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RE: Docket Number FHWA-2005-22477

Comments on NPRM for Design-Build

Dear Docket Clerk:

The National Council for Public-Private Partnerships (NCP PPP) is a non-profit educational institute (501c3) that promotes the use of this unique contract form between the public and private sectors for the delivery of public services and infrastructures. NCP PPP, through its Transportation Institute, appreciates the opportunity to comment on the Federal Highway Administration (FHWA) Notice of Proposed Rulemaking (NPRM) for Design-Build (DB) as required under Section 1503 of the **Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU)**.

DB is a frequent component of public-private partnerships (PPPs). By consolidating the design and construction roles into one party, a project can be delivered more quickly, by a certain date, and at a more certain price than with the traditional design, bid, build approach. Through this process, the public sector retains a high level of control and a simplified interface, making the process additionally useful.

The U.S. Department of Transportation (DOT)/FHWA's "Design-Build Effectiveness Study" of January 2006, required by the *Transportation Equity Act for the 21st Century (TEA-21)* under Section 1307(f), illustrates some of the savings and benefits of the DB method for highway projects. However, FHWA has placed restrictions on DB projects by precluding the issuance of a Request for Proposals (RFP)/Request for Qualifications (RFQ) until after the completion of National Environmental Policy Act (NEPA) requirements.

Overall, this NPRM is an improvement, reflecting the policy in SAFETEA-LU. The statute permits state Departments of Transportation to issue RFQs/RFPs, proceed with awards, and issue notices to proceed with

preliminary design prior to the completion of NEPA. These are positive preliminary steps, but there are some concerns about several specifics in the NPRM that can limit the flexibility of implementation. Accordingly, we wish to make the following comments.

Under “Preconstruction Procedures” (Part 630), we disagree with the proposed change. The project agreement should be executed prior to the completion of NEPA requirements. The goal is not to have final design or construction occur prior to the completion of NEPA, but rather to the flexibility in design that can be advantageous to the NEPA process. Also, this would allow the negotiating of one contract with the design-builder team following the competitive selection prior to the start of project engineering activities.

“Construction and Maintenance” (Part 635) needs clarification extending FHWA’s approval to selection and award, not just for release of the NEPA document. With qualification and performance-based contracting, the selection criteria and awarding of the contract should allow for the negotiation of one contract with the design-build team. Clarification also is needed to allow for additional warranties beyond the normal construction/contractor warranties of one to two years.

Under “Definitions” (Part 636.103) we suggest a modification in the definition of “preliminary design” to mean “all design activities necessary to meet the NEPA requirements and to develop a negotiated fixed price for the DB.” Without this change, states would be limited in using some of their traditional preliminary engineering activities such as engaging the design-build team to support the preparation of the NEPA documents, and evaluating the impacts of right-of-way and utility acquisitions. These efforts are necessary to help determine the fixed price earlier in the process which is one of the key advantages of DB.

“NEPA Compliance” (Part 636.109 & Part 636 .116) illustrates an environmental objective, a posture we support. It is equally worthwhile for both the private and public sectors to be able to provide engineering and other related support activities, but not participate in the environmental analysis or document preparation. However, the NPRM does not allow the design-build team to precede with final design (FD) activities at its own risk. The design-build team should be able to perform FD as long as no reimbursement commitment has been for the FD activities if the alternative or project does not proceed for environmental reasons. Allowancing this would not compromise or jeopardize NEPA.

The section on “Public Private Partnerships” (Part 636.119) gives us the most concern. Current FHWA practice requires concurrence on project development, and contract provisions. The NPRM would require FHWA to provide prior review and approval for a number of items, including: state procurement procedures; RFQ/RFP documents; PPP agreements; price reasonableness for proposed developer activities; and evaluation and award criteria for proposed DB contracts and subsequent final design and construction activities. The additional requirements at the federal level are not necessary when the DB and/or PPP project delivery methods are consistent with state law and/or regulation.

PPPs offer a means of substantial acceleration in project delivery, and this provides significant savings by avoiding cost escalations associated with delays. The proposed additional oversight would introduce unnecessary delay in the process, and thereby produce unnecessary delays and additional costs.

Thank you for consideration of these views.

Sincerely,

Richard Norment
NCPPP Executive Director