the completed work. When accepted, TxDOT certifies that the completed project meets all approval criteria.

Complete confidence that a project meets all approved criteria can be accomplished only by full-time involvement in all phases of the project. For TxDOT, this is neither practical nor desirable. By executing an agreement with TxDOT, the LG assures that it has the staff to manage all project functions. TxDOT verifies the LG's actions by conducting periodic inspections. However, it is the LG's day-to-day responsibility to determine compliance with the approved plans, specifications and contract administration requirements.

Compliance with the plans, specifications and contract administration requirements have many parts. One part is assuring that the contractor meets all material and construction requirements. This can be summarized as "quality of the construction". If the LG is not adequately staffed to assure quality construction, it can retain the services of an engineering or architectural firm. If this option is chosen, the firm's services must be secured in compliance with 23 CFR 172B.

One often-overlooked principle is that contract administration issues are also important. For example, a specification implementing Davis-Bacon wages and the associated monitoring and reporting requirements has as much validity as a specification on concrete quality. To assure full contract compliance and Federal participation, the LG is responsible for day-to-day inspection. When the LG executes an agreement with TxDOT, the LG is providing assurance that they are staffed to manage the project and are capable of managing all requirements, including contract administration responsibilities.

23 CFR 1.36 states:

"If the (Federal Highway) Administrator determines that a State (or LG) has violated or failed to comply with the Federal laws or the regulations in this part with respect to a project, he may withhold payment to the State (or LG) of Federal funds on account of such project, withhold approval of further projects in the State (or to the LG), and take such other action that he deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State (or LG) to the satisfaction of the Administrator."

23 CFR 635.105 states:

"The STD (TxDOT) has responsibility for the construction of all Federal-aid projects, and is not relieved of such responsibility by authorizing performance of the work by a local public agency. The STD (TxDOT) shall be responsible for insuring that such projects receive adequate supervision and inspection to insure that projects are completed in conformance with approved plans and specifications. When a project is located on a street or highway over which the SDT (TxDOT) does not have legal jurisdiction, or when special conditions warrant, the SDT (TxDOT), while not relieved of overall project responsibility, may arrange for the Local Government having jurisdiction over such street or highway to perform the work with its own forces or by contract provided the following conditions are met:

- ◆ When the work is to be performed under a contract awarded by a local public agency, all Federal requirements shall be met.
- ◆ The Local Government is adequately staffed and suitably equipped to undertake and satisfactorily complete the work; and
- ◆ In those instances where a Local Government elects to use consultants for construction engineering services, the Local Government shall provide a full-time employee of the agency to be in responsible charge of the project."

Federal Regulation

- a. 23 USC 114 – Requires that federally funded projects be constructed under the direct supervision of the state transportation agency (TxDOT).
- b. 23 USC 302 – States must have a transportation department with adequate powers and be suitably equipped and organized to carry out the duties required by this title.
- c. 23 CFR 635.105 – Supervising agency
 - i. For projects under a local public agency's jurisdiction, TxDOT may allow the local public agency to directly manage projects if TxDOT has assurance that LG staffing and inspection is adequate. This means:
 1. All Federal requirements shall be met.
 2. The local public agency must be adequately staffed and suitably equipped to undertake and satisfactorily complete the work
 3. When the local public agency elects to use consultants for construction engineering services (inspection), the local public agency must provide a full-time employee of the agency to be in responsible charge of the project.
 - ii. Procurement of consultant inspection staff must be procured using the provisions of 23 CFR 172.

State Regulation

- a. Texas Administrative Code, Title 43, Chapter 9, Subchapter C
 - i. Allows TxDOT to contract for construction engineering and inspection services.
 - ii. Provides selection criteria that comply with state law and 23 CFR 172.
- b. Government Code 2254 – Provides for procurement of professional services by all governmental entities.

- c. Local Government Code 271.188 – For design-build projects, the LG must provide or contract for inspection services that are independent from the design-build firm.
- d. Occupations Code 1001.003 – Includes “review of the construction or installation of engineered works to monitor compliance with drawings or specifications” in the definition of “practice of engineering”.
- e. Occupation Code 1001.407 – Requires engineering construction of public works be performed under the supervision of an engineer. Applies to all political subdivisions in Texas.

