• Adequate U.S. postmarketing-use data are available for the non-ODS product(s); and

• Patients who medically require the ODS product are adequately served by the non-ODS product(s) containing that active moiety and other available products (21 CFR 2.125(g)(3)).

Sterile aerosol talc is currently marketed for intrapleural administration in two non-ODS formulations—powder and aerosol. Sterile aerosol talc is a powder formulation of talc available for intrapleural administration via chest tube. Sclerosol Intrapleural Aerosol (sterile talc powder) is an aerosol formulation which contains the propellant, hydrofluoroalkane (HFA) 134a and is approved for intrapleural administration. Sclerosol Intrapleural Alcohol, a form of aerosol sterile talc, is indicated for the treatment of recurrent MPE in symptomatic patients.

The route of administration, indications, and level of convenience appear to be the same for the ODS and non-ODS formulations of sterile aerosol talc. Moreover, because production of non-ODS formulations are not limited by restrictions on the use of ODSs, the Agency believes that non-ODS formulations can be produced at greater quantities and have the potential to be more widely available than prior formulations that contained ODSs. In addition, there is adequate U.S. postmarketing-use data indicating that the non-ODS products are available in sufficient quantities to serve the current patient population. For these reasons, we believe that patients may be adequately served by the non-ODS products containing sterile aerosol talc. Thus, FDA is seeking public comment concerning whether sterile aerosol talc administered intrapleurally by thoracoscopy for human use is no longer an essential use of ODSs described in 21 CFR 2.125(e).

B. Drug Products That Are No Longer Being Marketed

Under 21 CFR 2.125(g)(1), an active moiety may no longer be an essential-use (21 CFR 2.125(e)) if it is no longer marketed in an approved ODS formulation. FDA believes failure to market indicates non-essentiality because the absence of a demand sufficient for even one company to market the product is highly indicative that the use is not essential.

FDA is seeking public comment as to whether metered-dose atropine sulfate aerosol human drugs administered by oral inhalation (21 CFR 2.125(e)(4)(vi)) and anesthetic drugs for topical use on accessible mucous membranes of humans where a cannula is used for application (21 CFR 2.125(e)(4)(iii)) are no longer essential uses as described at 21 CFR 2.125(e). FDA has information that these products are not currently being marketed in an approved form that releases ODSs, and, under 21 CFR 2.125(g)(1), they may no longer constitute an essential-use. Because these products are no longer being marketed, FDA does not believe that loss of essential use status would not result in any drugs being made unavailable to patients.

III. Comments

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

Dated: June 24, 2015.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2015–15902 Filed 6–26–15; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 630 and 635

[Docket No. FHWA–2015–0009; FHWA RIN 2125–AF61

Construction Manager/General Contractor Contracting

AGENCY: Federal Highway Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: Section 1303 of the Moving Ahead for Progress in the 21st Century Act (MAP–21) amends 23 U.S.C. 112 to require the Secretary of Transportation to promulgate regulations as necessary to implement the Construction Manager/General Contractor (CM/GC) contracting method. This NPRM initiates the formal rulemaking process to fulfill the legislative requirement and establish such regulations as are necessary for the FHWA's approval of projects using the CM/GC method of contracting.

DATES: Comments must be received on or before August 28, 2015.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

• Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.

• Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE., West Building Ground Floor Room W12–140, Washington, DC 20590–0001;

• Hand Delivery: West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE., between 9 a.m. 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329;

• Instructions: You must include the agency name and docket number DOT–FHWA-or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comments. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Gerald Yakowenko, Contract Administration Team Leader, Office of Program Administration, (202) 366–1562, or Ms. Janet Myers, Office of the Chief Counsel, (202) 366–2019, Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Summary

This regulatory action is undertaken to fulfill the statutory requirement in Section 1303(b) of MAP–21 requiring the Secretary to promulgate a regulation to implement the CM/GC method of contracting. The CM/GC is a contracting method that allows a contracting agency to use a single procurement to secure pre-construction and construction services. In the pre-construction services phase, a contracting agency procures the services of a construction contractor early in the design phase of a project in order to obtain the contractor's input on constructability issues that may be affected by the project design. A CM/GC contractor does not provide any preliminary or final design services. As part of the preconstruction services phase of a CM/GC contract, the CM/GC contractor provides information for consideration in the design and environmental review processes on construction-related aspects of a project, including the potential effects of design elements on

construction costs, schedule and quality. The second phase, for construction services, may begin once environmental review is complete and risks are adequately defined. If the contracting agency and the CM/GC contractor are able to agree on a price for a given scope and schedule for construction, the CM/GC contractor and the contracting agency may execute contract commitments for the construction services phase of the project or a portion of the project.[1] The CM/GC method has proven to be an effective method of project delivery through its limited deployment in the FHWA's Special Experimental Project Number 14 (SEP–14) Program. Utilizing the contractor's unique construction expertise in the design phase can offer innovations, best practices, reduced costs, and reduced schedule risks.

The major provisions of these proposed regulations include: (1) establish the minimum standards that contracting agencies' CM/GC procurement procedures must follow, (2) establish the FHWA's role in reviewing contracting agencies' CM/GC procurement procedures and other FHWA approval requirements, (3) establish the procedures for authorizing Federal funds for CM/GC projects, and 4) establish rules regarding the relationship between the procurement of CM/GC project and the environmental review process required under the National Environmental Policy Act (NEPA) of 1969. The rule would apply to State transportation agencies (STA) that contract for CM/GC services, and any State or local government agency, public-private partnership, or Indian tribe (as defined in 2 CFR 200.54) that is acting under the supervision of the STA and is awarding or administering a CM/GC contract.

(1) The CM/GC Procurement Procedures: The proposed regulations provide that CM/GC contracts must be procured through competitive selection procedures providing for free and open competition. This section also establishes procedural options for a contracting agency to utilize in procuring CM/GC projects, the minimum information required to be included in a CM/GC solicitation document, rules regarding the use of interviews, and the basis on which CM/GC contracts are to be awarded.

(2) The FHWA Concurrence in CM/GC Procedures, Contract Documents, and Contract Awards: These proposed regulations provide that contracting agencies must submit their CM/GC procurement procedures to FHWA for approval to fulfill FHWA responsibilities to ensure that the procedures comply with Federal requirements. The proposed rule also provides that certain documents or actions relating to CM/GC contracting, such as contract solicitation documents, contracts, contract prices, and contract price analyses, require FHWA approval prior to award. While the proposed regulation would reserve the approval of the State's CM/GC procedures to FHWA, it would permit States to assume all other CM/GC approvals through the FHWA-State Stewardship and Oversight Agreements in accordance with 23 U.S.C. 106(c) and related FHWA guidance (see *http://www.fhwa.dot.gov/federalaid/stewardship/140328.cfm*). If an STA assumes responsibility for CM/GC approvals under 23 U.S.C. 106(c), the STA would be required to include documentation in the project file regarding actions taken for assumed responsibilities. The documentation must be sufficient to substantiate the approval or determination and, if applicable, to support project authorization. In such cases, the STA will provide FHWA with the documentation upon request. Note that the authority for State assumption does not extend to eligibility determinations or project authorizations.

(3) Authorization: These proposed regulations provide that FHWA must approve contracting agencies' price estimate for the entire CM/GC project before the authorization of construction services. Also, these proposed regulations provide that FHWA must approve contracting agencies' price or cost analyses, performed in accordance with 2 CFR 200.323(a), for preconstruction and constructions services before the authorization of either of those activities. These approvals would be subject to STA assumption of responsibilities under 23 U.S.C. 106(c). When authorizing construction services, FHWA will rely on the agreed price and scope of services or, if no agreement is reached between the contracting agency and the CM/GC contractor, on the price established through competitive bidding.

(4) Relationship to NEPA: These proposed regulations also establish the relationship of the procurement of CM/GC projects to the NEPA process to ensure that the CM/GC process may be used on projects involving all potential NEPA reviews—a categorical exclusion, environmental assessment (EA), or environmental impact statement (EIS). One area in which CM/GC projects are similar to design-build projects is that both types of projects may be awarded to a contractor before the completion of NEPA. As such, these proposed regulations incorporate many of the provisions regarding this relationship from the design-build regulations at 23 CFR 636.109, such as ensuring that alternatives will be evaluated and fairly considered when a project involves an EA or EIS, including a provision in the CM/GC contract that allows termination in the event the environmental review process does not result in the selection of a build alternative, and permitting Federal authorization of preliminary design activities. These proposed regulations also establish the rules and conditions under which Federal funds may participate, through reimbursement after the completion of the NEPA process, in eligible costs of final design activities that the contracting agency undertook at its own expense before completion of the NEPA process.

Background

Section 1303 of MAP–21 amended 23 U.S.C. 112(b) by adding paragraph (4) to authorize the use of the CM/GC method of contracting for projects carried out by, or under the supervision of, an STA.

While the term CM/GC is not used in Section 1303 of MAP–21, the statute allows contracting agencies to award a two-phase contract to a ''construction manager or general contractor'' for the provision of construction-related services during both the preconstruction and construction phases of a project. State statutes authorizing this method of contracting use different titles including: CM/GC, Construction Manager at-Risk, and General Contractor/Construction Manager. Regardless of the terminology used by grantees and subgrantees, FHWA has elected to use the term ''construction manager/general contractor,'' or ''CM/GC,'' in reference to two-phase contracts that provide for construction-related services in the preconstruction and construction phases of a project.

