ACEC
AMERICAN COUNCIL OF ENGINEERING COMPANIES

March 25, 2024

The Honorable Shailen Bhatt
Administrator
Federal Highway Administration
U.S. Department of Transportation
1200 New Jersey Ave. SE
Washington, DC 20590

Re: Docket No. FHWA-2023-0046-0001

Dear Administrator Bhatt:

On behalf of the American Council of Engineering Companies (ACEC) – the business voice of the engineering industry – I am writing to express our strong opposition to proposed changes to the important rules governing the procurement, management, and administration of engineering and design services on federally funded projects.

We believe the changes in the NPRM would be counterproductive to our shared goal of successful implementation of the Bipartisan Infrastructure Law, also known as the Infrastructure Investment and Jobs Act (IIJA). Existing FHWA requirements directly impact public health and safety and play a key role in controlling costs and promoting project success. They ought to be maintained.

A better solution for FHWA would be to continue to bolster its technical assistance capacity for facilitating local compliance. ACEC has greatly appreciated the collaboration and coordination with the U.S. DOT in this regard, and we are strongly committed to continuing to work with the Administration to facilitate efficient and effective project delivery under the IIJA. We are eager to partner with FHWA on education, training, and outreach programs for local officials managing federal funds.

We have five primary objections to the FHWA proposal:

1) Current law works well and represents best practice for the procurement of engineering and design services.
2) The changes in the NPRM will undermine successful project delivery.
3) The changes will lead to confusion and additional delays in contracting.
4) The changes may lead to less competition for contracts and fewer options for local governments.
5) The changes would reverse a decade of regulatory certainty and clarity.

Current Law Works Well

The current regulations in 23 CFR part 172 mandate the use of Qualifications-Based Selection (QBS) for the procurement of engineering services. As you know, QBS is a well-established

process through which firms compete for work based on experience and technical expertise, rather than making procurement decisions on the basis of who submits the cheapest bid. Under QBS, firms are evaluated and shortlisted based on their qualifications, as well as their track record of successfully delivering projects similar to that which the client is seeking now. The top-ranked firm negotiates with the agency for a fair and reasonable price based on a detailed scope of the project and deliverables.

QBS is good public policy. Academic studies have shown that QBS saves time, saves money, delivers innovation, and results in more satisfied owners.[1] Projects utilizing the QBS procurement process for engineering services outperform the national average in cost growth by 50 percent and reduce schedule growth by 30 percent below the national average. QBS projects also achieve a greater degree of consistency in project success than non-QBS projects, likely in part due to the strong association with the quality of construction documents developed by the design team.

These project cost and schedule savings are the result of the collaborative partnership between the engineering firm and the client fostered through the QBS process. In most cases, procurement of engineering services is done before the full scope and needs of a project are well known. Competing based on price does not work in that environment because there is not anything to bid on. QBS facilitates a negotiation about the project deliverables, required level of effort, staffing and technology needs. That is why projects incorporating QBS have a greater likelihood of producing innovative solutions and better outcomes, all while saving time and money.

QBS is the gold standard of procurement. It has been endorsed by the American Public Works Association and is included in the ABA model procurement code.

Congress recognized the merits of QBS when enacting the Brooks Act in 1972 and then later expanding those requirements to the federal highway program, first in 1987 and reinforcing and reclarifying those rules in subsequent transportation legislation. This is a well-established, proven, and reliable procurement framework.

Now is not the time to walk back from those requirements. Given the size and scope of the infrastructure program in IIJA, the benefits of QBS are more essential than ever.

The NPRM Will Undermine Successful Project Delivery

Under the proposed rule, compliance with QBS would be *optional* for local projects funded through FHWA discretionary grants. The agency would remove the requirement that local governments award contracts for engineering and design-related services in accordance with QBS. It would also remove the requirement that contracts comply with the Federal Acquisition Regulation cost principles, another critical protection.

Removing these requirements for local grant recipients will undermine successful project delivery. Under the rule, local governments will be permitted to low-bid engineering services that have a tremendous impact on construction schedules, costs, and life cycle performance. Any

[1] Paul S. Chinowsky, University of Colorado Boulder, and Gordon Kingsley, Georgia Institute of Technology. *Savings, Efficiency, and Innovation: An Analysis of QBS in the Procurement of Engineering Services,* (2022). This and other resources available at https://program.acec.org/qbs-resources-portal.

meager time savings or perceived cost savings from avoiding a QBS process at the front end of a project will result in far greater cost increases and complications during construction and beyond.

QBS is preferred over other procurement methods because at the beginning of a project, the scope of work for engineering and design services is often unclear. Interested firms are unable to provide definitive pricing. It is imperative that public agencies evaluate qualifications, competence, availability, and other factors to determine the best candidate for the job. For federally funded projects, this is especially important for projects that can require community involvement, political sensitivities, and other social factors that call for experienced teams with broad knowledge and understanding. In one analysis, QBS was found to have the lowest cost growth and the fastest construction speed when compared to sole source, best value, and low bid procurement methods.[2]

The NPRM Will Cause Confusion and Delay

The rule will also create a messy patchwork of procurement regimes. There will be inconsistent requirements between projects managed by State Departments of Transportation and the multitude of local jurisdictions, making it difficult for firms to navigate the varying requirements and reducing competition. That confusion may lead to an increased potential for non-respondent proposals or an insufficient number of proposals, which places an additional burden on public agencies, especially if additional rounds of procurement are necessary. That costs time and money and eats up precious agency human resources.