Required Practices

- a. For all federally and state funded projects, and all projects on the state highway system, the LG must:
 - i. Ensure that projects will be constructed in conformance with the approved plans and specifications.
 - ii. Name a full time employee in responsible charge of the project and advise TxDOT of any changes in personnel.
 - iii. Make inspection staff accessible for periodic reviews and inspections by TxDOT.
 - iv. Provide a certification sealed by an engineer licensed in Texas that specified material quality and construction standards were met.
- b. For projects off the state system and no federal or state funding, assure project is constructed under supervision of a professional engineer licensed in Texas.

LG Responsibilities

- a. Name full time employee of agency to be in responsible charge
- b. Provide adequate project supervision and inspection.
- c. Assure supervision of inspection staff by licensed professional engineer.
- d. Procure consultant services per TAC, Title 43 if needed.

TxDOT District Responsibilities

- a. General – All projects have an executed agreement between the LG and TxDOT. Part of the agreement is delineation of roles and responsibilities. One of the LG’s roles is to name a “Responsible person in charge” of the project. The District is to also name a “Responsible person in charge” who should develop a relationship with the LG’s “responsible person” with the goal of establishing trust and confidence that the project is properly prosecuted.
- b. For projects with state or federal funds and all projects on the state system, conduct periodic inspections during the life of the project. Monitor the level of inspection and discuss inspection concerns with the LG in view of their responsibilities as outlined in the agreement with TxDOT. If there are unresolved concerns, request assistance from CST.
- c. For projects with state or federal funds, review and approve all proposed agreements between the LG and private inspection firms to ensure compliance with the provisions of Texas Administrative Code, Title 43. Submit questions and non-compliance issues through CST to DES for final determination.

- d. There is no monitoring on projects without state or federal funds that are not on the state system.

Progress Payments

General. Progress payments are compensation to the prime contractor for the value of work performed during a covered period. Payments should be based on estimates, prepared by the engineer, of the value of the work performed and materials delivered or stockpiled in accordance with the contract. As a highway construction project progresses, the LG may request that FHWA reimburse the LG for the Federal share of the estimated costs for completed work. The progress payments are generally made monthly, but can be more frequently with TxDOT concurrence. All requests for Federal reimbursements of payments to the contractor by the LG must go through TxDOT.

Stockpiled Materials: When the contract provisions provide for stockpiled materials, Federal participation is based on the appropriate value of approved specification materials delivered by the contractor to the project site, or other designated location in the vicinity of such construction, provided that:

- ◆ Stockpiled material is stored in such manner that security and the inventory can be maintained,
- ◆ The material is supported by a paid invoice or receipt for delivery, with the contractor furnishing the paid invoice within a reasonable time after receiving payment from the LG,
- ◆ The material conforms with the requirements of the plans and specifications,
- ◆ The materials have not been delivered or stockpiled prematurely in advance of the contractor's schedule of operations, and
- ◆ The quantity of the material eligible for participation does not exceed the quantity required by the project, nor does the value exceed the appropriate portion of the contract item in which the material is to be incorporated.

Retention for Subcontract Work - The US DOT's DBE regulation at 49 CFR 26.29 requires recipients to include a "prompt pay clause" in all Federally-funded contracts as follows:

- ◆ Prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days (NOTE, Government Code §2251.022 requires a contractor to pay a subcontractor not later than 10 days after receiving payment for a governmental entity. This supersedes the 30 days.) from receipt of each payment by the prime²; and
- ◆ Prompt return of retainage payments within 30 of days (NOTE, Government Code §2251.022 requires a contractor to pay a subcontractor not later than 10 days after receiving payment for a governmental entity. This supersedes the 30 days.) after the subcontractor's work is satisfactorily completed.

² Texas Government Code §2251.022 requires a contractor to pay a subcontractor not later than 10 days after receiving payment for a governmental entity

Final Payment: By statute (23 U.S.C. 121(b)), FHWA cannot make final payment for a project until TxDOT approves the completion of its construction. A final inspection of the project should determine whether the actual construction conforms to the approved plans and specifications, including all approved changes. TxDOT's final inspection may be an actual on-site inspection performed at or near project completion, an in-depth review of the LG's project records at or near project completion or a finding that is based on a process review of the LG's internal project controls which demonstrates that the LG is properly exercising its internal controls.