The CM/GC contracting method allows a contracting agency to receive a contractor's constructability recommendations during the design process. A number of States, including Utah, Colorado, and Arizona, have used the CM/GC project delivery method on a number of Federal-aid highway projects under FHWA's SEP–14 program with great success. These projects have shown that early contractor involvement through the CM/GC method has the potential to improve the quality, performance, and cost of the project while ensuring that construction issues

[1] After NEPA is complete, early work packages may be used and can be awarded while final design for the project is being completed, as described in the Section-by-Section analysis for sections 635.504 and 635.506(d).

are addressed and resolved early in the project development process. The CM/GC contractor's constructability input during the design process is used to supplement, but not replace or duplicate, the engineering or design services provided by the contracting agency or its consultant. More information about the CM/GC project delivery method can be found on the FHWA's Every Day Counts Web page at *http://www.fhwa.dot.gov/everydaycounts/edctwo/2012/cmgc.cfm.*

The following procedures are typically included in the CM/GC contracting method: (1) The contracting agency enters into an agreement for pre-construction services with a construction contractor who provides advice regarding constructability, price, construction scheduling, and other information related to the construction of the project; (2) the contracting agency may use this information in the preliminary and final design phases of the project; (3) at a certain stage in the design process where risks are adequately identified and the scope of work is defined sufficiently for the contracting agency and the CM/GC contractor to reasonably determine price, the contracting agency may receive a price proposal from the CM/GC contractor (or negotiate a price) for the defined scope and schedule for the project or a portion of the project (such as an early work package); and (4) if the price is reasonable, the contracting agency awards a construction contract for the project or portion of the project. If the contracting agency is not able to reach an agreement regarding price, scope, and schedule, it may complete the design and let a traditional construction contract by competitive bidding in accordance with Part 635. Given the advanced stage of design at the conclusion of the preconstruction phase of a CM/GC project, it is unlikely that a contracting agency would convert the project to a design-build project; however, in such cases, the contracting agency must comply with FHWA's design-build procurement and other requirements in Part 636.

Services provided by the selected CM/GC contractor during the preconstruction phase generally shall be limited to providing advice on construction scheduling, sequencing, cost estimation, constructability, material pricing, risk identification, and other construction related-factors or issues (as defined in 23 U.S.C. 112(b)(4)(A)(ii)). During the construction phase of the contract, the CM/GC contractor is responsible for the physical construction of the project, or portion of the project, for the agreed scope, schedule, and price.

The selected CM/GC contractor must not provide or conduct engineering and design related services (as defined in 23 U.S.C. 112(b)(2) and 23 CFR part 172) under the contract. During the construction phase of a CM/GC project, the CM/GC contractor may provide incidental engineering related services typically performed by general construction contractors, such as the preparation of falsework plans, shop drawings, etc., which are identified within the request for proposal and in the final plans and specifications for the project. These services are not engineering and design related services as defined in 23 CFR 172.3. Engineering and design related services for a project utilizing a CM/GC contract would still be procured under a separate contract in accordance with 23 CFR part 172.

Section 1303(b) of MAP–21 requires FHWA, acting on behalf of the Secretary of Transportation, to promulgate regulations as necessary to implement the CM/GC method of contracting. This NPRM is intended to address the legislative requirement and establish procedures for FHWA's approval of the CM/GC method of contracting in the Federal-aid highway program.

Section-by-Section Discussion of the Proposed Changes

General Conforming Amendments in 23 CFR Parts 630 and 635

The FHWA proposes several amendments in 23 CFR part 630 and 635 to account for the particular application of various Federal requirements to CM/GC projects.

Section 630.106

The FHWA proposes to amend 23 CFR 630.106(a)(8) to provide for the execution of the project agreement for CM/GC projects. This amendment is similar to the existing language for design-build projects at § 630.106(a)(7) in that this proposed amendment makes clear that FHWA execution of a project agreement for preconstruction services associated with final design and for construction shall not occur until after the completion of the NEPA process. This language implements 23 U.S.C. 112(b)(4)(C)(ii), which prohibits the contracting agency from awarding the construction services phase of a CM/GC contract until after completion of the NEPA process.

Section 635.102

The FHWA proposes to amend the definitions in 23 CFR 635.102 by adding a definition of CM/GC project. This definition incorporates the language at 23 U.S.C. 112(b)(4)(A)(i) authorizing contracting agencies to award 2-phase contracts to a construction manager or general contractor for preconstruction and construction services.

Section 635.104

The FHWA proposes to amend 23 CFR 635.104 to state that the applicable regulations pertaining to the CM/GC contracting process, which are proposed in this rule, apply to CM/GC projects.

Section 635.107

The FHWA proposes to amend 23 CFR 635.107 to clarify that the disadvantaged business enterprise program requirement will also apply to CM/GC projects.

Section 635.109

The FHWA proposes to amend 23 CFR 635.109 to clarify that the standardized changed condition clauses would also apply to construction services agreements of CM/GC projects.

Section 635.110

The FHWA proposes to amend 23 CFR 635.110 to clarify that STAs may use their own bonding, insurance, licensing, qualification or prequalification procedure for any phase of design-build or CM/GC procurement.

Section 635.112

The FHWA proposes to amend 23 CFR 635.112 to indicate that the FHWA Division Administrator's approval of the solicitation document constitutes FHWA's approval to use the CM/GC contracting method and approval to release the solicitation document.

Section 635.113

The FHWA proposes to amend 23 CFR 635.113 to make clear that the requirements for bid opening and tabulation do not apply to CM/GC projects because the requirements in this section are only appropriate for projects delivered under the traditional design-bid-build method.

Section 635.114

The FHWA proposes to amend 23 CFR 635.114 to make clear that the award of a contract for a CM/GC project and the FHWA's concurrence in such award are subject to the proposed requirements in 23 CFR part 635 subpart E.

Section 635.122

The FHWA proposes to amend 23 CFR 635.122 to require contracting agencies to define their procedures for making progress payments for CM/GC

projects in the appropriate solicitation and contract documents.

Section 635.309

The FHWA proposes to amend 23 CFR 635.309(p) to make clear what certification is required as a prerequisite to FHWA authorization of physical construction and final design activities. Since both CM/GC and design-build contracts are similar in that both types of contracts may be awarded before the completion of the NEPA process, FHWA believes that the certification requirements applicable to design-build contracts should be equally applicable to CM/GC contracts.

CM/GC Procedures and Requirements

The FHWA proposes to add a new subpart E to 23 CFR part 635 to provide the policies, requirements, and procedures relating to the use of CM/GC contracting. As previously discussed, with the exception of approval of STA CM/GC procedures, all FHWA approval requirements proposed in this new subpart would be subject to assumption by the STA in accordance with 23 U.S.C. 106(c).

Section 635.501—Purpose

In 23 CFR 635.501, we propose to add a paragraph describing that the general purpose of subpart E is to prescribe the policies, requirements, and procedures for the use of the CM/GC contracting method.

Section 635.502—Definitions

In 23 CFR 635.502, we propose the definitions for certain terms utilized in subpart E.

First, FHWA proposes to define the term *agreed price* to mean the price agreed to by the CM/GC contractor and the contracting agency for construction services.

Second, FHWA proposes to define the term *CM/GC contractor* to mean the entity that has been awarded a CM/GC contract and is responsible for providing preconstruction services under the first phase and, if a price agreement is reached, construction services under the second phase of such contract.

Third, FHWA proposes to define the term *CM/GC project* to mean a project delivered using a 2-phase contract for preconstruction and construction services. This definition is the same as the definition proposed for section 635.102.

Fourth, FHWA proposes to define the term *construction services* as the physical construction work undertaken by a CM/GC contractor to construct a project or a portion of the project (including early work packages). Construction services may be authorized as a single contract for the project, or through a combination of contracts covering portions of the project. If a combination of contracts is used for the CM/GC project construction phase, procurement and authorization procedures are the same for every construction services contract.

Fifth, FHWA proposes to define the term *contracting agency* as the STA and any State or local government agency, public-private partnership, or Indian tribe (as defined in 2 CFR 200.54) that is acting under the supervision of the STA. This definition is consistent with the grant structure reflected in 23 U.S.C. 112(a), (b)(1), and (d). Those provisions set forth requirements and authorities applicable to STAs as the recipients of title 23 funds. The requirements include STA responsibility for overseeing compliance with applicable Federal requirements by STA contractors and subrecipients. In the proposed rule, the definition of ''contracting agency'' explicitly acknowledges that both public and private entities may serve as subrecipients of title 23 funds. This is consistent with 2 CFR 200.330, which guides determinations on whether a non-Federal entity is receiving funds as a subrecipient or as a contractor.

Sixth, FHWA proposes to define the term *Division Administrator* as the chief FHWA official assigned to conduct business in a particular State.

