

infant suffocation deaths caused by adult pillows, sofa cushions, and other pillows as well as further reducing incidents involving SIDS.

G. Effective Date

This rule exempts the Boston Billow Nursing Pillow and substantially similar nursing pillows that would otherwise be banned under the FHSA. Because the rule grants an exemption, it is not subject to the requirement under the Administrative Procedure Act (APA) that a rule must be published 30 days before it takes effect. 5 U.S.C. 553(d)(1). The rule lifts an existing restriction and allows a product not previously permitted. Thus, the Commission believes it is appropriate for the rule to become effective upon publication in the **Federal Register**.

H. Impact on Small Businesses

The NPR discussed the Commission assessment of the impact that a rule to exempt the Boston Billow Nursing Pillow and similar nursing pillows might have on small businesses. There are approximately 15 firms that either manufacture or import nursing pillows. Most, if not all, firms are considered to be small businesses. Because the exemption is deregulatory in nature and will not increase production costs on businesses, the Commission concludes that the proposed amendment exempting the Boston Billow Nursing Pillow and substantially similar nursing pillows would not have a significant impact on a substantial number of small entities.

I. Environmental Considerations

The National Environmental Policy Act and the Council on Environmental Quality Act regulations, and CPSC procedures for environmental review require the Commission to assess the possible environmental effects associated with the proposed exemption. As discussed in the NPR, a proposed exemption for nursing pillows is expected to have little or no potential for affecting the human environment, and is considered to fall within the "categorical exclusions" under the CPSC regulations that cover its environmental review procedures (see 16 CFR 1021.5(c)(1)). The Commission concludes that the rule would have no adverse effect on the environment and thus, no environmental assessment or environmental impact statement is required in this proceeding.

J. Executive Orders

According to Executive Order 12988 (February 5, 1996), agencies must state in clear language the preemptive effect,

if any, of new regulations. The preemptive effect of this exemption is stated in section 18 of the FHSA. 15 U.S.C. 1261n.

List of Subjects in 16 CFR Part 1500

Consumer protection, Hazardous materials, Hazardous substances, Imports, Infants and children, Labeling, Law enforcement, and Toys.

K. Conclusion

■ For the reasons stated above, the Commission amends title 16 of the Code of Federal Regulations as follows:

PART 1500—HAZARDOUS SUBSTANCES AND ARTICLES: ADMINISTRATION AND ENFORCEMENT REGULATIONS

■ 1. The authority for part 1500 continues to read as follows:

Authority: 15 U.S.C. 1261–1278.

■ 2. Amend section 1500.18 by revising paragraph (a)(16)(i) introductory text to read as follows:

§ 1500.18 Banned toys and other banned articles intended for use by children.

* * * * *

(a) * * *

(16) * * *

(i) Any article known as an "infant cushion" or "infant pillow," and any other similar article, which has all of the following characteristics (But see § 1500.86(a)(9)):

* * * * *

■ 3. Section 1500.86 is amended by adding a new paragraph (a)(9) to read as follows:

§ 1500.86 Exemptions from classification as banned toy or other banned article for use by children.

(a) * * *

(9) Boston Billow Nursing Pillow and substantially similar nursing pillows that are designed to be used only as a nursing aide for breastfeeding mothers. For example, are tubular in form, C- or crescent-shaped to fit around a nursing mother's waist, round in circumference and filled with granular material.

Dated: December 15, 2008.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 620, 635, 636, and 710

[FHWA Docket No. FHWA–2008–0136]

RIN 2125–AF29

Fair Market Value and Design-Build Amendments

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is revising its regulations to require State departments of transportation (DOT) and other public authorities to obtain fair market value as part of any concession agreement involving a facility acquired or constructed with Federal-aid highway funds. Additionally, the FHWA is revising its regulations to permit public agencies to compete against private entities for the right to obtain a concession agreement involving such facilities. Also, the FHWA is revising its design-build regulations to permit contracting agencies to incorporate unsuccessful offerors' ideas into a design-build contract upon the acceptance of a stipend.

DATES: *Effective Dates:* This rule is effective January 18, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Marcus J. Lemon, Chief Counsel, Mr. Michael Harkins, Office of Chief Counsel, or Mr. Steve Rochlis, Office of Chief Counsel, (202) 366–0740, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., *e.t.*, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

Internet users may access this document, the notice of proposed rulemaking (NPRM), and all comments received by the U.S. DOT by visiting <http://www.regulations.gov>. It is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: <http://www.archives.gov> or the Government Printing Office's Web page at <http://www.gpoaccess.gov/nara>.

I. Background

In recent years, some State and local governments have entered into

concession agreements to provide for the long-term development, construction, operation, and maintenance of a public highway. Under these agreements, which are typically in the form of lease agreements, the State or local government grants the right to a third party concessionaire to collect revenues or fees from the use of a public highway for a certain period of time in return for compensation, usually in the form of a large up-front lease payment or structured payments that are payable over the life of the agreement.

Current FHWA regulations do not contemplate the use of concession agreements. While 23 U.S.C. 156 requires State and local agencies to charge fair market value (FMV) for the sale, lease, or use of any real property acquired with funding made available under the Highway Trust Fund, it excludes sales, leases, or uses for utility use and occupancy or for a title 23, United States Code, eligible transportation project. In the context of concession agreements, the FHWA is concerned that this broad exception for transportation projects could be construed to exempt concession agreements from the fair market value requirement, which is contrary to the FHWA interpretation of 23 U.S.C. 156. Moreover, FHWA regulations at 23 CFR 620.203(j) specifically provide that State DOTs need not charge a public agency for a relinquishment of a Federal-aid facility when the facility will continue to operate as a public highway. This final rule confirms the application of the FMV requirement of 23 U.S.C. 156 to concession agreements. Additionally, this final rule amends the FHWA design-build regulations to permit State DOTs to incorporate the ideas of unsuccessful offerors to a design-build contract upon the acceptance of a stipend by the offeror.