Government Code Chapter 2251 Subchapter B stipulates that payment from the LG to the contractor is considered late on the 31st. day after:

- ◆ The date the governmental entity receives the goods under the contract;
- ◆ The date the performance of the service under the contract is completed; or
- ◆ The date the governmental entity receives an invoice for the goods or services.

Late payments to the contractor will be subject to the appropriate interest as determined by the comptroller in accordance with Government Code 2251.025.

Federal Regulation

- a. 23 USC 121(a) – Authorizes periodic payment of construction costs incurred. Payment may include the value of stockpiled material not yet incorporated into the project.
- b. 23 USC 121(b) – Final payment may be made after project completion.
- c. 23 CFR 635.122 – Further defines periodic progress payments and requirements for federal participation in stockpiled material.
- d. 23 CFR 635.122(c) – For design-build projects, procedures for making progress payments on lump sum contracts must be defined in the request for proposals.
- e. 49 CFR 26.29 – The US Department of Transportation's DBE regulation requires that the prime contractor must pay subcontractors for satisfactory work performance within 30 days of receipt of payment from the contracting agency.

State Regulation

- a. Texas Administrative Code, Title 43, Chapter 26.33(g)(1) – A Regional Mobility Authority must use specifications that conform to the latest TxDOT Standard Specifications on projects that connect with the state highway system.
- b. Texas Administrative Code, Title 43, Chapter 27.56(c)(3) – A Regional Tollway Authority must use specifications that conform to the latest TxDOT Standard Specifications on projects with state fund participation.
- c. Government Code §2251.021 – Requires payment to a contractor within 30 days or interest will accrue.
- d. Government Code §2251.042 allows payment of interest involving a claim if the claim is resolved in favor of the contractor.
- e. Government Code §2251.022 requires a contractor to pay a subcontractor not later than 10 days after receiving payment from a governmental entity

Required Practices

- a. For all projects with federal and state funds, the LG must request payment through TxDOT in sufficient time to assure payment to prime contractor complies with state and federal statutes.
- b. For projects with state or federal funds, a Regional Mobility Authority and a Regional Tollway Authority must adopt TxDOT specification articles 9.6 through 9.8 or develop comparable contract language for TxDOT approval regardless of system.
- c. For projects with no state or federal funds, the LG should pay the contractor in accordance with the terms of the contract.
- d. For all projects on the state system with no state or federal funds, the LG must notify TxDOT when all work is satisfactorily complete to give TxDOT the opportunity to conduct a final inspection.

LG Responsibilities

- a. Adopt TxDOT specification articles 9.6 through 9.8 or submit alternate specification to TxDOT for approval.
- b. Pay contractor within 30 days.
- c. Request periodic payment of completed work through TxDOT to FHWA.
- d. Request TxDOT final inspection when all work is satisfactorily completed.
- e. Assure subcontractors receive payment from prime contractor within 10 days.
- f. For design-build, include procedures for making progress payments on lump sum contracts in the request for proposals, if applicable.
- g. For concessions, pay concessionaire in accordance with agreement.

TxDOT District Responsibilities

- a. There is no monitoring on projects without state or federal funds or for projects where monthly estimates are not submitted to TxDOT for reimbursement (i.e. pass-through tolls).
- b. For projects with state or federal funds, submit LG requests for payment to CST for processing.
 - i. Review approximately 10% of the LG's estimates per project to ensure work billed has been performed.

Quality Assurance Program

General. In conjunction with 23 CFR Part 637, Subchapter B, the LG must implement a quality assurance (QA) program to ensure that the materials and workmanship incorporated into each contract involving federal participation are in conformance with the requirements of the approved plans and specifications, including any approved changes. This QA Program (QAP) must include an acceptance program and an independent assurance (IA) program consisting of the following components:

Acceptance Program

- ◆ Frequency guide schedules for verification sampling and testing;

- ◆ Identification of the verification sampling and testing locations;
- ◆ Identification of the desired finished product quality attributes; and
- ◆ Dispute resolution system, when quality control sampling and testing results are used as part of the acceptance decision.

