

PART 172—PROCUREMENT, MANAGEMENT, AND ADMINISTRATION OF ENGINEERING AND DESIGN RELATED SERVICES

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Authority: 23 U.S.C. 106, 112, 114(a), 302, 315, and 402; 40 U.S.C. 1101 *et seq.*; 48 CFR part 31; 49 CFR 1.48(b); and 2 CFR part 200.

§ 172.1 Purpose and applicability.

This part prescribes the requirements for the procurement, management, and administration of engineering and design related services under 23 U.S.C. 112 and as supplemented by the Uniform Administrative Requirements For Federal Awards rule. The Uniform Administrative Requirements, Cost Principles and Audit Requirements For Federal Awards rule (2 CFR part 200) shall apply except where inconsistent with the requirements of this part and other laws and regulations applicable to the Federal-aid highway program (FAHP). The requirements herein apply to federally funded contracts for engineering and design related services for projects subject to the provisions of 23 U.S.C. 112(a) (related to construction) and are issued to ensure that a qualified consultant is obtained through an equitable qualifications based selection procurement process, that prescribed work is properly accomplished in a timely manner, and at fair and reasonable cost. State transportation agencies (STA) (or other recipients) shall ensure that sub-recipients comply with the requirements of this part and the Uniform Administrative Requirements, Cost Principles and Audit Requirements For Federal Awards rule. Federally funded contracts for services not defined as engineering and design related, or for services not in furtherance of a highway construction project or activity subject to the provisions of 23 U.S.C. 112(a), are not subject to the requirements of this part and shall be procured and administered under the requirements of the Uniform Administrative Requirements, Cost Principles and Audit Requirements For Federal Awards rule and procedures applicable to such activities.

§ 172.3 Definitions.

As used in this part:

Audi means a formal examination, in accordance with professional standards, of a consultant's accounting systems, incurred cost records, and other cost presentations to test the reasonableness, allowability, and allocability of costs in accordance with the Federal cost principles (as specified in 48 CFR part 31).

Cognizant agency means any governmental agency that has performed an audit in accordance with generally accepted government auditing standards to test compliance with the requirements of the Federal cost principles (as specified in 48 CFR part 31) and issued an audit report of the consultant's indirect cost rate, or any described agency that has conducted a review of an audit report and related work-papers prepared by a certified public accountant and issued a letter of concurrence with the audited indirect cost rate(s). A cognizant agency may be any of the following:

- (1) A Federal agency;
- (2) A State transportation agency of the State where the consultant's accounting and financial records are located; or
- (3) A State transportation agency to which cognizance for the particular indirect cost rate(s) of a consulting firm has been delegated or transferred in writing by the State transportation this definition.

Competitive negotiation means qualifications-based selection procurement procedures complying with 40 U.S.C. 1101–1104, commonly referred to as the Brooks Act.

Consultant means the individual or firm providing engineering and design related services as a party to a contract with a recipient or sub-recipient of Federal assistance (as defined in 2 CFR 200.86 or 2 CFR 200.93, respectively).

Contract means a written procurement contract or agreement between a contracting agency and consultant reimbursed under a FAHP grant or sub-grant and includes any procurement subcontract under a contract.

Contracting agencies means a State transportation agency or a procuring agency of the State acting in conjunction with and at the direction of the State transportation agency, other recipients, and all sub-recipients that are responsible for the procurement, management, and administration of engineering and design related services.

Contract modification means an agreement modifying the terms or conditions of an original or existing contract.

Engineering and design related services means:

- (1) Program management, construction management, feasibility studies, preliminary engineering, design engineering, surveying, mapping, or architectural related services with respect to a highway construction project subject to 23 U.S.C. 112(a) as defined in 23 U.S.C. 112(b)(2)(A); and
- (2) Professional services of an architectural or engineering nature, as defined by State law, which are required to or may logically or justifiably be performed or approved by a person licensed, registered, or certified to provide the services with respect to a highway construction project subject to 23 U.S.C. 112(a) and as defined in 40 U.S.C. 1102(2).

Federal cost principles means the cost principles contained in 48 CFR part 31 of the Federal Acquisition Regulation for determination of allowable costs of commercial, for-profit entities.

Fixed fee means a sum expressed in U.S. dollars established to cover the consultant's profit and other business expenses not allowable or otherwise included as a direct or indirect cost.

Management support role means performing engineering management services or other services acting on the contracting agency's behalf, which are subject to review and oversight by agency officials, such as a program or project administration role typically performed by the contracting agency and necessary to fulfill the duties imposed by title 23 of the United States Code, other Federal and State laws, and applicable regulations.