As will be discussed in more detail below, a number of commenters were opposed to the adoption of the FMV requirements proposed in the NPRM. While some commenters were fundamentally opposed to the use of concession agreements in general, most of the comments expressing opposition to the adoption of the FMV requirements appear based on the belief that the proposed regulations would have forced a State to use a public-private partnership when that State wishes to utilize a public toll agency. This was not the intent. The purpose of these regulations is merely to implement the FMV requirement of 23 U.S.C. 156 whenever a federally funded highway is subject to a concession agreement. Given the requirement of 23

U.S.C. 156, and the increased use of concession agreements, it is important to ensure that these transactions result in a fair return for the taxpayers' investment.

The FHWA appreciates all of the comments received in response to the NPRM and has made a number of changes to the proposed regulations. These changes ensure the States are afforded maximum discretion in choosing to transfer highways to other public entities and the broadest flexibility in determining what constitutes FMV whenever the State chooses to utilize a concession. These changes are discussed in more detail below.

II. Requests for Extension of the Comment Period

The FHWA received 8 requests to extend the comment period established in the NPRM, which ended on November 7, 2008. These requests came from the International Bridge, Tunnel and Turnpike Association (IBTTA), Texas Department of Transportation (TxDOT), Texas State Senator Robert Nichols, Harris County Judge Ed Emmett, Miami-Dade Expressway Authority, Georgia State Road and Tollway Authority (SRTA), Texas Council of Engineering Companies (TCEC), and American Highway Users Alliance (AHUA). One commenter, Robert W. Poole, Jr., supported the November 7, 2008, deadline. After considering the requests from the IBTTA and TxDOT, the FHWA extended the comment period until November 21, 2008. Notice of this extension was published in the **Federal Register** on November 13, 2008, at 73 FR 67117, and posted in the rulemaking docket on November 10, 2008. Since all other remaining requests for extension appear to relate to the original November 7, 2008, deadline, the FHWA deems the extension to November 21, 2008, to be responsive to these requests.

III. Summary of Comments Received to the Notice of Proposed Rulemaking (NPRM)

The FHWA published its NPRM on October 8, 2008, at 73 FR 58908. In response to the NPRM, the FHWA received 34 comments. The commenters include State DOTs, toll authorities, elected officials, associations, public interest groups, contractors, and individuals. The majority of the comments regarding the fair market value (FMV) requirements were negative, and 8 commenters urged the FHWA to rescind the rulemaking. In general, the main objection to the adoption of the FMV requirements

appears to be the perception that the FHWA is attempting to displace State and local decision-making. However, the majority of the comments regarding the design-build amendments were mainly supportive. The FHWA considered each of these comments in adopting this final rule.

The majority of the comments addressed several common issues. The following discussion summarizes the major comments submitted to the docket by the commenters on the NPRM, notes where and why changes have been made to the rule, and, where relevant, explains why particular recommendations or suggestions have not been adopted.

IV. Discussion of NPRM Comments Concerning Fair Market Value Requirements

A. Legal Interpretation of 23 U.S.C. 156

The American Association of State Highway Transportation Officials (AASHTO), the American Trucking Associations (ATA), the Pennsylvania Turnpike Commission (PTC), and Michael Baker Jr., Inc. (Baker), each commented that the FHWA's proposed regulation requiring FMV for concession agreements overrides an express statutory exemption to the FMV requirement in 23 U.S.C. 156. Specifically, AASHTO, PTC, and Baker argue that the FHWA's proposed regulation requiring FMV for concession agreements overrides an express statutory exemption for transportation projects. Section 156(a) of title 23, United States Code, provides "[A] State shall charge, at a minimum, fair market value for the sale, use, lease, or lease renewal (other than for utility use and occupancy or for a transportation project eligible for assistance under this title) of real property acquired with Federal assistance made available from the Highway Trust Fund (other than the Mass Transit Account)." (Emphasis added).

The FHWA respectfully disagrees with AASHTO's, PTC's, and Baker's analyses. A concession agreement is not a title 23, United States Code, eligible transportation project. Rather, a concession agreement is a transaction under which a public entity leases a public highway to a third party and grants the third party the authority to collect revenues from the operation of the highway in return for compensation to be paid to the public entity. The FHWA does not believe that such a lease transaction constitutes a transportation project within the meaning of the "transportation project" exemption in 23 U.S.C. 156(a). There is

certainly nothing related to the transactions costs, in and of themselves, that would be title 23, United States Code, eligible. Moreover, 23 U.S.C. 101(a)(21) defines "project" to mean "[a]n undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed or any other undertaking eligible for assistance under this title." Thus, the term "transportation project" is limited to the undertaking to construct a highway. While a concession agreement may provide for certain title 23, United States Code, eligible improvements to be made on the facility, the FHWA believes that the improvements to be made, which may be title 23, United States Code, eligible, must be separated from the lease whenever a concession agreement is involved for purposes of 23 U.S.C. 156.