Seventh, FHWA proposes to define the term *early work package* as a portion or phase of construction work (including material acquired for a construction phase) that is procured before all design work for the project is complete. Under the proposed rule, once NEPA is complete, early work packages would allow contracting agencies to acquire long-lead items or start a particular phase of construction for which the risks are adequately identified and the scope of work is defined sufficiently for the contracting agency and the CM/GC contractor to reasonably determine price. If the authorized early work ultimately is not needed or used for the project, Federal-aid funding participation would be determined in a manner similar to FHWA's long-established test for participation in the cost of corrective work necessitated by engineering errors (see FHWA guidance at *http://www.fhwa.dot.gov/programadmin/contracts/071263.cfm* and *http://www.fhwa.dot.gov/programadmin/contracts/090878.cfm*). The FHWA would determine, on a case-by-case basis, whether the excess costs were incurred based on the reasonable exercise of diligence and judgment by the contracting agency, in which case participation is permissible. If carelessness, negligence, or incompetence on the part of the contracting agency or those working on its behalf led to the excess costs, then Federal-aid participation will be denied. Although there is some financial risk to the contracting agency associated with using early work packages, in certain instances, the use of early work packages may provide for schedule acceleration, overall risk mitigation, and cost savings related to inflation. The use of an early work package as a phase of a project is consistent with 23 U.S.C. 112(b)(4)(A)(iii)–(iv).

Eighth, FHWA proposes to define the term *final design* as having the same meaning as defined in 23 CFR 636.103. The FHWA intends for the definition of final design to be as uniform as possible for all project delivery methods.

Ninth, FHWA proposes to define the term *NEPA process* to make clear that this is the environmental review required under the National Environmental Policy Act of 1969, the applicable portions of the CEQ Regulations Implementing NEPA (40 CFR parts 1500–1508), and the FHWA regulations implementing NEPA at 23 CFR part 771.

Tenth, FHWA proposes to define the term *preconstruction services* as consulting to provide a contracting agency and its designer with information regarding the impacts of design on the physical construction of the project. The ability of a contracting agency to obtain this information from the CM/GC contractor early in the process is the key component of a CM/GC contract and is what makes this project delivery method beneficial. Under the preconstruction services phase of a CM/GC contract, the CM/GC contractor may provide such information during both preliminary and final design phases. However, while preconstruction services includes constructability input from a CM/GC contractor, these services must not constitute design and engineering related services as defined in 23 CFR 172.3. Any procurement of design and engineering related services must follow the procedures required under 23 CFR part 172.

Eleventh, FHWA proposes to define the term *preliminary design* as having the same meaning defined in 23 CFR 636.103. The FHWA intends for the definition of preliminary design to be as uniform as possible for all project delivery methods.

Twelfth, FHWA proposes to define the term *solicitation document* as the document used by a contracting agency

to advertise a CM/GC project and request expressions of interest, statements of qualifications, proposals or offers.

Lastly, FHWA proposes to define the term *State transportation agency* as having the same meaning as the term *State transportation department* under section 635.102.

Section 635.503—Applicability

In 23 CFR 635.503, FHWA proposes to add a general statement of the applicability regarding the requirements for this subpart. The requirements apply to all CM/GC Federal-aid projects within the right-of-way of a public highway or projects which are linked to a Federal-aid project within the right-of way of a public highway. The determination whether a project is ''linked'' is based on proximity, dependency, or impact (*i.e.,* the non-highway construction project would not exist without the public highway, or exists to fulfill a separate requirement of another highway project). Where the applicable law requires that projects be treated as a project on a Federal-aid highway, the provisions of this subpart will apply regardless of the location of the project. The terms ''Federal-aid highway'' and ''highway,'' as used in this NPRM, are defined in 23 U.S.C. 101(a)(6) and (11), respectively. The proposed language for this rule is similar to applicability language used in the design-build contracting regulation (23 CFR 636.104). The applicability provision is intended to distinguish between projects that are subject to the provisions of 23 CFR parts 635 and 636, and projects where the contracting agency may follow State-approved procedures and requirements. Parts 635 and 636 are applicable to Federal-aid construction projects that are located within the right-of-way of a public highway. For projects neither within a right-of-way of a public highway, nor linked to a project within a right-of way of a public highway, contracting agencies may follow their own State-approved procurement procedures consistent with 2 CFR part 200. These distinctions in procurement requirements are discussed in the June 26, 2008, FHWA guidance ''Procurement of Federal-aid Construction Contracts,'' available online at *http://www.fhwa.dot.gov/construction/080625.cfm.*

Section 635.504—CM/GC Requirements

In section 635.504(a), FHWA proposes to make clear that contracting agencies may award a 2-phase contract for preconstruction and construction services, as provided in 23 U.S.C. 112(b)(4)(A). The two phases shall be the preconstruction and construction phases, respectively. Subject to applicable procurement requirements, the contracting agency has flexibility in determining how to structure the award and contract documents that flow from the single competitive procurement of the CM/GC contractor authorized in 23 U.S.C. 112(b)(4)(A), enacted by MAP–21. For example, the contracting agency may elect to use a single contract document that makes firm commitments for the preconstruction services at the time the contract is executed, but conditions commitments for construction services on actions that occur in the future (*e.g.,* a negotiated agreement on construction price). Alternatively, the contracting agency may choose to structure the commitments by using separate agreements for the preconstruction and construction services phases. In this latter scenario, the contracting agency may treat the contract award as occurring in two phases. The construction services phase may occur under one contract or under multiple contracts covering portions of the project, including early work packages.

The FHWA believes these contracting flexibilities are consistent with the contracting efficiency purposes underlying 23 U.S.C. 112(b)(4), and with contracting practices used by participants in the CM/GC SEP–14 experiments approved by FHWA. The language in 23 U.S.C. 112(b)(4) is ambiguous with respect to whether there is any limitation on the number of contracts that may be used to carry out the 2-phase CM/GC process. Section 112(b)(4) of Title 23, U.S.C. references the use of ''a 2-phase contract'' (23 U.S.C. 112(b)(4)(A)(i)), which could be interpreted as limiting CM/GC contracting agencies to the use of a single contract. However, 23 U.S.C. 112(b)(4)(C)(ii) references ''the award of the construction services phase of a contract.'' This could be read as calling for the use of two contracts. The ''award'' of a public contract typically is the contracting agency's decision to accept an offer for performance of the specified work. In the normal course of business, an award is followed by the execution of a contract between the contracting agency and the successful offeror. Based on its experience with CM/GC contracting, FHWA concluded requiring the use of a single contract would create legal and administrative barriers to the use of CM/GC contracting. For example, procurement laws in some States require the use of separate contracts for preconstruction and construction services. In addition, it could be administratively challenging to develop adequate construction contract documents at the time of the selection of the CM/GC contractor. Much of the relevant construction information is not available until well into the preconstruction phase. The FHWA concluded it is important to provide contracting agencies with the flexibility to use either a single contract or multiple contracts for CM/GC projects. This will facilitate the use of the CM/GC method of procurement and further the statutory purpose of more efficient contracting.

In section 635.504(b), FHWA proposes several requirements that apply to contracting agencies' CM/GC procedures. First, consistent with 23 U.S.C. 112(a) and the new provisions in 23 U.S.C. 112(b)(4)(B), FHWA proposes that all CM/GC contracts be procured utilizing competitive selection procedures providing for free and open competition. The requirement for free and open competition is a fundamental principle under 23 U.S.C. 112 for the procurement of all Federal-aid highway projects.

Second, FHWA proposes to allow contracting agencies to procure the services of a CM/GC contractor using any of the following solicitation options: Letters of interest, requests for qualifications, interviews, request for proposals, or other solicitation procedures permitted by applicable State law, regulation, or policy that promote a fair and transparent procurement process.

Third, FHWA proposes to require contracting agencies to provide the following minimum information in their solicitation documents for CM/GC preconstruction services to ensure fairness and transparency: (1) A clearly defined scope of services; (2) a list of evaluation factors and significant subfactors, including their relative weight of importance that will be used in evaluating proposals; (3) a list of required deliverables; (4) an indication of whether interviews will be conducted before establishing the final rank; and (5) a sample contract form(s). In FHWA's experience, this information is needed, at a minimum, to have an effective, fair, and transparent procurement process. In addition, this information is typical of what many of the contracting agencies that have utilized CM/GC under SEP–14 have included in their solicitation documents.

Fourth, FHWA proposes to require contracting agencies to offer the opportunity for an interview to all short listed firms if the contracting agency

intends to interview any contractor during the procurement process. If an interview is conducted, the opportunity for an interview must be offered to all shortlisted firms (or firms that submitted responsive proposals, if a short list is not used). Also, in conducting interviews, contracting agencies must not engage in conduct that favors one offeror over another and must not disclose one contractor's proposal to another. The FHWA feels that interviews could aid a contracting agency in evaluating its selection of a contractor for a CM/GC project. If interviews are conducted, then it is important that they be done in a fair and transparent manner.

Fifth, FHWA proposes to permit contracting agencies to award CM/GC contracts based on qualifications, experience, best value, or any other combination of factors considered appropriate by the contracting agency as provided in 23 U.S.C. 112(b)(4)(B) and allowed by State law.

Lastly, FHWA proposes that contracting agencies follow the traditional competitive bidding process required under 23 CFR part 635 subpart A in situations where they are unable to agree on a price with the CM/GC contractor for the construction of the project. In such cases, it is proposed that the contracting agency must notify the FHWA Division Administrator of this decision and request FHWA's approval before advertising for the receipt of competitive bids pursuant to 23 CFR 635 Subpart A if Federal-aid funding is desired in the cost of construction. Once the contracting agency advertises for bids or proposals for the project or a portion of the project, the contracting agency no longer can use the CM/GC agreed price procedures under this regulation.