IA Program

- ◆ Schedule of frequency for IA evaluation;
- ◆ Sampling procedures;
- ◆ Testing procedures; and
- ◆ Testing equipment.

The LG may develop its own QA Program, or adopt the appropriate TxDOT QA Program pertinent to the type of project delivery method used:

- ◆ Quality Assurance Program for Design-Bid-Build Projects
- ◆ Quality Assurance Program for Design-Build Projects

A statewide TxDOT QAP for Concession projects currently does not exist; therefore, the LG must submit a project-specific QAP through TxDOT to FHWA for approval.

Any program developed by the LG must receive approval from TxDOT prior to use.

Federal Regulation

- a. 23 CFR 637B – For projects on the National Highway System, the contracting agency must have a Quality Assurance Program approved by the Federal Highway Administration. The program must provide for an acceptance program and an independent assurance program and is intended to assure the quality of materials used in construction.
- b. 23 CFR 637B, Appendix A – Provides a certification that materials incorporated into a project on the National Highway System are in conformity with the approved plans and specifications.
- c. 23 CFR 637.207(a)(1)(iv) – For design-build projects, warranties may be used where appropriate.
- d. 23 CFR 637.207(b) – For design-build and concession projects, requirements for a Quality Assurance Program still apply. The Program shall meet FHWA Technical Advisory 6120.3 in addition to 23 CFR 637.207(b). For concession projects, as required in Book 2 of the Comprehensive Development Agreement documents under Section 2, “Project Management – PMP Chapter 2B – Construction Quality Management”, the Developer shall submit a comprehensive Quality Management Plan to TxDOT for approval. The Quality Management Plan shall be consistent with ISO 9001, 2000 version, or more current versions as updated by the International Standards Organization. The Developer may elect to obtain formal ISO 9001 certification, but will not be required to do so. There is

some added flexibility to use the design-builder's quality control testing, but there must be independent verification of those results.

State Regulation

- a. Local Government Code 271.116 – A municipality or county governmental entity shall provide or contract for, independently of the contractor, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility or project by the governmental entity.
- b. Local Government Code 271.188 – For design-build projects, the LG must provide or contract for material engineering, testing and verification testing that is independent from the design-build firm.
- c. Texas Administrative Code, Title 43, Chapter 26.33(g)(1) – A Regional Mobility Authority must use specifications that conform to the latest TxDOT Standard Specifications on projects that connect with the state highway system.
- d. Texas Administrative Code, Title 43, Chapter 27.56(c)(3) – A Regional Mobility Authority must use specifications that conform to the latest TxDOT Standard Specifications on projects with state fund participation.

Required Practices

- a. For all projects with state or federal funds and all projects on the state highway system, the LG must either adopt the TxDOT Quality Assurance program or submit an equivalent program to TxDOT for approval. The program must provide reasonable assurance that the materials incorporated into the project substantially meet specification requirements.
- b. For all projects with state or federal funds and all projects on the state highway system, the LG must submit a letter of certification sealed by a licensed engineer that all materials incorporated into the project are in conformity with the approved plans and specifications.
- c. For projects off the state highway system and funded by local or private funds, the LG may use their own Quality Assurance program.

LG Responsibilities

- a. Adopt the appropriate TxDOT Quality Assurance Program for the project delivery method used or submit a program through TxDOT to FHWA that meets the requirements of 23 CFR 637B.
- b. For design-bid-build, design-build, and concession projects where the developer (contractor) is responsible for QA tests, the LG is to employ an independent lab to verify the developer's (contractor's) QA tests in accordance with FHWA Technical Advisory 6120.3. TxDOT has an electronic data and materials management system that supports meeting the requirements of Technical Advisory 6120.3 and may be licensed from TxDOT.
- c. Assure compliance with approved program.
- d. Submit letter of certification sealed by a licensed engineer that all materials incorporated into the project are in conformity with the approved plans and specifications to TxDOT when construction is complete.

- e. For concession projects, see Required Practices “a” if there is a long-term maintenance component.

