



December 18, 2001

US Department of Transportation  
Dockets Management Facility  
400 Seventh Street, SW  
Washington, DC 20590-0001

**Re: American Council of Engineering Companies' Response Comments to the FHWA  
Design-Build Contracting Proposed Rule [FHWA Docket No. FHWA-2000-7799]**

Dear Sir or Madam:

The American Council of Engineering Companies (ACEC) appreciates the opportunity to participate in the proposed rulemaking process and states the following:

Introduction

On October 19, 2001, The Federal Highway Administration (FHWA) proposed implementing regulations to be used by the FHWA in approving the use of design-build contracting by State Transportation Departments (STDs) for Federal-aid highway projects. The regulation would establish prescribed policies and procedures for using design-build contracting on these projects, but does not require the use of design-build contracting. The FHWA solicited comments on this proposed regulation.

ACEC is the business association of America's engineering industry, representing over 6,000 independent engineering companies throughout the United States engaged in the development of America's transportation, environmental, industrial, and other infrastructure. Founded in 1910 and headquartered in Washington, DC, ACEC is a national federation of 51 state and regional organizations.

ACEC supports procurement methods that ensure the quality of the delivered product. Whatever method is used must be appropriate for the particular project and meet the industry's standards for quality, integrity, responsiveness and trust. An appropriate delivery method should be chosen based on its ability to provide the best value to the owner, taking into consideration all of the risks, rewards, and demands of a given project. ACEC agrees with the FHWA approach in that it does not require design-build but rather allows it as an optional delivery method.

ACEC supports two-phase design-build development. During phase one, which is prior to solicitation, the STD and a design professional should develop preliminary plans, performance specifications, budgets, schedules and other documentation that fulfill the owner's expectations. The design professional should either be in-house or chosen using a qualifications-based selection process, and should remain as the STD's representative

throughout the course of the project providing technical advice, construction review services, and professional expertise. Phase two consists of a two-part selection process: In part one, the STD evaluates and shortlists design-builders based on their qualifications. Part-two proposals shall be evaluated based on the technical submission and other evaluation factors, including cost and price.

ACEC submits the following comments:

ACEC Comments By Section

1. Part 627--Value Engineering  
***Acceptable***
  
2. Part 635--Construction and Maintenance
  - a. Section 635.102 Definitions  
***Acceptable***
  
  - b. Section 635.104 Method of Construction  
***Acceptable***
  
  - c. Section 635.107 Participation by Disadvantaged Business Enterprises  
***Acceptable***
  
  - d. Section 635.109 Standardized Changed Condition Clauses  
***Acceptable***
  
  - e. Section 635.110 Licensing and Qualification of Contractors  
***ACEC reiterates its concern that by allowing States to utilize their own prequalification and licensing statutes and procedures, design firms may be precluded from leading a design-build team if the state requirements are too stringent. ACEC recommends flexibility in these requirements.***
  
  - f. Section 635.112 Advertising for Bids  
***Acceptable***
  
  - g. Section 635.113 Bid Opening and Bid Tabulations  
***Acceptable***
  
  - h. Section 635.114 Award of Contract and Concurrence in Award  
***Acceptable***
  
  - i. Section 635.116 Subcontracting and Contracting Responsibilities  
***Acceptable, but ACEC suggests that the FHWA offer guidance to the STDs so that self-performance goals, if established, match the needs of the particular project, rather than being arbitrarily set.***
  