Similarly, failure to follow the uniform cost accounting rules based on the FAR cost principles, as required in 23 CFR part 172, will cause confusion, create additional delays, and will likely dissuade firms from even competing for this work. For many years, firms and our state and local clients have followed FAR-based accounting rules to ensure that costs are properly allocated and regulated. Waiving this requirement will make cost accounting across multiple projects for multiple agencies extremely difficult.

Conversely, agencies in a particular state or metropolitan area benefit by having their local engineering community work seamlessly across their agencies. It is our understanding that many State DOTs are being asked to take over or manage local project grants because the local entity realizes it is not capable of delivering the project. If the engineering services had been procured in a manner consistent with 23 CFR part 172, that could avoid additional complications or delays in the project handover.

A single, comprehensive federal framework governing all procurements on federally funded projects provides the uniformity and consistency needed to not only ensure successful project delivery, but also proper oversight in the use of public funds. The rules that apply to a dollar of FHWA funds flowing to a State DOT through a formula program ought also apply to a dollar of FHWA funds flowing through a discretionary grant to a local entity.

The NPRM May Reduce Competition

The engineering industry is in extremely high demand for services in the current market, and that is not likely to change in the foreseeable future. Capacity is constrained and firms are selective about what projects and contract opportunities to pursue. According to a quarterly economic

[2] El Wardani, M. A., Messner, J. I., & Horman, M. J. (2006). *Comparing procurement methods for design-build projects*. Journal of Construction Engineering and Management, 132(3), 230-238.

sentiment survey from the ACEC Research Institute, more than half of respondents indicated that they have turned down work in the last six months.

The withdrawal of federal rules on locally managed projects – rules that protect both the public as well as local engineering firms – will be a complicating factor. We expect that many firms may be less likely to pursue contracting opportunities with agencies that fail to follow well-established federal procurement rules. The NPRM could have the effect of reducing the number of qualified firms competing for work on these locally administered projects, further undermining successful IIJA implementation.

The NPRM Reverses Nearly 10 Years of Regulatory Clarity

When FHWA last updated 23 CFR part 172, it was never contemplated that the rules would not apply to local entities receiving direct discretionary grants.

The Background section of the final rule, posted in the Federal Register on May 22, 2015, notes that,

> States and local public agencies are required to procure engineering and design services in accordance with the qualifications-based selection procedures prescribed in the Brooks Act (40 U.S.C. 1101 *et seq.*) and to accept and apply consultant indirect cost rates established by a cognizant Federal or State agency in accordance with the Federal Acquisition Regulation (FAR) cost principles (48 CFR part 31) as required by 23 U.S.C. 112(b)(2).
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> Federal Register / Vol. 80, No. 99 / Page 29908 [emphasis added].

Further, in the discussion of comments received, FHWA noted its decision to explicitly add the parenthetical "(or other recipient)" following the State Transportation Agency, for the sake of consistency (page 29911). This term replaced references to "other direct grantees" that was included in the original NPRM, posted on September 4, 2012 (Federal Register / Vol. 77, No. 171). In fact, that earlier NPRM defined "*Contracting agencies*" to include "other direct grantees" in addition to State transportation agencies and their subgrantees (page 53807).

At no point in the previous rulemaking process, from the posting of the proposed rule in 2012 to the final rule in 2015, did FHWA seem to entertain the notion that the regulatory framework would not apply to local entities receiving discretionary grants. No commenters asked for that exclusion, and in fact, FHWA made the point to add "other recipients" to coverage under the regulations.

We acknowledge that the number and size of the competitive discretionary grant programs has increased significantly under the IIJA compared with previous surface transportation laws. However, that does not mean that a change in the interpretation of the regulatory framework is justified. Nothing in the IIJA changed the terms or conditions for the procurement of engineering and design services.

Compliance With QBS is Not a Burden

FHWA states but fails to provide supporting data or evidence that compliance with 23 CFR part 172 would be an "undue" and "unnecessary regulatory burden" on grant recipients. In our experience, many local agencies already have policies and procedures in place for contracting for engineering and design services. There are others that may not, but it is in the interest of the

federal program to support those agencies coming into compliance rather than simply waiving the rules.

This is particularly true with respect to the services that our members provide which have such a tremendous impact on overall project success. As noted earlier, hiring the most qualified design team results in cost savings, time savings, innovative problem solving, and more satisfied owners.

The lead researcher on the ACEC Research Institute study on QBS, Paul Chinowsky of the University of Colorado Boulder, stated, "Our research shows that using QBS helps address challenges faced by procurement professionals, including the reduction in trained staff in smaller jurisdictions, [and] the lack of education on appropriate procurement policy."

For all these reasons, we strongly encourage FHWA to abandon this flawed proposal and work with the engineering industry and our local partners on other methods for promoting compliance with existing regulations. The successful implementation of the IIJA and delivery of high-quality projects to the public will be better served by retaining the existing regulatory framework.

Thank you for your attention and consideration.

Sincerely,

Linda Bauer Darr
President & CEO