TxDOT District Responsibilities

- a. For design-bid-build projects with state or federal funds and projects on the state system regardless of funding source:
 - i. Submit the LG’s Quality Assurance Program to CST-M&P for approval. This step is not required for concessionaire projects with a long-term maintenance component unless it is required in the concessionaire agreement. The LG’s Quality Assurance Program shall include requirements addressing item b. under LG Responsibilities above.
 - ii. Spot check compliance with the approved program during periodic inspections.
 - iii. Receive LG’s letter certifying materials conformity and retain with official project records. Do not recommend final acceptance and payment until the certification is received.
- b. For design-build projects where the design-builder is responsible for QA tests, the District is to employ an independent lab to verify the design-builder’s QA tests in accordance with FHWA Technical Advisory 6120.3.
- c. There is no monitoring on projects without state or federal funds off the state system.

Records

General. Project records support payment of contract work. Project records fall into many categories, such as documentation of pay quantities, test reports supporting that the materials used meet specification requirements and a variety of contract administration documentation. For example, 23 CFR 635.123 states,

"The STD (LG) shall have procedures in effect which will provide adequate assurance that the quantities of completed work are determined accurately and on a uniform basis...All such determinations and all related source documents upon which payment is based shall be made a matter of record. Initial source documents pertaining to the determination of pay quantities are among those records and documents which must be retained pursuant to 49 CFR part 18. "

The non-regulatory supplement to 23 CFR 637 Subpart B defines verification/check samples and tests as those samples and tests performed by State (LG) personnel to verify the results of certified tests or the manufacturers' certifications or specification compliance for manufactured materials. There must be documentation to demonstrate specification compliance.

FHWA does not specify the content and format of job records. However, FHWA approves TxDOT manuals and procedures used on Federal-aid projects. The LG has the option of adopting TxDOT’s job record process or submitting its own for TxDOT concurrence. The goal is to give TxDOT a level of comfort when they certify to FHWA that a project has been

completed in substantial conformity with the approved plans and specifications, including authorized changes.

Additional guidance may be obtained from TxDOT's Contract Administration Handbook for Construction Projects.

Federal Regulation

- a. 23 CFR 635.123 – Requires that procedures be in place to provide adequate assurance that quantities of completed work are accurately and uniformly determined. Such determinations and source documents are a matter of record.
- b. 49 CFR 18.42 – Project records must be kept for 3 years after the date of acceptance of the project by TxDOT and must be made available for review by federal and state officials.

State Regulation

- a. Various

Required Practices

- a. For projects with state or federal funds and projects on the state highway system regardless of funding source, the LG must use TxDOT's Records Retention Manual (available from TxDOT) or submit an alternate procedure for TxDOT approval. This approval must be received before work on the project begins.
- b. For projects with no state or federal funds that are not on the state highway system, the LG may follow their own practices.

LG Responsibilities

- a. Adopt TxDOT Records Retention Manual or submit record management system to TxDOT for approval.
- b. Retain records for 3 years after final project acceptance by TxDOT.

TxDOT District Responsibilities

- a. For projects with state or federal funds and all projects on the state system regardless of funding source:
 - i. If the LG does not adopt TxDOT's Records Retention Manual, submit LG's proposed records retention system to CST for approval.
 - ii. Spot check project records for compliance with the approved system during periodic inspections.
- b. There is no monitoring on projects without state or federal funds off the state system.

Salvage Credits

General. Salvaged materials associated with a contract must be disposed of in accordance with the state statute requirements located at Government Code Chapter 2175, Surplus and

Salvage Property. The Texas Facilities Commission rules related to these statutory requirements are located at 1 TAC Chapter 126. The disposition of property must be made through competitive bidding or auction to the highest bidder.

Federal Regulation

- a. 49 CFR 18.36 – Non-state agency grantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in 49 CFR 18.
- b. FHWA Policy Memorandum dated October 3, 1988 – Requires a credit for material salvaged from the project unless the state agency has a procedure in place that does not require salvage credit. The process to determine salvage credit is described.

State Regulation

- a. Texas Administrative Code, Title 1, Chapter 126 – Describes a process for disposal of surplus property owned by a state agency.
- b. Government Code 2151 – Describes procedures used by the Texas Building and Procurement Commission for sale of excess state property.