Where contracting agencies bid the construction of the project after being unable to reach a price agreement with the CM/GC contractor, there is an inherent risk that the CM/GC contractor may have (or be perceived as having) an unfair advantage if permitted to competitively bid for project construction work. Under the proposed rule, the contracting agency may follow State or local procurement policies in determining if there is a real or apparent conflict of interest and it is necessary to preclude the CM/GC contractor from competitive bidding. For example, the contracting agency may determine that the CM/GC contractor that performed preconstruction services does not have an inherent advantage over other potential bidders/proposers because the same information is available to all bidders/proposers. In other cases, the contracting agency may preclude the CM/GC contractor from competing with other firms due to State or local conflict of interest policies, or a belief that the firm has knowledge or information that other potential bidders/proposers do not have.

In section 635.504(c), FHWA proposes several standards governing the FHWA's approval of an STA's CM/GC procedures.

First, FHWA proposes that STAs must submit their proposed CM/GC procurement procedures to the FHWA Division Administrator for review and approval. This review and approval is consistent with 23 U.S.C. 112(a), and is necessary to facilitate efficient administrative oversight of an STA's CM/GC procurement process for compliance with Federal requirements. The FHWA's approval of the STA's process will eliminate the need for FHWA to review and evaluate the STA's CM/GC procurement process on a project-by-project basis. Also, this review and approval is consistent with other project delivery methods. The FHWA also proposes that other contracting agencies be allowed to either follow the FHWA-approved STA procedures or their own local procedures if such local procedures are approved by both the STA and FHWA.

Second, FHWA proposes to establish the parameters for the Division Administrator's approval of the STA's CM/GC procedures. Under the proposed rule, the Division Administrator would be required to review an STA's CM/GC procedures to verify that the procedures conform to the requirements of applicable Federal regulations and do not operate to restrict competition.

The Division Administrator's approval of CM/GC procurement procedures is a program-level action and may not be delegated or assigned to the STA.

In 23 CFR 635.504(d), FHWA proposes to include language that makes it clear the 30 percent minimum self-performance requirement by the general contractor in 23 CFR 635.116(a) applies to all agreements for construction services. In CM/GC contracting, the contractor's role in the construction phase of the contract is very similar to a general contractor's role in traditional bid-build contracting. Therefore, it is reasonable to require the same minimum self-performance requirements for the construction phase of CM/GC projects. Contracting agencies may continue to use higher self-performance requirements if required by applicable State law, regulation or policy. Also, FHWA proposes to allow contracting agencies to require the CM/GC contractor to award subcontracts for construction services on a low bid basis if required by State law, regulation, or policy.

In 23 CFR 635.504(e), FHWA proposes to specify the payment methods that may be used for CM/GC projects. For preconstruction services, the method of payment may be lump sum, cost plus fixed fee, cost per unit of work, specific rates of compensation, or any other comparable payment method permitted under State law. Since preconstruction services are essentially services for consulting, the payment methods for these services should be similar to other methods used for consulting. However, the cost plus a percentage of cost and other percentage of cost methods of payment must not be used, since these methods are highly susceptible to abuse and, as a result, generally prohibited in any type of Federal contracting. For construction services, the method of payment may include any method of payment authorized by State law (including, but not limited to; lump sum, unit price, and target price); however, when compensation is based on actual costs, an approved indirect cost rate must be used. See proposed section 635.507.

Section 635.505—Relationship to the NEPA Process

In section 635.505, FHWA proposes the requirements to establish the relationship between the CM/GC procurement process and the NEPA process. The requirements in this section are designed to protect the integrity of the NEPA decisionmaking process, since the solicitation and award of a CM/GC project will often occur before the completion of the NEPA process. In this section, FHWA not only incorporates the specific statutory requirements in 23 U.S.C. 112(b)(4)(C), but also substantially follows the requirements that have already been established for design-build projects in 23 CFR 636.109 for consistency. The design-build requirements were established to protect the integrity of the NEPA decisionmaking process in situations where design-build contracts are awarded before the completion of the NEPA process.

First, in section 635.505(a), FHWA incorporates the provision of 23 U.S.C. 112(b)(4)(C)(i), providing that before the completion of the NEPA process a contracting agency may: (a) Issue requests for proposals, (b) proceed with the award of a contract for preconstruction services, (c) issue notices to proceed to the contractor for preconstruction services for preliminary design-related work, and (d) issue

notices to proceed to a design firm for the preliminary design of the project and any work related to preliminary design, to the extent that those actions do not limit any reasonable range of alternatives. The FHWA interprets the statutory condition in 23 U.S.C. 112(b)(4)(C)(i)(III), which appears in section 635.505(a)(4) of the proposed regulation, as intended to ensure that performance of preliminary design work will not bias or influence the environmental review of the project, and that all reasonable alternatives will be fairly considered when a project involves an EIS or EA.

Second, in section 635.505(b), FHWA proposes to implement the provisions of revised 23 U.S.C. 112(b)(4)(C)(ii), by prohibiting contracting agencies from proceeding with the award of an agreement for construction services (including early work packages such as advanced material acquisition or site work) before the completion of the NEPA review process.

Third, in section 635.505(c), FHWA proposes to implement the provisions of revised 23 U.S.C. 112(b)(4)(C)(ii) and (iv), by allowing contracting agencies to proceed, solely at their own risk and expense, with final design activities for a CM/GC project before completion of the NEPA review process without affecting subsequent approvals required for the project. If the contracting agency wishes to use the CM/GC contractor for advice in connection with at-risk final design activities, it may do so if it has a procedure for segregating the costs of the CM/GC contractor's at-risk final design work from other work. This is to ensure that the costs of the CM/GC contractor's at-risk final design work are not submitted for Federal reimbursement until after NEPA is complete. The proposed rule would require the contracting agency to notify FHWA of its decision to proceed with at-risk final design before the completion of the NEPA process. After NEPA review of the CM/GC project is completed, contracting agencies may seek reimbursement of eligible costs pursuant to proposed section 635.506(c), including any CM/GC contractor costs for at-risk final design-related work. The statute and the proposed regulation create an exception to the normal cost eligibility principles under 2 CFR part 200, subpart E, which exclude costs incurred before Federal authorization. The proposed provisions are based on FHWA's interpretation of 23 U.S.C. 112(b)(4)(C)(iv), as allowing final design work by a contracting agency solely at its own risk, and 23 U.S.C. 112(b)(4)(C)(ii), as prohibiting FHWA approval or financial support for final design and construction-related work before the completion of NEPA review for the CM/GC project. The FHWA's proposal is consistent with the statutory objective of protecting the integrity of the NEPA decisionmaking process, as articulated throughout 23 U.S.C. 112(b)(4)(C).

Fourth, in section 635.505(d), FHWA proposes to implement the requirement of 23 U.S.C. 112(b)(4)(C)(v), that contracting agencies include a contract termination provision in the CM/GC contract in the event the NEPA process does not result in the selection of a build alternative. This NEPA-related provision is included to help ensure the NEPA decisionmaking process is not biased by the existence of the CM/GC contract. This provision is in addition to contract clauses relating to termination for cause and convenience required by 2 CFR Appendix II to Part 200.

Fifth, in section 635.505(e), FHWA proposes to require contracting agencies to include a provision in their CM/GC contracts making it clear that the scope of services in the preconstruction phase includes all alternatives identified and considered in the NEPA process. It is FHWA's belief that unbiased decisionmaking in the NEPA process requires the State to maintain the ability to receive preconstruction services from the constructor on any alternative identified and evaluated in the NEPA process.

Sixth, in section 635.505(f), FHWA proposes to require contracting agencies to include a provision in their CM/GC contracts expressly declaring that no commitments are being made to any alternative evaluated in the NEPA process and that the comparative merits of the alternatives will be evaluated and fairly considered. Similar to section 635.505(e), this provision is intended to ensure unbiased decisionmaking in the NEPA process.

Seventh, in section 635.505(g), FHWA proposes to prohibit the CM/GC contractor from preparing NEPA documentation or having any decisionmaking responsibility with respect to the NEPA process. This provision protects the preparation of the NEPA documentation against any conflict of interest in the preconstruction services provided by the CM/GC contractor. However, information that the CM/GC contractor develops in providing preconstruction services may be considered in the NEPA analysis and included in the record.

Lastly, in section 635.505(h), FHWA proposes to require contracting agencies to include a provision in all agreements for construction services ensuring that all environmental and mitigation measures identified in the NEPA documentation and committed to in the NEPA determination for the selected alternative will be implemented. Those commitments form part of the basis for FHWA decision approving the project for funding. Any proposed change to a final commitment made during NEPA (regardless whether the review involved a categorical exclusion, EA, or EIS) requires FHWA consideration of potential effects on the earlier environmental review process.

Section 635.506—Project Approvals and Authorizations

First, in section 635.506(a)(1), FHWA proposes to provide parameters regarding the assumption of specific project approval actions by the STA under 23 U.S.C. 106(c). Under the proposed rule, FHWA would retain approval of the STA's CM/GC procedures, but all of the proposed CM/GC project-level FHWA approval responsibilities may be assumed by the STA, in accordance with 23 U.S.C. 106(c). Assumptions by the STA would occur through the FHWA/STA Stewardship and Oversight Agreement for that State. Section 106(c) provides authority for State assumption of a broad range of FHWA project-level actions relating to design, plans, specifications, estimates, contract awards and inspection of projects. The STAs may not further delegate or assign FHWA's responsibilities to approve CM/GC projects to other contracting agencies.