Also, the ATA argues that the FMV requirement of 23 U.S.C. 156 applies only to non-highway uses of right-of-way (ROW) airspace. The FHWA agrees that 23 U.S.C. 156, as originally enacted at section 126 of the Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987, Public Law 100-17, 101 Stat. 132, 167 (1987), limited the application of the statute to highway right-of-way airspace. However, in section 1205 of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 184 (1998), Congress amended 23 U.S.C. 156 to expand the application of the statute to all real property acquired with Federal assistance, not just the airspace. Additionally, while reference to non-highway uses to the application of the FMV requirement of 23 U.S.C. 156, as it was enacted in 1987, might have been a logical conclusion since the statute applied to only airspace, the TEA-21 amendments to 23 U.S.C. 156 expanded the application of the FMV requirement to all real property, including existing highways. There is nothing in the legislative history to the TEA-21 amendments to suggest that Congress intended to limit the expanded application of 23 U.S.C. 156 to only non-highway uses. Rather, the express statutory language provides that the FMV requirement applies to all real property acquired with assistance from the Highway Trust Fund (other than the Mass Transit Account).

B. General Objections to Tolling, Public-Private Partnerships, and Characterization of Concession Payments as Operating Costs

The ATA, the Owner-Operator Independent Drivers Association

(OOIDA), and AHUA each objected to the use of tolls, statements that the fuel tax is not a sustainable form of revenue, public-private partnerships (although AHUA supports concessions and public-private partnerships for new capacity and new road construction), and the FHWA's characterization of concession payments as operating costs for purposes of the revenue use restrictions for the Federal toll programs. Additionally, the Wisconsin Department of Transportation (WisDOT) stated that it does not support public-private partnerships that involve long-term leases. The FHWA does not view these comments as directly relevant to the proposed regulations. The FHWA's reference to these issues in the NPRM was provided merely as background information. The use of tolling and public-private partnerships will continue to occur regardless of the implementation of these regulations. Similarly, the FHWA's characterization of a concession payment as an operating cost will also continue. Furthermore, nothing in these regulations would require WisDOT to enter into a public-private partnership involving a long-term lease. Therefore, the FHWA makes no changes to the proposed regulations as a result of these comments.

C. Reduced State Flexibility and Displacement of State Law

A number of commenters objected to what they perceived as reduced State and local government flexibility and/or a displacement of State law. These commenters include the Texas Toll Authorities (joint comments submitted by the following 9 Texas toll authorities: Alamo Regional Mobility Authority, Cameron County Regional Mobility Authority, Camino Real Regional Mobility Authority, Central Texas Regional Mobility Authority, Grayson County Regional Mobility Authority, Harris County Toll Road Authority, Hidalgo County Regional Mobility Authority, North East Texas Regional Mobility Authority, and North Texas Tollway Authority), PTC, Baker, IBTTA, New Hampshire Department of Transportation (NHDOT), New York State Department of Transportation (NYSDOT), New York State Thruway Authority, Senator Kay Bailey Hutchison, Texas State Senator Robert Nichols, Texas State Representative Linda Harper-Brown, and Harris County Judge Ed Emmett. Generally, these commenters expressed the concern that the proposed regulations would limit the ability of State and local governments to transfer highways between governmental entities without charge or for a charge in transactions

that are not intended to represent consideration for a sale or a lease.

In developing the regulations proposed in the NPRM, the FHWA did not intend to adversely affect the ability of State and local governments to transfer highways to other governmental entities without charge whenever a transaction is intended to resolve inherently governmental decisions in determining governmental jurisdiction, ownership, control, or other responsibilities with respect to the operation of a public highway. Rather, the regulations were intended to apply only to those transactions that are essentially commercial in nature (that is, for purposes of this rule, where the transfer is conducted in the context of an arms-length transaction and where the price is intended to represent the FMV of the facility). As such, the proposed regulations retained the rules governing "relinquishments" under 23 CFR Part 620, except where a transaction between governmental entities would constitute a concession agreement.

The Texas Toll Authorities commented that there may be transactions between governmental entities that may involve a payment to reimburse the State for previously incurred costs in developing the facility. The Texas Toll Authorities recommended that the definition of "concession agreement" should be clarified to take this factor into account. After considering this comment, as well as all the comments regarding the lack of State and local government flexibility, the FHWA has amended its definition of "concession agreement" to exclude agreements between government entities, even when compensation is paid, where the primary purpose is to determine governmental ownership, control, jurisdiction, or other responsibilities with respect to the operation of a highway from the definition. The definition further provides that a highway agency's determination as to whether an agreement's primary purpose is to determine these governmental responsibilities is controlling.

The Florida Department of Transportation (FDOT) requested a clarification that the proposed rule change will not preclude Florida's Turnpike Enterprise from operating and collecting tolls on federally assisted facilities, whose ownership is still maintained by FDOT. The FHWA did not intend for the proposed rules to do so, and with the modifications made to the final rule, it should be clear that these regulations do not affect this

arrangement between FDOT and Florida's Turnpike Enterprise.

D. Direct Competition Between Public and Private Entities

SRTA, Texas State Representative Linda Harper-Brown, Texas State Senator Robert Nichols, Association of General Contractors (AGC), and Zachry Construction each commented that competition between public and private entities is unfair. SRTA, Texas State Representative Linda Harper-Brown, and Texas State Senator Robert Nichols commented that such competition would be unfair to public entities while AGC and Zachry Construction commented that such competition is unfair to private entities. SRTA notes that public sector agencies have more restrictions on how they may structure debt. Zachry Construction notes that both entities have different legal and accounting standards, such as with respect to the payment of taxes, insurance and bonding costs, different overhead cost structures, risk management profiles, and operation and maintenance philosophies. Additionally, the IBTTA notes that statutory constraints on public agencies, differences in legal and accounting standards, and risk assessment philosophies are some significant differences between public and private entities. The FHWA agrees that there may be some differences between public and private entities. However, the FHWA does not believe that these differences are so significant to conclude that either type of entity would have a significant competitive advantage for a concession agreement. More significantly, the FHWA is concerned that a highway agency's inability to permit any kind of competition between public and private entities for concession agreements may be discouraging any type of competition for concession agreements. Since the existing rules prohibit any kind of competition, States are forced to completely forego a competition if they wish to consider a public toll agency. Therefore, the FHWA has made no change to the rule allowing public entities to compete against private entities for concession agreements.