Required Practices

- a. For projects on the state system with state and federal funds, the LG must follow the procedures described in 1 TAC Chapter 126.
- b. For all projects, the contract documents must be clear on ownership of material found on the project. For contract work, the contractor's bid price will reflect the cost of disposal or ownership.

LG Responsibilities

- a. Follow provisions of 1 TAC, Chapter 126 through contact with Texas Facilities Commission

TxDOT District Responsibilities

- a. For projects on the state system with state or federal funds, review plans and change orders for disposal of surplus property for compliance with the Texas Administrative Code.
- b. There is no monitoring on projects without state or federal funds unless specified in the agreement with TxDOT.

Specification Compliance

General. Once authorized, the project must be built to follow the PS&E. Any changes must be approved before Federal funds can participate.

Compliance with the plans, specifications and contract administration requirements have many parts. One part is assuring that the contractor meets all material and construction requirements. This can be summarized as "quality of the construction".

One often-overlooked principle is that contract administration issues are also important. For example, a specification implementing Davis-Bacon wages and the associated monitoring and reporting requirements has as much validity as a specification on concrete quality.

23 CFR 1.36 states:

"If the (Federal Highway) Administrator determines that a State (or LG) has violated or failed to comply with the Federal laws or the regulations in this part with respect to a project, he may withhold payment to the State (or LG) of Federal funds on account of such project, withhold approval of further projects in the State (or to the LG), and take such other action that he deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State (or LG) to the satisfaction of the Administrator."

Federal Regulation

- a. 23 CFR 635.105 – TxDOT has responsibility for the construction of all federally funded projects, and is not relieved of such responsibility by authorizing performance of the work by a local public agency. Compliance with specifications is part of that responsibility.

State Regulation

- a. No comparable statute

Required Practices

- a. On projects where TxDOT participates with state or federal funds or projects on the state system, the LG must:
 - i. Secure written TxDOT approval of any changes to the specifications before being incorporated into the project,
 - ii. Afford TxDOT reasonable access to the project for inspection,
 - iii. Provide a written certification that the completed project substantially complies with the plans and specifications as approved by TxDOT. The certification must be signed by a representative of the LG with the authority to sign the certification. The certification must also be notarized.
- b. For projects with no state or federal funds off the state system, the LG may determine specification compliance in accordance with their own procedures.
- c. The agreement between the LG and TxDOT will establish that projects meet specifications and will discuss compliance with specifications.

LG Responsibilities

- a. Follow provisions of agreement with TxDOT.
- b. Gain TxDOT approval of specification changes.

- c. Accommodate TxDOT inspection.
- d. Provide notarized certification of compliance to TxDOT.

TxDOT District Responsibilities

- a. For projects with state or federal funds or on the state system:
 - i. Conduct periodic inspections during construction.
 - ii. Review and approve all change orders. (See Change Order module).
 - iii. Retain LG's written certification of compliance with the plans and specifications as part of the official project records.
- b. There is no monitoring on projects without state or federal funds off the state system.

Statements and Payrolls

General. Under the Copeland Act, workers are protected from paying "kickbacks" to employers for the "privilege" of being employed.

Form FHWA-1273 includes the following sections related to payrolls:

- ◆ Section V.1. The Department of Labor regulations that implement the Copeland Act are incorporated by reference in the Form FHWA-1273.
- ◆ Section V.2. The regulations require that the contractor, and subcontractors, furnish weekly certified payroll statements to the LG. The weekly payroll statement is to include information on employees and wages so that compliance with the Davis-Bacon requirement of Section IV may be verified.

The LG must review the payroll statements for completeness and certification, and then "spot-check" items, such as: classification, hourly rate, authorized deduction, fringe benefits, overtime hours and rate, and net wages paid. The LG must also conduct employee interviews that are cross-referenced to classifications and hourly rates in the payroll. While minor discrepancies may be resolved with the contractor, the LG should refer any apparent violations to the Office of Inspector General.

The USDOL's Davis-Bacon and Related Acts requirement for payment of prevailing wages may be found in 29 CFR Part 5. Enforcement provisions are addressed in Section 5.6. It states in part the following:

"The Federal agency shall cause such investigations to be made as may be necessary to assure compliance with the labor standards clauses required by 5.5...". Also: "Investigations shall be made...with such frequency as may be necessary to assure compliance." It further states: "Such investigations shall include interviews with employees ... examination of payroll data..."