  - j. Section 635.122 Participation in Progress Payments  
***Acceptable***
  
  - k. Section 635.309 Authorization  
***Acceptable***

- l. Section 635.411 Material or Product Selection  
*Acceptable*
  - m. Section 635.413 Warranty Clauses  
*ACEC reiterates its concern over attempts by STDs to directly or indirectly extend uninsurable warranty provisions to professional engineering services (e.g., those that go beyond legal standards of care in the industry).*
3. Part 636—Design-Build Contracting
- a. Section 636.102 Does This Part Apply to Me?  
*Acceptable*
  - b. Section 636.103 What Are the Definitions of Terms Used in This Part?  
*Acceptable*
  - c. Section 636.106 What Type of Projects May Be Used With Design-Build Contracting?  
*Acceptable*
  - d. Section 636.107 Does the Definition of a "Qualified Project" Limit the Use of Design-Build Contracting?  
*Acceptable*
  - e. Section 636.108 How Does the Definition of a "Qualified Project" Apply to ITS Projects?  
*Acceptable*
  - f. Section 636.109 How Does the NEPA Review Process Relate to the Design-Build Procurement Process?  
*Acceptable*
  - g. Section 636.110 What Procedures May Be Used for Solicitations and Receipt of Proposals?  
*Acceptable*
  - h. Section 636.111 Can Oral Presentations Be Used During the Procurement Process?  
*Acceptable*
  - i. Section 636.112 May Stipends Be Used?  
*ACEC reiterates its concern about STDs retaining and using concepts and designs put forth by unsuccessful offerers who have accepted stipends. A mandatory stipend of a particular percentage of the project budget would help to defray the high cost of bid preparation that oftentimes falls on the design team and would also help to improve competition.*
  - j. Section 636.113 Is the Stipend Amount Eligible for Federal Participation?  
*Acceptable*

- k. Section 636.114 What Factors Should Be Considered in Risk Allocation?  
*Acceptable. Risk should be assigned to the party best able to manage and control it. This may be accomplished by establishing a comment period on proposed terms and conditions prior to requesting qualifications on a project. Additionally, as market trends indicate an increasing unavailability of policies for design firms in the design-build market based on severe owner provisions and requirements, the FHWA should encourage STDs to provide a uniform owner controlled insurance program.*
- l. Section 636.115 May I Meet With Industry To Gather Information Concerning the Appropriate Risk Allocation Strategies?  
*Acceptable*
- m. Section 636.116 What Organizational Conflict of Interest Requirements Apply to Design-Build Projects?  
*Acceptable*
- n. Section 636.117 What Conflict of Interest Standards Apply to Individuals Who Serve as Selection Team Members for the Owner?  
*Acceptable*
- o. Section 636.118 Is Team Switching Allowed After Contract Award?  
*Acceptable*
- p. Section 636.119 How Does This Part Apply to a Project Developed Under a Public-Private Partnership?  
*Acceptable*
4. Part 636—Subparts B through F  
*ACEC reiterates its recommendation that the integrity of the selection process and the engineering design be maintained by fully developing a pre-defined point award system and judging rules that are described in the RFQ and/or RFP documents; placing significant weight on technical qualifications and not overemphasizing cost at the expense of other essential criteria; assigning knowledgeable people to the selection team; and requiring separate cost and technical proposal submissions whereby cost submissions are opened only after the technical scoring is completed and published.*
5. Part 637—Subpart B—Quality Assurance Procedures for Highway Construction  
*Acceptable*
6. Part 710—Right-of-Way; Subpart C—Project Development  
*Acceptable*

#### Additional Comments

1. The effect of design-build contracting on project quality, project cost, and timeliness of project delivery.  
*Design-build is an appropriate delivery method to select if it offers the best value, given the unique opportunities, constraints, risks and demands of a particular project.*

2. The appropriate level of design for design-build procurements.  
*The preliminary design should be advanced to the extent that risks are identified and each properly allocated to the party who is best able to manage it.*
3. The impact of design-build contracting on small businesses.  
*ACEC recommends that the design-build procurement rule developed by the FHWA not give preferential treatment to a firm based on its size during the selection process. Additionally, there must be flexibility in all procurement policies to allow the situation where a design firm of any size serves as the leader on a design-build team.*

Signed: American Council of Engineering Companies

By: s/ \_\_\_\_\_  
Camille Fleenor