Corridor Watch commented that the use of concession agreements should be limited to agreements with private entities, contending that the public gains no benefit from requiring their own State agencies to demand FMV from another public entity. The FHWA disagrees with this comment and believes that highway agencies should have the flexibility to offer a concession

agreement to another public agency if authorized to do so under State law.

E. Best Value

AASHTO, PTC, NYSDOT, IBTTA, and Debevoise & Plimpton each commented that the definition of "best value" should be expanded to include other qualitative considerations. NHDOT commented that FMV is much more than the maximum price that may be received, and should include other qualitative considerations. The FHWA agrees. The definition of "best value" was not intended to be an exhaustive list of factors. Therefore, the definition of "best value" is expanded to include policy considerations that are not necessarily quantifiable but that a highway agency considers important. It is the FHWA's intent that the list of factors in this definition continue to be a flexible, open-ended list to allow State and local governments to take into account factors that they feel best fits their needs.

The American Automobile Association (AAA) commented that the most appropriate method to award a concession agreement is on a best value basis. The PTC commented that the States should have flexibility in how they go about determining FMV and that, in no event, should the award to the highest bidder be universally required. The FHWA agrees that the States should have flexibility in determining FMV, and further agrees that the best value approach may be more desirable. However, in order to ensure maximum flexibility in the approach to be used in determining FMV, the FHWA declines to make best value the only approach that may be used.

Additionally, AGC commented that State and local agencies should spell out in detail the weight that will be given to each factor to be used in the FMV evaluation. Debevoise & Plimpton commented that, where best value is the method chosen to determine FMV, the highway agency should be required to identify the considerations that will be used to determine best value. The FHWA agrees that any process used by the highway agency should be as transparent as possible. However, the FHWA believes that the decision regarding how the process will be conducted is most appropriately addressed by State law. Thus, the FHWA has amended section 710.709(a) to specify that if best value is used, the highway agency should, but is not required to, identify the criteria to be used in determining best value as well as the weight to be afforded to the criteria.

F. Guidance Regarding the Determination of Fair Market Value

AASHTO, FDOT, Georgia Department of Transportation (GDOT), PTC, Texas Toll Authorities, IBTTA, AGC, Baker, Robert W. Poole, Jr., and Debevoise & Plimpton each commented that the FHWA should provide guidance regarding how FMV should be determined whenever a competitive process is not used. AASHTO, PTC, Texas Toll Agencies, AGC, and Baker, were concerned that the lack of standards to be used in determining FMV could subject a State to an arbitrary FHWA decision regarding whether FMV has been obtained. PTC and Baker further noted that the proposed regulations do not give effect to any State laws or court decisions that may be relevant for determining FMV within a particular State. These comments regarding the lack of standards in determining FMV also relate to comments made by Robert W. Poole, Jr., Greater Houston Partnership, Gulf Coast Regional Mobility Partners, Texas Council of Engineering Companies, Harris County Judge Ed Emmett, and Texas State Representative Linda Harper-Brown that the market valuation process in Texas is troublesome and unworkable. Greater Houston Partnership, Gulf Coast Regional Mobility Partners, and Harris County Judge Ed Emmett expressed further concern that the process used for establishing FMV could cause project delays.

AAA and Robert W. Poole, Jr., commented that the determination of FMV, in instances where a competition is not conducted, must not involve negotiated compromises and, instead, be arrived at through a transparent process. Mr. Poole suggests that a "Public Sector Comparator" process, such as the processes used in Australia and British Columbia, would be an acceptable transparent process. Debevoise & Plimpton also suggests that FMV may be determined by comparing the public benefits brought by the terms of a concession agreement against those where a highway agency retains the rights assigned to a concessionaire.

The FHWA agrees that the lack of standards regarding how to arrive at FMV could create problems. The FHWA further agrees that FMV is most appropriately determined in accordance with State law. Therefore, the FHWA has amended the regulations in section 710.709(d) to defer to a State as to whether FMV has been obtained in accordance with State law. The FHWA also agrees with the need for transparency. Thus, if there is no

competition and if the highway agency represents that it has entered into a concession agreement for FMV, whatever that amount may be, the highway agency must also obtain an independent third party assessment and make that assessment publicly available. While the highway agency is not bound to accept the third party assessment, the fact that the assessment is publicly available may compel the highway agency to disclose how it arrived at its amount.

With respect to the comments urging the FHWA to require highway agencies to use a Public Sector Comparator, or specify certain standards to be used in making the FMV determination, the FHWA declines to do so. While the FHWA agrees that a transparent process should be established, the FHWA believes that highway agencies should have the flexibility to determine FMV in accordance with their own laws and policies. However, the FHWA does support the use of the public sector comparator process, as recommended by Mr. Poole, and essentially embraced by Debevoise & Plimpton. By deferring to the States on how to arrive at FMV, as well as whether the amount obtained constitutes FMV, the potential for project delays should be minimal.

G. Prospective Application

AASHTO, PTC, IBTTA, and Zachry Construction commented that the regulations should be clarified to ensure that the regulations apply prospectively, and that any concession agreement that has already been executed is “grandfathered” under existing regulations. The FHWA agrees with this comment and has revised section 710.705 to clarify that the regulations apply only to concession agreements executed after the effective date of this rule.