The FHWA's implementation of the USDOL requirement is found in Title 23, U.S.C. Section 113. Section 113 states in part:

"(a) The Secretary [USDOT] shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors and subcontractors on the

construction work performed on highway projects on the Federal-aid highways...be paid wages at rates not less than those...as determined by the Secretary of Labor..."

For purposes of this guide, the LG is considered the "contracting agency". The LG is required to ensure:

- ◆ A representative sampling of employees is interviewed to verify contractor compliance, and
- ◆ Contractor and subcontractor payroll records are reviewed on a sampling basis.

The regulation does not require 100% coverage; it requires coverage frequency "... as may be necessary to assure compliance". TxDOT and the LG must agree on what coverage is appropriate. All contractors and subcontractors on the project must be included in the spot-check. Contractors or subcontractors with violations must be reviewed in more detail.

Federal Regulation

- a. 23 USC 113 – Requires the Secretary of Transportation to take all steps necessary to assure laborers and mechanics working on federally funded projects are paid no less than the prevailing wage for similar work.
- b. 40 USC § 3141 et seq – Requires the Secretary of Labor to implement regulations including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week.
- c. 29 CFR 3.1 – Requires contractors and subcontractors to submit weekly statements of wages paid on work covered by Davis-Bacon.
- d. 29 CFR 5.6(a)(3) – Requires recipients of federal funds to conduct investigations at a frequency necessary to assure compliance. The investigations must include employee interviews and examination of payroll data.
- e. 23 CFR 635.118 - For all projects, copies of payrolls and statements of wages paid, filed with the State as set forth in the required contract provisions for the project, are to be retained by the STD for the time period pursuant to 49 CFR part 18 (3 years) for review as needed by the Federal Highway Administration, the Department of Labor, the General Accounting Office, or other agencies.
- f. 23 CFR 636.119(c) – Design-build projects must conform to all non-procurement requirements, including Davis-Bacon.
- g. Form FHWA 1273
 - i. Section V.1. incorporates the Department of Labor regulations in the Copeland Act (anti-kickback provisions)
 - ii. Section V.2. requires weekly, certified payroll submissions by the contractor and subcontractors.

State Regulation

- a. Government Code 2258.024 – Describes records to be kept by contractor and subcontractor concerning minimum wages paid. The records must be made available to inspection by the contracting entity.

- b. Government Code 2258.026 – Allows a contractor to accept a certification from a subcontractor in lieu of actual records.
- c. Government Code 2258.051 – Requires the public entity investigate complaints and withhold payment for violations.

Required Practices

- a. For all projects with state or federal funds, the LG must adopt TxDOT's procedures for monitoring wage rate compliance or submit an alternate program for TxDOT approval.
- b. For projects with no state or federal funds, the LG does not have to submit their monitoring procedures for TxDOT approval.

LG Responsibilities

- a. Include FHWA-1273 in contract.
- b. Adopt TxDOT monitoring program or submit alternate program for TxDOT approval.
- c. Monitor compliance according to approved program.

TxDOT District Responsibilities

- a. For projects with federal funds:
 - i. Transmit LG's proposed program to monitor wage rate compliance to CST for approval.
 - ii. Review at least one payroll per project to ensure compliance.
 - iii. Submit questions and non-compliance issues to CST for final determination.
- b. There is no monitoring on projects without federal state funds.

Supervision and Staffing

General. An LG must be suitably equipped and staffed before they can be given authority to manage Federal-aid Highway projects within their jurisdiction. 23 CFR 635.105 requires that TxDOT be suitably equipped and organized to carry out the Federal-aid program. Therefore, TxDOT is responsible for design, contract administration and construction inspection of all Federal-aid construction projects. This responsibility is formalized by the project agreement that is executed for each Federal-aid project. FHWA and TxDOT are the two parties to the agreement.