In section 635.506(a)(2), FHWA proposes a requirement for the contracting agency to provide a copy of the solicitation documents for FHWA review and approval before requesting FHWA's authorization for either preconstruction or construction activities.

Second, in section 635.506(b), FHWA proposes to require contracting agencies to request FHWA's authorization of preliminary engineering before incurring costs for preconstruction services. Under the proposed rule, the Division Administrator must review and approve the contracting agency's cost or price analysis for preconstruction services, prepared in a manner consistent with 23 CFR 200.323, before authorizing preconstruction services for all procurements exceeding the simplified acquisition threshold (currently $150,000).

Third, in section 635.506(c), FHWA proposes the requirements that must be met before FHWA can authorize funds to reimburse a contracting agency for final design and preconstruction services associated with final design for

a CM/GC project where those costs were incurred at the contracting agency's risk before the completion of the NEPA review of the project. As discussed under section 635.505(c), 23 U.S.C. 112(b)(4)(C)(ii) and (iv), as well as 23 CFR 771.113(a), prohibit FHWA authorization of funding or other FHWA approval of these activities until after the completion of the NEPA process. However, as provided in 23 U.S.C. 112(b)(4)(C)(iv), a contracting agency may proceed at its own expense with final design and preconstruction services related to final design, and seek reimbursement if the NEPA process concludes in the selection of a build alternative.

In cases where contracting agencies proceed at their own risk and expense, 23 U.S.C. 112(b)(4)(C)(iv)(II) provides that these activities may eventually be eligible for Federal reimbursement.[2] The FHWA proposes to adopt provisions to safeguard the NEPA process and the use of Federal funds for these activities by using criteria derived from other parts of section 112 that address the NEPA process, and from governmentwide NEPA implementing regulations issued by the President's Council on Environmental Quality.[3] Accordingly, FHWA proposes that such activities be eligible for post-NEPA reimbursement only if the Division Administrator finds the contracting agency's final design-related activities: (1) Did not limit the identification and fair evaluation of a reasonable range of alternatives for the proposed project, (2) did not result in an irrevocable commitment by the contracting agency to the selection of a particular alternative, (3) did not have an adverse environmental impact, and (4) consistent with governmentwide cost principles (2 CFR 200.403), are necessary and reasonable and are adequately documented. This is an eligibility determination, and it cannot be delegated or assigned to the STA. However, in the case of projects for which the State is directly responsible for NEPA compliance (either under an assignment of environmental responsibilities pursuant to 23 U.S.C. 326 or 327, or under a programmatic categorical exclusion agreement as authorized by section 1318(d) of MAP–21), the Division Administrator may rely on a State certification indicating these conditions are satisfied. These proposed conditions for reimbursement under 23 U.S.C. 112(b)(4)(C)(iv)(II) in no way diminish the responsibility of the Division Administrator to prevent actions by FHWA and others during the NEPA process that would limit the choice of reasonable alternatives or have an adverse environmental effect.[4] If the Division Administrator finds that either of those circumstances are present during the NEPA review of the CM/GC project, regardless of whether the contracting agency plans to seek reimbursement for final design-related activities from Federal funds, the Division Administrator shall require the contracting agency to take any necessary action to maintain the integrity of the NEPA process.

Fourth, section 635.506(d) would address construction approvals and authorizations. Under proposed section 635.506(d)(1), FHWA's construction contracting requirements will apply to all of the CM/GC project's construction contracts if any portion (including an early work package) of the CM/GC project construction is funded with title 23 funds. In section 635.506(d)(2), the proposed rule would require FHWA approval of the price estimate for construction costs for the entire project before authorization of construction services (including authorization for an early work package). This requirement is in the statute at 23 U.S.C. 112(b)(4)(C)(iii)(I).

In section 635.506(d)(3), FHWA proposes to require contracting agencies to perform a price analysis for every agreement for construction services that establishes or modifies scope, schedule and price for the CM/GC project or a portion of the project. This requirement is intended to be consistent with price analysis requirements under 2 CFR 200.323. The construction services price analysis will be a comparison of the agreed price with the contracting agency engineer's estimate or an independent cost estimate (if required by the agency).

In section 635.506(d)(4), FHWA proposes to require FHWA approval of the contracting agency's price analysis and agreed construction services price before FHWA's construction authorization. This paragraph would implement 23 U.S.C. 112(b)(4)(C)(iii)(II), which requires FHWA's approval of any price agreement with the CM/GC contractor for the project or any portion of the project before authorizing construction activities.

Under section 635.506(d)(5) of the proposed rule, FHWA's authorization of construction services will be based on the approved agreed price for the project or portion of the project. The FHWA proposes to allow the construction services authorization for early work packages. Early work packages would allow contracting agencies to acquire long-lead items, such as materials for the project (consistent with 23 CFR 635.122), or start a particular phase of construction for which final design is complete. Under the proposed rule, and in accordance with 2 CFR part 200 and proposed section 635.507, FHWA may deny eligibility for part or all of an early work package if such work is not needed or used for the project. For example, if construction materials are acquired for a CM/GC project, but not installed in the project, the cost of such material would not be eligible for Federal-aid participation (however, the contracting agency, as owner of the excess materials, may propose use of the material on a future Federal-aid project in accordance with 23 CFR 635.407(a)). In making the cost eligibility determination, FHWA would include consideration of the kinds of factors described in its long-established guidance on participation in the cost of corrective work necessitated by engineering errors (see FHWA guidance at *http://www.fhwa.dot.gov/programadmin/contracts/071263.cfm* and *http://www.fhwa.dot.gov/programadmin/contracts/090878.cfm*). The FHWA would evaluate, on a case-by-case basis, whether the excess costs were incurred based on the reasonable exercise of diligence and judgment by the contracting agency. The FHWA would not participate in excess costs incurred as a result of fraud, carelessness, negligence, or incompetence on the part of the contracting agency or those working on its behalf. Despite the financial risk to the contracting agency, in certain instances the use of early work packages may provide for schedule acceleration, overall risk mitigation, and cost savings related to inflation. The use of an early work package as a phase of a project is consistent with 23 U.S.C. 112(b)(4)(A)(iii)–(iv).

Lastly, in section 635.506(e), FHWA proposes to require concurrence from the Division Administrator before a contracting agency's award of a Federal-aid CM/GC contract, including agreements to proceed to the construction services phase or decisions to not proceed with an agreement for construction services. Concurrence in the contract award constitutes approval of the agreed price, scope, and schedule for the work. Under 23 U.S.C. 112(b)(4)(C)(iii)(II), approval of the price agreement is a prerequisite to FHWA authorization of preconstruction and construction services costs. The documentation supporting a contract

[2] Note that 23 U.S.C. 112(b)(4)(C)(iv)(II) erroneously references 23 U.S.C. 109(r), which cannot be applied to this provision.

[3] 40 CFR 1506.1(a).

[4] 40 CFR 1506.1(a)–(b).

award should include the Disadvantaged Business Enterprise (DBE) documentation required by 26 CFR 26.53(b)(2) when there is a contract goal. The FHWA's concurrence in contract awards is required by 23 U.S.C. 112(d), and the concurrence provides FHWA with an opportunity to verify that the appropriate contract requirements have been incorporated and DBE commitments or good faith efforts have been submitted.

Section 635.507—Cost Eligibility

In this section, FHWA makes clear that the Federal cost principles must be satisfied for any costs that are included in negotiated prices, as required by 2 CFR part 200, subpart E. Contracting agencies must perform a cost or price analysis in connection with every procurement action (including contract modifications) in excess of the simplified acquisition threshold (currently $150,000).

In section 635.507(a)(1), for preconstruction services agreements where actual costs or cost estimates are included in negotiated prices that will be used for cost reimbursement, we propose to require that all such costs must comply with the Federal cost principles to be eligible for participation. This is consistent with 2 CFR part 200 subpart E.

In section 635.507(a)(2), for construction services agreements or contracts, FHWA proposes that a price analysis must confirm price reasonableness, consistent with 2 CFR 200.320 and 200.323, to satisfy cost eligibility requirements. The FHWA will rely on a price analysis that is prepared and approved in accordance with section 635.506(d)(3) of this proposed rule, when authorizing construction services (including early work packages).

In section 635.507(b), for cost-reimbursement contracts, we propose to require that the CM/GC contractor provide an indirect cost rate established in accordance with the Federal cost principles. The indirect cost rate provisions in 23 U.S.C. 112(b)(2) do not apply to CM/GC contracts because they are not agreements for architectural or design services. Accordingly, contracting agencies must use an indirect cost rate that is consistent with applicable provisions in 2 CFR part 200.

In section 635.507(c), we propose to implement a certification requirement regarding the use of indirect cost rates for those firms who have provided an approved indirect cost rate for use. This proposal is consistent with Paragraph 3(d) of FHWA Order 4470.1A, ''FHWA Policy for Contractor Certification of Costs in Accordance with Federal Acquisition Regulations to Establish Indirect Cost Rates on Engineering and Design-related Services Contracts.'' (*http://www.fhwa.dot.gov/legsregs/directives/orders/44701a.htm*).