H. Price Established Through Competition

Debevoise & Plimpton commented that any price established through a competitive process should be determinative of whether FMV has been received, not just presumed. Robert W. Poole, Jr., notes that a market value cannot be negotiated, but only realized through arm’s length bidding. GDOT inquired whether a value arrived at through a competitive process involving only one bidder constitutes FMV. The FHWA agrees with the premise of the comments that a value established through a fair and open competitive process constitutes FMV. As such, the FHWA has modified section 710.709(c) to provide that any proposal procured through a competitive process with

multiple bidders shall be deemed FMV. However, whenever only one bidder is involved, the highway agency will need to determine whether the proposal constitutes FMV. Like any solicitation, the highway agency will need to evaluate the proposal against its own estimate to determine whether to accept the bid. Thus, the FHWA has amended section 710.709(c) to provide that a concession agreement awarded through a competitive process with only one bidder is presumed to be FMV. The highway agency may overcome the presumption if not to be FMV based on its own estimates.

While the FHWA has established certain degrees of deference to proposals awarded through competitive processes, it is not the FHWA’s intent for any highway agency to be forced to accept any proposal, even if awarded through a competitive process with multiple bidders. The highway agency may, for a variety of reasons, decide not to accept a proposal. Thus, the FHWA has added a sentence to ensure that nothing in the regulations can be construed to force a highway agency to accept a proposal.

I. Highest Bid Received

Robert W. Poole, Jr., commented that the phrase “highest bid received” could be construed to require States to seek the largest possible up-front payment. Mr. Poole notes that many arrangements involve long-term leases where payments are made on a regular basis throughout the term of the lease. As such, Mr. Poole recommends clarifying that FMV may mean the bid yielding the highest net present value of payments over the life of the concession agreement. The FHWA agrees with Mr. Poole that the method for determining FMV should include transactions that do not involve single, up-front payments. In the proposed regulations, the FHWA had intended the term “best value” to be broad enough to include any standard the State may use that is not simply high bid. However, in order to ensure the regulations are clear that structured payments over the life of the lease may be properly considered in determining FMV, the FHWA has added Mr. Poole’s suggested edits to section 710.709(a). However, the FHWA declines to delete the phrase “highest bid received” from regulation. The FHWA believes that the States should have maximum flexibility in determining how they wish to determine FMV.

J. Federally Funded Highway

Zachry Construction commented that the definition of federally funded highway should be revised to exclude

highways constructed with TIFIA loan proceeds. Section 156 of title 23, United States Code, applies to real property acquired with Federal assistance made available from the Highway Trust Fund (other than the Mass Transit Account). Since TIFIA funding is made available, at least in part, from the Highway Trust Fund, the FHWA declines to make Zachry Construction’s suggested change. Also, Debevoise & Plimpton commented that the concept of Federal assistance in the definition of federally funded highway should be limited to funds made available from the Highway Trust Fund. Since 23 U.S.C. 156 limits the concept of Federal assistance to funds from the Highway Trust Fund, the FHWA accepts this change. Accordingly, the definition of federally funded highway has been amended to replace the phrase “title 23, United States Code” with “Highway Trust Fund (other than the Mass Transit Account).”

K. Definition of Fair Market Value

Debevoise & Plimpton commented that the definition of FMV should be revised to reflect the customary market definition, where the terms reflect an agreement by both parties to a transaction. The FHWA agrees with this comment and has amended the definition of FMV to include this concept. Debevoise & Plimpton further commented that the word “price” should be substituted with the word “terms.” The FHWA declines to make this change because, consistent with Debevoise & Plimpton’s earlier comment, the change would not reflect the customary definition. However, the FHWA does agree with the essence of Debevoise & Plimpton’s concern that a proposal based on best value, which may include a consideration of qualitative factors, be considered to satisfy the definition of FMV. Accordingly, the FHWA has added a sentence providing that a concession agreement based on best value shall be deemed FMV. The FHWA has also added some clarifying language to the phrase “on the open market” to make clear that the highway agency is not required to compete a concession agreement on the open market. FMV may be satisfied if an amount is developed “as if” the concession agreement is offered on the open market.

L. Relationship to Toll Programs

Debevoise & Plimpton commented that there could be a potential conflict between the toll revenue use restrictions contained in the various Federal toll programs, such as 23 U.S.C. 129, and the concession agreement. As such,

Debevoise & Plimpton suggested that language should be added to clarify that the toll revenue use restrictions are automatically deemed satisfied once the tolled highway become subject to a concession agreement. The FHWA declines to incorporate this comment. Toll revenues generated from the operation of any highway operating under a Federal toll program must be used for the specified revenue use restrictions under such program. Provisions contained in concession agreements cannot trump these requirements. State DOTs are responsible for ensuring compliance with these provisions. While the FHWA declines to incorporate this comment, it is worth noting that all the toll facilities subject to both a Federal toll program and a concession agreement appear to be operating without any difficulty.

PTC commented that it is inappropriate to address the criteria for participation in the highway tolling pilot programs in the context of a rulemaking regarding how States should value concession agreements. Specifically, the PTC argues that the Federal tolling provisions establish no FMV criteria for what constitutes a valid operational cost. While the FHWA agrees with PTC that this rulemaking should not address any requirements with respect to the criteria for participation in a Federal tolling program, the FHWA disagrees with the PTC that there are no limits as to what constitutes a valid operating cost for lease payments.