When a Federal-aid project is to be constructed on a facility that is not under TxDOT's jurisdiction, TxDOT may allow the Local Government having jurisdiction to perform the work with its own forces, or by contract, provided that all of the following conditions are met:

- ◆ All Federal requirements, including those prescribed in 23 CFR 635 Subpart A, are satisfied on work performed under a contract awarded by a local public agency,
- ◆ Force account work shall be in full compliance with 23 CFR 635 Subpart B,

- ◆ The Local Government is adequately staffed and suitably equipped to undertake and satisfactorily complete the work, and
- ◆ The Local Government shall provide a full-time employee of the agency to be in responsible charge of each Federal-aid project, including those that employ consultants for construction engineering services.

This arrangement does not relieve TxDOT of overall responsibility for the project. While 23 CFR 1.11(b) allows TxDOT to:

"utilize, under its supervision, the services of well-qualified and suitably equipped engineering organizations of other governmental instrumentalities for making surveys, preparing plans, specifications and estimates, and for supervising the construction of any project,"

23 CFR 1.11(e) clearly states that TxDOT is not relieved of its responsibilities under Federal law and the regulations in 23 CFR if it chooses to use the services of other governmental engineering organizations.

Supervision of construction engineering consultants or construction management firms. The LG's responsibilities for contract administration and construction inspection are not terminated should a consultant provide construction engineering and inspection services. While a consultant may provide daily inspection, the LG must assign a full-time employee to be in responsible charge of the project at all times, although the engineer need not be assigned solely to that project. "Responsible charge "means the LG engineer is:

- ◆ Aware of the day-to-day operations on the project;
- ◆ Aware of and involved in decisions about changed conditions which require change orders or supplemental agreements;
- ◆ Aware of the qualifications, assignments, on-the-job performance, etc., of the consultant staff at all stages of the project; and
- ◆ Visiting the project on a frequency that is commensurate with the magnitude and complexity of the project.

If the LG uses the services of a consulting engineering or construction management firm, the services must have been procured in compliance with 23 CFR Part 172.

Federal Regulation

- a. 23 CFR 635.105 - For projects under a local public agency's jurisdiction, TxDOT may allow the local public agency to directly manage projects if TxDOT has assurance that LG staffing is adequate

State Regulation

- a. Occupation Code 1001.407 – Requires engineering construction of public works be performed under the supervision of an engineer. Applies to all political subdivisions in Texas.

- b. Transportation Code 201.113 – Allows TxDOT to enter into an agreement with a Regional Tollway Authority for projects on the state highway system.
- c. Transportation Code 223.201 – Allows TxDOT to enter into a comprehensive development agreement with a private entity.
- d. Transportation Code 370.302(a) – TxDOT may enter into an agreement with a Regional Mobility Authority to implement, operate, and maintain a project on behalf of TxDOT.
- e. Transportation Code 370.302(b)(1) – A Regional Mobility Authority may negotiate with private entities through a Comprehensive Development Agreement. The negotiations may include financing.

Required Practices

- a. The agreement or contract will include assignment of duties and responsibilities. This will include designation of a “LG responsible person in charge”. Prior to executing the agreement, the LG must assure TxDOT that the projects will be staffed to TxDOT’s satisfaction. Changes to that assurance must be approved by TxDOT prior to implementation.

LG Responsibilities

- a. Assure TxDOT that the project will be staffed to TxDOT’s satisfaction
- b. Advise TxDOT of any changes in staffing
- c. Assure construction is under supervision of PE registered in Texas
- d. Comply with terms of agreement with TxDOT

TxDOT District Responsibilities

- a. Become familiar with terms of the LG’s agreement with TxDOT in the area of “Responsible person in charge” and staffing commitments.
- b. Conduct periodic inspections of the project to ensure LG complies with terms of the agreement.
- c. Submit questions and non-compliance issues to CST for final determination.

See the following from Bid Document Preparation section:

- ◆ Change Orders
- ◆ Claims
- ◆ Differing Site Conditions
- ◆ Disadvantaged Business Enterprises (DBE), Historically Underutilized Businesses (HUB), and Small Business Enterprises (SBE)
- ◆ Equal Employment Opportunity
- ◆ Equipment Rental Rates
- ◆ Liquidated Damages
- ◆ Local Hiring Preference

- ◆ Non-segregated Facilities
- ◆ Prevailing Minimum Wage
- ◆ Retainage
- ◆ Subcontracting
- ◆ Termination of Contract