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, FHWA will continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period.

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The FHWA has determined preliminarily that this action would not be a significant regulatory action within the meaning of Executive Order 12866, nor within the meaning of the U.S. Department of Transportation's regulatory policies and procedures. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The FHWA anticipates that the economic impact of this rulemaking would be minimal. The FHWA anticipates that the proposed rule would not adversely affect, in a material way, any sector of the economy. As mandated by Section 1303 of MAP–21, this rulemaking provides a regulatory framework for the CM/GC contracting method, which is a process that has already been deployed and used under the authority of the FHWA's SEP–14 Program. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), the FHWA has evaluated the effects of this action on small entities and anticipates that the action would not have a significant economic impact on a substantial number of small entities. The proposed amendment provides procedures for approving CM/GC projects in the Federal-aid highway program. As such, it primarily affects States and States are not included in the definition of small entity set forth in 5 U.S.C. 601.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48, March 22, 1995) as it will not result in the expenditure by State, local, tribal governments, in the aggregate, or by the private sector, of $148.1 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the agency will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector.

Executive Order 13132 (Federalism Assessment)

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, and FHWA has determined that this proposed action would not have a substantial direct effect or sufficient federalism implications on the States. The FHWA has also determined that this proposed action would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The FHWA has analyzed this proposed rule under the PRA and has determined preliminarily that this proposal does not contain collection of information requirements for the purposes of the PRA.

National Environmental Policy Act

The FHWA has analyzed this action for the purpose of the NEPA, as amended (42 U.S.C. 4321 *et seq.*). Agencies are required to adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: Those that normally require preparation of an EIS; those that normally require preparation of an EA; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). The proposed action is the adoption of regulations that provide the policies, procedures, and requirements for implementing the CM/GC contracting method pursuant to 23 U.S.C. 112(b)(4). This proposed action qualifies for categorical exclusions under 23 CFR 771.117(c)(20) (promulgation of rules, regulations, and directives). The FHWA has evaluated whether the proposed action would involve unusual circumstances or extraordinary circumstances and has determined that this proposed rulemaking action would not involve such circumstances. As a result, FHWA finds that this proposed rulemaking would not result in significant impacts on the human environment.

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this proposed rule under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. The FHWA does not anticipate that this proposed action would affect a taking of private property or otherwise have taking implications under Executive Order 12630.

Executive Order 12898 (Environmental Justice)

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,* and DOT Order 5610.2(a) (the DOT Order), 91 FR 27534 (May 10, 2012) (available online at *www.fhwa.dot.gov/enviornment/environmental_justice/ej_at_dot/order_56102a/index.cfm*), require DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations in the United States. The DOT Order requires DOT agencies to address compliance with Executive Order 12898 and the DOT Order in all rulemaking activities. In addition, FHWA has issued additional documents relating to administration of Executive Order 12898 and the DOT Order. On June 14, 2012, FHWA issued an update to its EJ order, FHWA Order 6640.23A, *FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations* (the FHWA Order) (available online at *www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm*).

The FHWA has evaluated this proposed rule under the Executive Order, the DOT Order, and the FHWA Order. The FHWA has determined that the proposed regulations would not cause disproportionately high and adverse human health and environmental effects on minority or low income populations.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this action would not cause an environmental risk to health or safety that might disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that the proposed action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal laws. The proposed rulemaking addresses obligations of Federal funds to States for Federal-aid highway projects and would not impose any direct compliance requirements on Indian tribal governments. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The FHWA has determined that this is not a significant energy action under that order since it is not a significant regulatory action under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Regulation Identifier Number

A RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects

23 CFR Part 630

Government contracts, Grant programs-transportation, Highways and roads, Reporting and recordkeeping requirements.

23 CFR Part 635

Grant programs-transportation, Highways and roads, Reporting and recordkeeping requirements.

Issued on: June 19, 2015.

Gregory G. Nadeau,

Acting Administrator, Federal Highway Administration.

In consideration of the foregoing, FHWA proposes to amend title 23, Code of Federal Regulations, parts 630 and 635 as follows:

PART 630—PRECONSTRUCTION PROCEDURES

■ 1. Revise the authority citation for part 630 to read as follows:

Authority: 23 U.S.C. 106, 109, 112, 115, 315, 320, and 402(a); Sec. 1501 and 1503 of Public Law 109–59, 119 Stat. 1144; Public Law 105–178, 112 Stat. 193; Public Law 104–59, 109 Stat. 582; Public Law 97–424, 96 Stat. 2106; Public Law 90–495, 82 Stat. 828; Public Law 85–767, 72 Stat. 896; Public Law 84–627, 70 Stat. 380; 23 CFR 1.32 and 49 CFR 1.48(b), and Pub. L. 112–141, 126 Stat. 405, section 1303.

■ 2. Amend § 630.106 by adding a new paragraph (a)(8) to read as follows:

§ 630.106 Authorization to proceed.

(a) * * *

(8) For Construction Manager/General Contractor projects, the execution or modification of the project agreement for preconstruction services associated with final design and construction services, and authorization to proceed with such services, shall not occur until after the completion of the NEPA process. However, preconstruction services associated with preliminary design may be authorized in accordance with this section.

* * * * *

PART 635—CONSTRUCTION AND MAINTENANCE

■ 3. Revise the authority citation for part 635 to read as follows:

Authority: Sections 1525 and 1303 of Pub.L. 112–141, Sec. 1503 of Pub.L. 109–59, 119 Stat. 1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.;* Sec. 1041(a), Pub.L. 102–240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.85(a)(1).

■ 4. Amend § 635.102 by adding, in alphabetical order, the definition of ''Construction Manager/General Contractor (CM/GC) project'' to read as follows:

§ 635.102 Definitions.

* * * * *

Construction Manager/General Contractor (CM/GC) project means a project to be delivered using a two-phase contract with a construction manager or general contractor for services during both the preconstruction and construction phases of a project.

* * * * *

■ 5. Amend § 635.104 by adding paragraph (d) to read as follows:

§ 635.104 Method of construction.

* * * * *

(d) In the case of a CM/GC project, the requirements of subpart E of this part and the appropriate provisions pertaining to the CM/GC method of contracting in this part will apply. However, no justification of cost effectiveness is necessary in selecting projects for the CM/GC delivery method.

■ 6. Amend § 635.107 by revising the first sentence of paragraph (b) to read as follows:

§ 635.107 Participation by disadvantaged business enterprises.

* * * * *

(b) In the case of a design-build or CM/GC project funded with title 23 funds, the requirements of 49 CFR part 26 and the State's approved DBE plan apply. * * *

■ 7. Amend § 635.109 by revising paragraph (a) introductory text to read as follows:

§ 635.109 Standardized changed condition clauses.

(a) Except as provided in paragraph (b) of this section, the following changed conditions contract clauses shall be made part of, and incorporated in, each highway construction project, including construction services agreements of CM/GC projects, approved under 23 U.S.C. 106:

* * * * *

■ 8. Amend § 635.110 by revising paragraph (f) introductory text to read as follows:

§ 635.110 Licensing and qualification of contractors.

* * * * *

(f) In the case of a design-build and CM/GC project, the STDs may use their own bonding, insurance, licensing, qualification or prequalification procedure for any phase of procurement.

* * * * *

■ 9. Amend § 635.112 by adding paragraph (j) to read as follows:

§ 635.112 Advertising for bids and proposals.

* * * * *

(j) In the case of a CM/GC project, the FHWA Division Administrator's approval of the solicitation document will constitute the FHWA's approval to use the CM/GC contracting method and approval to release the solicitation document. The STD must obtain the approval of the FHWA Division Administrator before issuing addenda which result in major changes to the solicitation document.

■ 10. Amend § 635.113 by adding paragraph (d) to read as follows:

§ 635.113 Bid opening and bid tabulation.

* * * * *

(d) In the case of a CM/GC project, the requirements of this section do not apply. See subpart E of this part for approval procedures.

■ 11. Amend § 635.114 by adding paragraph (l) to read as follows:

§ 635.114 Award of contract and concurrence in award.

* * * * *

(l) In the case of a CM/GC project, the CM/GC contract shall be awarded in accordance with the solicitation document. See subpart E of this part for CM/GC project approval procedures.

■ 12. Amend § 635.122 by adding paragraph (d) to read as follows:

§ 635.122 Participation in progress payments.

* * * * *

(d) In the case of a CM/GC project, the STD must define its procedures for making progress payments pursuant to the selected payment method in the appropriate solicitation and contract documents.

■ 13. Amend § 635.309 by revising paragraphs (p) introductory text, (p)(1)(vi) introductory text, and (p)(3) to read as follows:

§ 635.309 Authorization.

* * * * *

(p) In the case of a design-build or CM/GC project, the following certification requirements apply:

(1) * * *

(vi) If the STD elects to include right-of-way, utility, and/or railroad services as part of the design-builder's (or CM/GC contractor's) scope of work, then the Request for Proposals document must include:

* * * * *

(3) Changes to the design-build or CM/GC project concept and scope may require a modification of the transportation plan and transportation improvement program. The project sponsor must comply with the metropolitan and statewide transportation planning requirements in 23 CFR part 450 and the transportation conformity requirements (40 CFR parts 51 and 93) in air quality nonattainment and maintenance areas, and provide appropriate approval notification to the design builder (or the CM/GC contractor) for such changes.