As explained in the NPRM, the Federal toll programs generally require toll revenue to be used first for debt service, then to provide a reasonable return on investment to any private party financing a project, and for the costs that are necessary for the proper operation and maintenance of the facility. With the exception of the ISRRPP and ISCTPP, toll revenues in excess of these uses may be applied to other projects eligible for assistance under title 23, United States Code. If a lease payment is proposed that is based on factors completely unrelated to the value of the facility, such as Statewide transportation funding needs, then the lease payment becomes excess toll revenue. While such a payment could be made under toll programs allowing for excess toll revenue to be used for other title 23, United States Code, eligible purposes (after the needs for debt service, providing a reasonable return on investment to a private party, and operation and maintenance are provided for), the lease payment is problematic for programs, such as the

ISRRPP and ISCTPP, that do not allow any excess toll revenue to be used.

The toll programs were referenced in the preamble of the NPRM merely to note that the establishment of FMV for concession agreements would help State and local governments comply with Federal toll program requirements, not to create a new rule of applicability for such programs. As such, the FHWA has amended the authority section for Subpart G to refer simply to FMV requirement of 23 U.S.C. 156.

V. Discussion of NPRM Comments Concerning Design-Build Amendments

Eleven entities submitted comments on the proposed design-build amendments. All but one of the comments submitted were supportive of the amendments. The major comments concerning the proposed design-build amendments are discussed below.

A. Is the Stipend Mandatory?

NYSDOT, New York State Thruway Authority, GDOT, and Zachry Construction requested that the FHWA clarify whether the offering or acceptance of a stipend is mandatory. NYSDOT and New York State Thruway Authority noted that they support the amendment so long as the decision to offer a stipend is optional on the part of the contracting agency. GDOT requested a clarification as to whether a State is prohibited from incorporating an unsuccessful offeror's ideas if a stipend is not offered. Zachry Construction noted that the acceptance of a stipend should be optional on the part of the contractor. In considering these comments, the FHWA agrees that the decision as to whether to offer a stipend is optional on the part of the contracting agency and that if a stipend is offered, its acceptance must be optional on the part of the contractor. Forcing a contractor to relinquish its ideas to a contract it did not win could stifle competition. The American Council of Engineering Companies (ACEC) makes the point that contractors may either decide not to submit a proposal or hold back on its most innovative ideas with the assumption that additional design concepts could be later incorporated into the final design. Thus, FHWA agrees that contracting agencies should have the flexibility to use unsuccessful offeror's ideas, but only if the contracting agency offers, and the contractor accepts, a stipend. The FHWA has modified section 636.113(b) to clarify these issues.

B. Amount of the Stipend

AGC and ACEC commented that the amount of the stipend should be for the

FMV of those ideas or based on a formula related to the value of the project. The New York State Thruway Authority noted that it was concerned about potential disputes regarding the amount of the stipend. The FHWA does not believe it is necessary to specify how the amount of the stipend should be determined. The amount of a stipend should be determined by the contracting agency. The primary purpose of a stipend is to provide an incentive to a contractor to expend resources to develop a proposal. The amount of the stipend offered must be enough to induce a contractor to submit a proposal in order for it to be effective. Likewise, if a contracting agency wishes to appropriate an offeror's ideas into a contract it did not win, the contracting agency will need to determine how much its stipend will need to be in order for the contractor to accept.

C. Predetermined Process

Ms. Carolyn Bergeman Langelotti commented that allowing contracting agencies to incorporate unsuccessful offeror's concepts into the final contract will discourage competition and promote unethical actions by contracting agencies to select predetermined contractors. The FHWA believes that the use of stipends, as well as the optional nature of the decision to accept a stipend, will encourage competition. Furthermore, the FHWA is unaware of any circumstance in which a contracting agency has engaged in any unethical practices or failed to properly follow a fair and competitive process in the manner Ms. Langelotti suggests. Therefore, the FHWA declines to accept this comment.

D. Firms Submitting Multiple Bids

WisDOT commented that it is concerned that a firm may break up into smaller units and submit multiple bids with the intent of receiving both a stipend and an actual contract. The FHWA does not believe this is a major concern. It does not seem to be advantageous for a firm to either divide its resources when developing a proposal or to expend extra resources to submit multiple bids, especially in light of the fact that a stipend is not intended to compensate a contractor for all the costs it incurred in developing a proposal. Therefore, no changes to the final regulation have been made as a result of this comment.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and USDOT Regulatory Policies and Procedures

The FHWA and the Office of Management and Budget (OMB) have determined that this action is not a significant regulatory action within the meaning of Executive Order 12866 and is not significant within the meaning of U.S. Department of Transportation regulatory policies and procedures. It is anticipated that the economic impact of this rulemaking will be minimal. These changes will not adversely affect, in a material way, any sector of the economy. In addition, these changes will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

AASHTO, IBTTA, PTC, and Corridor Watch submitted comments contending that this action would be a significant regulatory action within the meaning of Executive Order 12866. AASHTO, IBTTA, and PTC contend this rule is economically significant because concession agreements can exceed \$100 million. The FHWA disagrees with this assessment. This rule is procedural in nature and does not mandate concession agreements. Rather, it describes the processes that must be undertaken in determining FMV, as required by 23 U.S.C. 156.

Corridor Watch asserted that this rule is significant because it would adversely affect the economy by dramatically increasing the costs of public transportation and public transportation project delivery. The FHWA also disagrees with this assessment. This rule is procedural in nature and is not directed at public transportation. The purpose of the rule is to provide direction with respect to how States can comply with the FMV requirement of 23 U.S.C. 156 when entering into a concession agreement.

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 has determined that the proposed action will not have a significant economic impact on a substantial number of small entities. OOIDA commented that this rulemaking will impact small businesses, because the policy promotes concession agreements, especially the implementation of tolls on non-tolled facilities. The FHWA

disagrees with this comment. This action does not affect any funding distributed under any of the program administered by the FHWA. It ensures that State and local governments comply with both 23 U.S.C. 156 to receive FMV and the Federal tolling provision listed above regarding operating expenses whenever a concession agreement is executed involving a Federally funded highway. For these reasons, the FHWA certifies that this action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$128.1 million or more in any one year (2 U.S.C. 1532).

Executive Order 13132 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA has determined that this action will not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this action will not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions. Corridor Watch and the Pennsylvania Turnpike Commission commented that the rule has federalism implications that require a federalism assessment under Executive Order 13132. Section 156, title 23, United States Code, requires States to obtain FMV for the sale, use, lease, or lease renewal of real property, which includes concession agreements. This rule provides for the procedures by which a State can comply with this statutory requirement. Any federalism implications arising from this rule are attributable to 23 U.S.C. 156. Additionally, the Federal Government has a substantial interest in ensuring that FMV is received on facilities in which there is a Federal investment.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, dated May 18, 2001. The FHWA has determined that it is not a significant energy action under that order since it 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.

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), Federal agencies must obtain approval from the OMB for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that this action does not contain collection of information requirements for the purposes of the PRA.

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)

The FHWA has 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 any environmental risk to health or safety that might disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

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

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) and has determined that this action will not have any effect on the quality of the environment. Corridor Watch

commented that a NEPA analysis is required because there are environmental justice issues associated with this rulemaking. FHWA disagrees with this comment. Additionally, FHWA notes that two categorical exclusions apply to this rulemaking; namely, 23 CFR 771.117(c)(11) (determination of payback under 23 U.S.C. 156 for property previously acquired with Federal-aid participation) and 23 CFR 771.117(c)(20) (promulgation of rules, regulations, and directives).

Executive Order 12898 (Environmental Justice)

The FHWA has analyzed this action under Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, dated February 16, 1994, and the U.S. Department of Transportation Order To Address Environmental Justice in Minority Populations and Low-Income Populations, dated April 15, 1997. Executive Order 12898 establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and/or low-income populations in the United States. In developing this rule in compliance with Executive Order 12898, the FHWA has determined that this rule does not raise any environmental justice concerns.

Corridor Watch commented that there are environmental justice issues with this rule because this rule will impact community, social fabric, and local economies. FHWA disagrees. This rule does not require the use of concession agreements or tolling. The purpose of this rule is to provide for procedures to ensure that State and local governments comply with both 23 U.S.C. 156 to receive FMV whenever a concession agreement is executed involving a federally funded highway.

Regulation Identification Number

A regulation identification number (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 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 620

Grant programs—transportation, Highways and roads, Rights-of-way.

23 CFR Part 635

Construction and maintenance, Grant programs—transportation, Highways and roads, Reporting and recordkeeping requirements.

23 CFR Part 636

Design-build, Grant programs—transportation, Highways and roads.

23 CFR Part 710

Grant programs—transportation, Highways and roads, Real property acquisition, Rights-of-way, Reporting and recordkeeping requirements.

Issued on: December 15, 2008.

Thomas J. Madison, Jr.,
Federal Highways Administrator.

■ In consideration of the foregoing, the FHWA amends chapter I of title 23, Code of Federal Regulations, as set forth below:

PART 620—ENGINEERING

■ 1. The authority citation for part 620 continues to read as follows:

Authority: 23 U.S.C. 315 and 318; 49 CFR 1.48, 23 CFR 1.32.

■ 2. Amend § 620.203 by revising paragraph (b) to read as follows:

§ 620.203 Is the stipend amount eligible for Federal participation?

* * * * *

(b) Other than a conveyance made as part of a concession agreement as defined in section 710.703, for purposes of this section, *relinquishment* is defined as the conveyance of a portion of a highway right-of-way or facility by a State highway agency (SHA) to another Government agency for highway use.

* * * * *

PART 635—CONSTRUCTION AND MAINTENANCE

■ 3. The authority citation for part 635 continues to read as follows:

Authority: Sec. 1503 of Public Law 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), Public Law 102–240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.48(b).

■ 4. Revise § 635.112(e) to read as follows:

§ 635.112 Advertising for bids and proposals.

* * * * *

(e) Except in the case of a concession agreement, as defined in section 710.703 of this title, no public agency shall be permitted to bid in competition or to enter into subcontracts with private contractors.

* * * * *

PART 636—DESIGN-BUILD CONTRACTING

■ 5. The authority citation for part 636 continues to read as follows:

Authority: Sec. 1503 of Public Law 109–59, 119 Stat. 1144; Sec. 1307 of Public Law 105–178, 112 Stat. 107; 23 U.S.C. 101, 109, 112, 113, 114, 115, 119, 128, and 315; 49 CFR 1.48(b).

■ 6. Amend § 636.113 by revising paragraph (b) and adding paragraph (c) to read as follows:

§ 636.113 Is the stipend amount eligible for Federal participation?

* * * * *

(b) Unless prohibited by State law, you may retain the right to use ideas from unsuccessful offerors if they accept stipends. If stipends are used, the RFP should describe the process for distributing the stipend to qualifying offerors. The acceptance of any stipend must be optional on the part of the unsuccessful offeror to the design-build proposal.

(c) If you intend to incorporate the ideas from unsuccessful offerors into the same contract on which they unsuccessfully submitted a proposal, you must clearly provide notice of your intent to do so in the RFP.

■ 7. Revise § 636.513 by designating the existing text as paragraph (a) and adding a new paragraph (b) to read as follows:

§ 636.513 Are limited negotiations allowed prior to contract execution?