■ 14. Add subpart E to read as follows:

Subpart E—Construction Manager/General Contractor (CM/GC) Contracting

Sec.

Subpart E—Construction Manager/General Contractor (CM/GC) Contracting

§ 635.501 Purpose.

The regulations in this subpart prescribe policies, requirements, and procedures relating to the use of the CM/GC method of contracting on Federal-aid projects.

§ 635.502 Definitions.

As used in this subpart:

Agreed price means the price agreed to by the Construction Manager/General Contractor (CM/GC) contractor and the contracting agency to provide construction services for a specific scope and schedule.

CM/GC contractor means the entity that has been awarded a two-phase contract for a CM/GC project and is responsible for providing preconstruction services under the first phase and, if a price agreement is reached, construction services under the second phase of such contract.

CM/GC project means a project to be delivered using a two-phase contract with a CM/GC contractor for services during the preconstruction and construction phases of a project.

Construction services means the physical construction work undertaken by a CM/GC contractor to construct a project or a portion of the project (including early work packages). Construction services may be authorized as a single contract for the project, or through a combination of contracts covering portions of the CM/GC project. Procurement and authorization procedures are the same for every contract for construction services.

Contracting agency means the State Transportation Agency (STA), and any State or local government agency, public-private partnership, or Indian tribe (as defined in 2 CFR 200.54) that is the acting under the supervision of the STA and is awarding and administering a CM/GC contract.

Division Administrator means the chief FHWA official assigned to conduct business in a particular State.

Early work package means a portion or phase of physical construction work (including material acquired for a construction phase) that is procured after NEPA is complete but before all design work for the project is complete. Contracting agencies may procure an early work package only when the risks of the work are adequately identified and the scope of work is defined sufficiently for the contracting agency and the CM/GC contractor to reasonably determine price. The requirements in § 635.506 and § 635.507 apply to procuring an early work package and FHWA authorization for an early work package.

Final design has the same meaning as defined in § 636.103 of this chapter.

NEPA process means the environmental review required under the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), applicable portions of the NEPA implementing regulations at 40 CFR parts 1500–1508, and part 771 of this chapter.

Preconstruction services means consulting to provide a contracting agency and its designer with information regarding the impacts of design on the physical construction of the project, including scheduling, work sequencing, cost engineering, constructability, cost estimating, and risk identification. Under an agreement for preconstruction services, the CM/GC contractor may provide consulting services during both preliminary and final design. Such services do not include design and engineering-related services as defined in § 172.3 of this chapter.

Preliminary design has the same meaning as defined in § 636.103 of this chapter.

Solicitation document means the document used by the contracting agency to advertise the CM/GC project and request expressions of interest, statements of qualifications, proposals, or offers.

State transportation agency (STA) has the same meaning as the term State transportation department under § 635.102 of this chapter.

§ 635.503 Applicability.

The provisions of this subpart apply to all Federal-aid projects within the right-of-way of a public highway, those projects required by law to be treated as if located on a Federal-aid highway, and other projects which are linked to such projects (*i.e.,* the project would not exist without another Federal-aid highway project) that are to be delivered using the CM/GC contractor method.

§ 635.504 CM/GC requirements.

(a) *In general.* A contracting agency may award a two-phase contract to a CM/GC contractor for preconstruction and construction services. The first phase of this contract is the preconstruction services phase. The second phase is the construction services phase. The construction services phase may occur under one contract or under multiple contracts covering portions of the project, including early work packages.

(b) *Procurement requirements.* (1) The contracting agency shall procure the CM/GC contract using competitive selection procurement procedures providing for free and open competition.

(2) Contracting agency procedures may use any of the following solicitation options in procuring a CM/GC contract: Letters of interest, requests for qualifications, interviews, request for proposals or other solicitation procedures provided by applicable State law, regulation or policy. Single-phase or multiple-phase selection procedures may also be used.

(3) Contracting agency procedures shall require, at a minimum, that a CM/GC contract be advertised through solicitation documents that:

(i) Clearly define the scope of services being requested;

(ii) List evaluation factors and significant subfactors and their relative importance in evaluating proposals;

(iii) List all required deliverables;

(iv) Identify whether interviews will be conducted before establishing the final rank; and

(v) Include or reference sample contract form(s).

(4) If interviews are used in the selection process, the contracting agency must offer the opportunity for an interview to all short listed firms (or firms that submitted responsive proposals, if a short list is not used). Also, if interviews are used, then the contracting agency must not engage in conduct that favors one firm over another and must not disclose a firm's offer to another firm.

(5) A contracting agency may award a CM/GC contract based on qualifications, experience, best value, or any other combination of factors considered appropriate by the contracting agency and the Division Administrator and which are clearly specified in the solicitation documents.

(6) In the event that the contracting agency is unwilling or unable to enter into an agreement with the CM/GC contractor for the construction services phase of the project (including any early work package), after notification to the Division Administrator, the contracting agency may initiate a new procurement process meeting the requirements of subpart A of this part. If FHWA participation is being requested in the cost of construction, the contracting agency must request FHWA's approval before advertising for bids or proposals in accordance with § 635.112. Once the contracting agency advertises for bids or proposals for the project or a portion of

the project, the contracting agency no longer can use the agreed price procedures under this CM/GC regulation. When the contracting agency makes a decision to initiate a new procurement, the contracting agency may determine that there is an apparent conflict of interest and not allow the CM/GC contractor to submit competitive bids.

(c) *FHWA approval of CM/GC procedures.* (1) The STA must submit its proposed CM/GC procurement procedures to the FHWA Division Administrator for review and approval. Any changes in approved procedures and requirements shall also be subject to approval by the Division Administrator. Other contracting agencies may follow STA approved procedures or their own procedures if approved by the both the STA and FHWA.

(2) The Division Administrator may approve procedures that conform to the requirements of this subpart and which do not, in the opinion of the Division Administrator, operate to restrict competition. The Division Administrator's approval of CM/GC procurement procedures may not be delegated or assigned to the STA.

(d) *Subcontracting.* Consistent with § 635.116(a), agreements for construction services must specify a minimum percentage of work (no less than 30 percent of the total cost of the agreement for construction services, excluding specialty work) that a contractor must perform with its own forces. If required by State law, regulation, or administrative policy, the contracting agency may require the CM/GC contractor to competitively let and award subcontracts for construction services to the lowest responsive bidder.

(e) *Payment methods.* (1) The method of payment to the CM/GC contractor shall be set forth in the original solicitation documents, contract, and any contract modification or change order thereto. A single contract may contain different payment methods as appropriate for compensation of different elements of work.

(2) The methods of payment for preconstruction services shall be: Lump sum, cost plus fixed fee, cost per unit of work, specific rates of compensation, or other comparable payment method permitted in State law and regulation. The cost plus a percentage of cost and percentage of construction cost methods of payment shall not be used.

(3) The method of payment for construction services may include any method of payment authorized by State law (including, but not limited to, lump sum, unit price and target price); however, when compensation is based on actual costs, an approved indirect cost rate must be used.

§ 635.505 Relationship to the NEPA process.

(a) In procuring a CM/GC contract before the completion of the NEPA process, the contracting agency may:

(1) Issue solicitation documents;

(2) Proceed with the award of a CM/GC contract providing for preconstruction services and an option to enter into a future agreement for construction services once the NEPA review process is complete;

(3) Issue notices to proceed to the CM/GC contractor for preconstruction services, excluding final design-related activities; and

(4) Issue a notice-to-proceed to a consultant design firm for the preliminary design and any work related to preliminary design of the project to the extent that those actions do not limit any reasonable range of alternatives.

(b) The contracting agency shall not proceed with the award of an agreement for the construction services phase of a CM/GC contract (including early work packages such as advanced material acquisition or site work) and, except as provided in paragraph (c) of this section, shall not proceed, or permit any consultant or contractor to proceed, with construction until the completion of the NEPA process for the project.

(c) A contracting agency may proceed, solely at the risk and expense of the contracting agency, with design activities at any level of detail, including final design and preconstruction services associated with final design, for a CM/GC project before completion of the NEPA process without affecting subsequent approvals required for the project. However, FHWA shall not authorize final design activities and preconstruction services associated with final design, and such activities shall not be eligible for Federal funding as provided in § 635.506(c), until after the completion the NEPA process. A contracting agency may use a CM/GC contractor for preconstruction services associated with at-risk final design only if the contracting agency has a procedure for segregating the costs of the CM/GC contractor's at-risk work from preconstruction services eligible for reimbursement during the NEPA process. If a contracting agency decides to perform at-risk final design, it must notify FHWA of its decision to do so before undertaking such activities.

(d) The CM/GC contract must include termination provisions in the event the environmental review process does not result in the selection of a build alternative. This termination provision is in addition to the termination for cause or convenience clause required by 2 CFR part 200, Appendix II.

(e) The CM/GC contract must include a provision providing that the scope of services in the preconstruction phase includes all alternatives identified and considered in the NEPA process.

(f) The CM/GC contract must include appropriate provisions ensuring no commitments are made to any alternative during the NEPA process, and that the comparative merits of all alternatives identified and considered during the NEPA process, including the no-build alternative, will be evaluated and fairly considered.

(g) The CM/GC contractor must not prepare NEPA documentation or have any decisionmaking responsibility with respect to the NEPA process. However, the CM/GC contractor may be requested to provide information about the project and possible mitigation actions, including constructability information, and its work product may be considered in the NEPA analysis and included in the record.

(h) Any agreement for construction services under a CM/GC contract must include appropriate provisions ensuring that all environmental and mitigation measures identified in the NEPA documentation and committed to in the NEPA determination for the selected alternative will be implemented.

§ 635.506 Project approvals and authorizations.

(a) *In general.* (1) Under 23 U.S.C. 106(c), the States may assume certain FHWA responsibilities for project design, plans, specifications, estimates, contract awards, and inspections. Any individual State's assumption of FHWA responsibilities for approvals and determinations for CM/GC projects, as described in this subpart, will be addressed in the State's FHWA/STA Stewardship and Oversight Agreement. The State may not further delegate or assign those responsibilities. If an STA assumes responsibility for an FHWA approval or determination contained in this subpart, the STA will include documentation in the project file sufficient to substantiate its actions and to support any request for authorization. The STA will provide FHWA with the documentation upon request.

(2) Before requesting the authorization for either preconstruction or construction activities, the contracting agency must submit its solicitation document for CM/GC services to the Division Administrator for approval.

(b) *Preconstruction services approvals and authorization.* (1) If the contracting agency wishes Federal participation in the cost of the CM/GC contractor's preconstruction services, it must request FHWA's authorization of preliminary engineering before incurring such costs.

(2) Before authorizing pre-construction services by the CM/GC contractor, the Division Administrator must review and approve the contracting agency's cost or price analysis for every procurement (including contract modifications). A cost or price analysis is encouraged but not required for procurements less than the simplified acquisition threshold (currently $150,000).

(c) *Final design during NEPA process.* (1) If the contracting agency proceeds with final design activities, including preconstruction services associated with final design activities, at its own expense before the completion of the NEPA process, then those activities for the selected alternative may be eligible for Federal reimbursement after the completion of the NEPA process so long as the Division Administrator finds that the contracting agency's final design-related activities:

(i) Did not limit the identification and fair evaluation of a reasonable range of alternatives for the proposed project,

(ii) Did not result in an irrevocable commitment by the contracting agency to the selection of a particular alternative,

(iii) Did not have an adverse environmental impact, and

(iv) Are necessary and reasonable and adequately documented.

(2) If, during the NEPA process, the Division Administrator finds the final design work limits the fair evaluation of alternatives, irrevocably commits the contracting agency to the selection of any alternative, or causes an adverse environmental impact, then the Division Administrator shall require the contracting agency to take any necessary action to ensure the integrity of the NEPA process regardless of whether the contracting agency wishes to receive Federal reimbursement for such activities.

(d) *Construction services approvals and authorizations.* (1) Subject to the requirements in § 635.505, the contracting agency may request Federal participation in the construction services costs associated with a CM/GC construction project, or portion of a project (including an early work package). In such cases, FHWA's construction contracting requirements will apply to all of the CM/GC project's construction contracts if any portion (including an early work package) of the CM/GC project construction is funded with title 23 funds. Any expenses incurred for construction services before FHWA authorization shall not be eligible for reimbursement except as may be determined in accordance with § 1.9 of this chapter.

(2) The FHWA must approve the price estimate for construction costs for the entire project before authorization of construction services (including authorization of an early work package).

(3) The contracting agency must perform a price analysis for any agreement (or contract modification) that establishes or revises the scope, schedule or price for the construction of the CM/GC project or a portion of the project (including an early work package). The price analysis must compare the agreed price with the contracting agency's engineer's estimate or an independent cost estimate (if required by the contracting agency). A price analysis is encouraged but not required for procurements less than the simplified acquisition threshold (currently $150,000).

(4) The Division Administrator must review and approve the contracting agency's price analysis and agreed price for the construction services of a CM/GC project or a portion of the project (including an early work package) before authorization of construction services.

(5) Where the contracting agency and the CM/GC contractor agree on a price for construction services, FHWA's authorization of construction services will be based on the approved agreed price for the project or portion of the project. The authorization may include authorization of an early work package, including the advanced acquisition of materials consistent with § 635.122. In the event that construction materials are acquired for a CM/GC project but not installed in the CM/GC project, the cost of such material will not be eligible for Federal-aid participation. In accordance with § 635.507 and 2 CFR part 200, FHWA may deny eligibility for part or all of an early work package if such work is not needed for, or used for, the project.

(e) *Contract award.* Award of Federal-aid CM/GC contracts for preconstruction and construction services requires prior concurrence from the Division Administrator. The concurrence is a prerequisite to the authorization of preconstruction and construction services (including authorization for an early work package). Concurrence in the contract award constitutes approval of the agreed price, scope, and schedule for the work. The documentation supporting a contract award should include the Disadvantaged Business Enterprise documentation required by 26 CFR 26.53(b)(2) when there is a contract goal. A copy of the executed contract between the contracting agency and the CM/GC contractor, including any agreement for construction services, shall be furnished to the Division Administrator as soon as practical after execution. If the contracting agency decides not to proceed with the award of a CM/GC construction services contract, then it must notify the FHWA Division Administrator as provided in § 635.504(b)(6).

§ 635.507 Cost eligibility.

(a) Costs, or prices based on estimated costs, for agreements under a CM/GC contract shall be eligible for Federal-aid reimbursement only to the extent that costs incurred, or cost estimates included in negotiated prices, are allowable in accordance with the Federal cost principles (as specified in 2 CFR part 200, subpart E). Contracting agencies must perform a cost or price analysis in connection with procurement actions, including contract modifications, in accordance with 2 CFR 200.323(a) and this subpart.

(1) For preconstruction services, to the extent that actual costs or cost estimates are included in negotiated prices that will be used for cost reimbursement, the costs must comply with the Federal cost principles to be eligible for participation.

(2) For construction services, the price analysis must confirm the agreed price is reasonable in order to satisfy cost eligibility requirements (see § 635.506(d)(3)). The FHWA will rely on an approved price analysis when authorizing funds for construction.

(b) *Indirect cost rates.* Where contract terms and payment are negotiated based on individual elements of costs, the CM/GC contractor must provide an indirect cost rate established in accordance with the Federal cost principles (as specified in 2 CFR part 200, subpart E).

(c) *Cost certification.* (1) If the CM/GC contractor presents an indirect cost rate established in accordance with the Federal cost principles (as specified in 2 CFR part 200, subpart E), it shall include a certification by an official of the CM/GC contractor that all costs are allowable in accordance with the Federal cost principles.

(2) An official of the CM/GC contractor shall be an individual executive or financial officer of the CM/GC contractor's organization, at a level no lower than a Vice President or Chief Financial Officer, or equivalent, who has the authority to make representations about the financial

information utilized to establish the indirect cost rate proposal submitted.

(3) The certification of final indirect costs shall read as follows:

Certificate of Final Indirect Costs

This is to certify that I have reviewed this proposal to establish final indirect cost rates and to the best of my knowledge and belief:

1. All costs included in this proposal (identify proposal and date) to establish final indirect cost rates for (identify period covered by rate) are allowable in accordance with the cost principles of the Federal Acquisition Regulation (FAR) of title 48, Code of Federal Regulations (CFR), part 31; and

2. This proposal does not include any costs which are expressly unallowable under applicable cost principles of the FAR of 48 CFR part 31.

Firm:

Signature:

Name of Certifying Official:

Title:

Date of Execution:

[FR Doc. 2015–15617 Filed 6–26–15; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2015–0022]

RIN 1625–AA00

Safety Zone; Charleston Patriot Festival, Cooper River; Charleston, SC

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a safety zone on the Cooper River in Charleston, South Carolina during the International Outboard Grand Prix (IOGP) Charleston Patriot Festival, a series of high-speed boat races. The event is scheduled to take place on Friday, September 11 through Sunday, September 13, 2015. Approximately 25 high-speed race boats are anticipated to participate in the races. This safety zone is necessary to provide for the safety of life and property on navigable waters of the United States during the event. This safety zone would temporarily restrict vessel traffic in a portion of Cooper River in front of River Front Park. Persons and vessels that are not participating in the races would be prohibited from entering, transiting through, anchoring in, or remaining within the restricted area unless authorized by the Captain of the Port Charleston or a designated representative.

DATES: This proposed rule would be effective from September 11, 2015 until September 13, 2015. It would be enforced on September 11, 2015 from 4:00 p.m. until 6:45 p.m.; on September 12, 2015 from 9:00 a.m. until 7:30 p.m.; and on September 13, 2015 from 10:00 a.m. until 5:45 p.m. There will be periodic river openings between each race.

Comments and related material must be received by the Coast Guard on or before July 29, 2015. Requests for public meetings must be received by the Coast Guard on or before July 14, 2015.

ADDRESSES: You may submit comments identified by docket number using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Chief Warrant Officer Christopher Ruleman, Sector Charleston Office of Waterways Management, Coast Guard; telephone (843)–740–3184, email *Christopher.L.Ruleman@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**

A. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov*, or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, type the docket number [USCG–2015–0022] in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number (USCG–2015–0022) in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.