* * * * *

(b) Limited negotiations conducted under this section may include negotiations necessary to incorporate the ideas and concepts from unsuccessful offerors into the contract if a stipend is offered by the contracting agency and accepted by the unsuccessful offeror and if the requirements of section 636.113 are met.

PART 710—RIGHT-OF-WAY AND REAL ESTATE

■ 8. The authority citation for part 710 continues to read as follows:

Authority: Sec. 1307 of Public Law 105–178, 112 Stat. 107; 23 U.S.C. 101(a), 107, 108, 111, 114, 133, 142(f), 156, 204, 210, 308, 315,

317, and 323; 42 U.S.C. 2000d *et seq.*, 4633, 4651–4655; 49 CFR 1.48(b) and (cc), 18.31, and parts 21 and 24; 23 CFR 1.32.

■ 9. Revise § 710.403(d)(5) to read as follows:

§ 710.403 Management.

* * * * *

(d) * * *

(5) Use for transportation projects eligible for assistance under title 23 of the United States Code, provided that a concession agreement, as defined in section 710.703, shall not constitute a transportation project.

* * * * *

■ 10. Add new Subpart G to Part 710 to read as follows:

Subpart G—Concession Agreements

Sec.

710.701 Purpose

710.703 Definitions

710.705 Applicability

710.707 Fair Market Value

710.709 Determination of Fair Market Value

Authority: 23 U.S.C. 156 and 315; 23 CFR 1.32; 49 CFR 1.48.

§ 710.701 Purpose.

The purpose of this subpart is to prescribe the standards that ensure fair market value is received by a highway agency under concession agreements involving federally funded highways.

§ 710.703 Definitions.

As used in this subpart:

(a) *Best value* means the proposal offering the most overall public benefits as determined through an evaluation of the amount of the concession payment and other appropriate considerations. Such other appropriate considerations may include, but are not limited to, qualifications and experience of the concessionaire, expected quality of services to be provided, the history or track record of the concessionaire in providing the services, timelines for the delivery of services, performance standards, complexity of the services to be rendered, and revenue sharing. Such appropriate considerations may also include, but are not limited to, policy considerations that are important, but not quantifiable, such as retaining the ability to amend the concession agreement if conditions change, having a desired level of oversight over the facility, ensuring a certain level of maintenance and operations for the facility, considerations relative to the structure and amount of the toll rates, economic development impacts and considerations, or social and environmental benefits and impacts.

(b) *Concession agreement* means an agreement between a highway agency

and a concessionaire under which the concessionaire is given the right to operate and collect revenues or fees for the use of a federally funded highway in return for compensation to be paid to the highway agency. A concession agreement may include, but not be limited to, obligations concerning the development, design, construction, maintenance, operation, level of service, and/or capital improvements to a facility over the term of the agreement. Concession agreement shall not include agreements between government entities, even when compensation is paid, where the primary purpose of the transaction is not commercial in nature but for the purpose of determining governmental ownership, control, jurisdiction, or responsibilities with respect to the operation of a federally funded highway. The highway agency's determination as to whether an agreement between government entities constitutes a concession agreement shall be controlling.

(c) *Concessionaire* means any private or public entity that enters into a concession agreement with a highway agency.

(d) *Fair market value* means the price at which a highway agency and concessionaire are ready and willing to enter into a concession agreement for a federally funded highway on, or as if in, the open market for a reasonable period of time and in an arm's length transaction to any willing, knowledgeable, and able buyer. For purposes of this subpart, a concession agreement based on best value shall be deemed fair market value.

(e) *Federally funded highway* means any highway (including highways, bridges, and tunnels) acquired with Federal assistance made available from the Highway Trust Fund (other than the Mass Transit Account). A highway shall be deemed to be acquired with Federal assistance if Federal assistance participated in either the purchase of any real property, or in any capital expenditures in any fixtures located on real property, within the right-of-way, including the highway and any structures located upon the property.

(f) *Highway agency* means any State transportation department or other public authority with jurisdiction over a federally funded highway.

§ 710.705 Applicability.

This subpart applies to all concession agreements involving federally funded highways that are executed after January 18, 2009.

§ 710.707 Fair Market Value.

A highway agency shall receive fair market value for any concession agreement involving a federally funded highway.

§ 710.709 Determination of Fair Market Value.

(a) Fair market value may be determined either on a best value basis, highest net present value of the payments to be received over the life of the agreement, or highest bid received, as may be specified by the highway agency in the request for proposals or other relevant solicitation. If best value is used, the highway agency should identify, in the relevant solicitation, the criteria to be used as well as the weight afforded to the criteria.

(b) In order to be considered fair market value, the terms of the concession agreement must be both legally binding and enforceable.

(c) Any concession agreement awarded pursuant to a competitive process with more than one bidder shall be deemed to be fair market value. Any concession agreement awarded pursuant to a competitive process with only one bidder shall be presumed to be fair market value. Such presumption may be overcome only if the highway agency determines the proposal to not be fair market value based on the highway agency's estimates. Nothing in this subpart shall be construed to require a highway agency to accept any proposal, even if the proposal is deemed fair market value. For purposes of this subsection, a competitive process shall afford all interested proposers an equal opportunity to submit a proposal for the concession agreement and shall comply with applicable State and local law.

(d) If a concession agreement is not awarded pursuant to a competitive process, the highway agency must receive fair market value, as determined by the highway agency in accordance with State law, so long as an independent third party assessment is conducted and made publicly available.

(e) Nothing in this subpart is intended to waive the requirements of Part 172, Part 635, and Part 636 whenever any Federal-aid (including TIFIA assistance) is to be used for a project under the concession agreement.

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