Noncompetitive means the method of procurement of engineering and design related services when it is not feasible to award the contract using competitive negotiation or small purchase procurement methods.

One-year applicable accounting period means the annual accounting period for which financial statements are regularly prepared by the consultant.

Scope of work means all services, work activities, and actions required of the consultant by the obligations of the contract.

Small purchases means the method of procurement of engineering and design related services where an adequate number of qualified sources are reviewed and the total contract costs do not exceed an established simplified acquisition threshold.

State transportation agency (STA) means that department or agency maintained in conformity with 23 U.S.C. 302 and charged under State law with the responsibility for highway construction (as defined in 23 U.S.C. 101); and that is authorized by the laws of the State to make final decisions in all matters relating to, and to enter into, all contracts and agreements for projects and activities to fulfill the duties imposed by title 23 United States Code, title 23 Code of Federal Regulations, and other applicable Federal laws and regulations.

Sub-consultant means the individual or firm contracted by a consultant to provide engineering and design related or other types of services that are part of the services which the consultant is under contract to provide to a recipient (as defined in 23 CFR 200.86) or sub-recipient (as defined in 2 CFR 200.93) of Federal assistance.

§ 172.5 Program management and oversight.

(a) **STA responsibilities.**

STAs or other recipients shall develop and sustain organizational capacity and provide the resources necessary for the procurement, management, and administration of engineering and design related consultant services, reimbursed in whole or in part with FAHP funding, as specified in 23 U.S.C. 302(a). Responsibilities shall include the following:

- (1) Preparing and maintaining written policies and procedures for the procurement, management, and administration of engineering and design related consultant services in accordance with paragraph (c) of this section;
- (2) Establishing a procedure for estimating the level of effort, schedule, and costs of needed consultant services and associated agency staffing and resources for management and oversight in support of project authorization requests submitted to FHWA for approval, as specified in 23 CFR 630.106;
- (3) Procuring, managing, and administering engineering and design related consultant services in accordance with applicable Federal and State laws, regulations, and approved policies and procedures, as specified in 23 CFR 1.9(a); and
- (4) Administering sub-awards in accordance with State laws and procedures as specified in 2 CFR part 1201, and the requirements of 23 U.S.C. 106(g)(4), and 2 CFR 200.331. Administering sub-awards includes providing oversight of the procurement, management, and administration of engineering and design related consultant services by sub-recipients to ensure compliance with applicable Federal and State laws and regulations.

Nothing in this part shall be taken as relieving the STA (or other recipient) of its responsibility under laws and regulations applicable to the FAHP for the work performed under any consultant agreement or contract entered into by a sub-recipient.

(b) **Sub-recipient responsibilities.**

Sub-recipients shall develop and sustain organizational capacity and provide the resources necessary for the procurement, management, and administration of engineering and design related consultant services, reimbursed in whole or in part with FAHP funding as specified in 23 U.S.C. 106(g)(4)(A). Responsibilities shall include the following:

- (1) Adopting written policies and procedures prescribed by the awarding STA or other recipient for the procurement, management, and administration of engineering and design related consultant services in accordance with applicable Federal and State laws and regulations; or when not prescribed, shall include:
 - (i) Preparing and maintaining its own written policies and procedures in accordance with paragraph (c) of this section; or
 - (ii) Submitting documentation associated with each procurement and subsequent contract to the awarding STA or other grantee for review to assess compliance with applicable Federal and State laws, regulations, and the requirements of this part; administering engineering and design related consultant services in accordance with applicable Federal and State laws, regulations, and approved policies and procedures, as specified in 23 CFR 1.9(a).

(c) *Written policies and procedures.*

The contracting agency shall prepare and maintain written policies and procedures for the procurement, management, and administration of engineering and design related consultant services. The FHWA shall approve the written policies and procedures, including all revisions to such policies and procedures, of the STA or recipient to assess compliance with applicable requirements. The STA or other recipient shall approve the written policies and procedures, including all revisions to such policies and procedures, of a sub-recipient to assess compliance with applicable requirements. These policies and procedures shall address, as appropriate for each method of procurement a contracting agency proposes to use, the following items to ensure compliance with Federal and State laws, regulations, and the requirements of this part:

- (1) Preparing a scope of work and evaluation factors for the ranking/selection of a consultant;
- (2) Soliciting interests, qualifications, or proposals from prospective consultants;
- (3) Preventing, identifying, and mitigating conflicts of interest for employees of both the contracting agency and consultants and promptly disclosing in writing any potential conflict to the STA and FHWA, as specified in 2 CFR 200.112 and 23 CFR 1.33, and the requirements of this part.
- (4) Verifying suspension and debarment actions and eligibility of consultants, as specified in 2 CFR part 1200 and 2 CFR part 180;
- (5) Evaluating interests, qualifications, or proposals and the ranking/selection of a consultant;
- (6) Determining, based upon State procedures and the size and complexity of a project, the need for additional discussions following RFP submission and evaluation;
- (7) Preparing an independent agency estimate for use in negotiation with the selected consultant;
- (8) Selecting appropriate contract type, payment method, and terms and incorporating required contract provisions, assurances, and certifications in accordance with § 172.9;
- (9) Negotiating a contract with the selected consultant including instructions for proper disposal of concealed cost proposals of unsuccessful bidders;
- (10) Establishing elements of contract costs, accepting indirect cost rate(s) for application to contracts, and assuring consultant compliance with the Federal cost principles in accordance with § 172.11;
- (11) Ensuring consultant costs billed are allowable in accordance with the Federal cost principles and consistent with the contract terms as well as the acceptability and progress of the consultant's work;
- (12) Monitoring the consultant's work and compliance with the terms, conditions, and specifications of the contract;
- (13) Preparing a consultant's performance evaluation when services are completed and using such performance data in future evaluation and ranking of consultant to provide similar services;
- (14) Closing-out a contract;
- (15) Retaining supporting programmatic and contract records, as specified in 2 CFR 200.333 and the requirements of this part;
- (16) Determining the extent to which the consultant, which is responsible for the professional quality, technical accuracy, and coordination of services, may be reasonably liable for costs resulting from errors and omissions in the work furnished under its contract;
- (17) Assessing administrative, contractual, or legal remedies in instances where consultants violate or breach contract terms and conditions, and providing for such sanctions and penalties as may be appropriate; and
- (18) Resolving disputes in the procurement, management, and administration of engineering and design related consultant services.

- (d)** A contracting agency may formally adopt, by statute or within approved written policies and procedures as specified in paragraph (c) of this section, any direct Federal Government or other contracting regulation, standard, or procedure provided its application does not conflict with the provisions of 23 U.S.C. 112, the requirements of this part, and other laws and regulations applicable to the FAHP.

- (e) Notwithstanding paragraph (d) of this section, a contracting agency shall have a reasonable period of time, not to exceed 12 months from the effective date of this rule unless an extension is granted for unique or extenuating circumstances, to issue or update current written policies and procedures for review and approval in accordance with paragraph (c) of this section and consistent with the requirements of this part.

§ 172.7 Procurement methods and procedures.

- (a) **Procurement methods.** The procurement of engineering and design related services funded by FAHP funds and related to a highway construction project subject to the provisions of 23 U.S.C. 112(a) shall be conducted in accordance with one of three methods: Competitive negotiation (qualifications based selection) procurement, small purchases procurement for small dollar value contracts, and noncompetitive procurement where specific conditions exist allowing solicitation and negotiation to take place with a single consultant.

- (1) **Competitive negotiation (qualifications-based selection).** Except as provided in paragraphs (a)(2) and (3) of this section, contracting agencies shall use the competitive negotiation method for the procurement of engineering and design related services when FAHP funds are involved in the contract, as specified in 23 U.S.C. 112(b)(2)(A). The solicitation, evaluation, ranking, selection, and negotiation shall comply with the qualifications-based selection procurement procedures for architectural and engineering services codified under 40 U.S.C. 1101-1104, commonly referred to as the Brooks Act. In accordance with the requirements of the Brooks Act, the following procedures shall apply to the competitive negotiation procurement method:

- (i) **Solicitation.** The solicitation process shall be by public announcement, public advertisement, or any other public forum or method that assures qualified in-State and out-of-State consultants are given a fair opportunity to be considered for award of the contract. Procurement procedures may involve a single step process with issuance of a request for proposal (RFP) to all interested consultants or a multiphase process with issuance of a request for statements or letters of interest or qualifications (RFQ) whereby responding consultants are ranked based on qualifications and a RFP is then provided to three or more of the most highly qualified consultants. Minimum qualifications of consultants to perform services under general work categories or areas of expertise may also be assessed through a prequalification process whereby annual statements of qualifications and performance data are encouraged. Regardless of any process utilized for prequalification of consultants or for an initial assessment of a consultant's qualifications under a RFQ, a RFP specific to the project, task, or service is required for evaluation of a consultant's specific technical approach and qualifications.

- (ii) **Request for proposal (RFP)** The RFP shall provide all information and requirements necessary for interested consultants to provide a response to the RFP and compete for the solicited services. The RFP shall:

- (A) Provide a clear, accurate, and detailed description of the scope of work, technical requirements, and qualifications of consultants necessary for the services to be rendered. To the extent practicable, the scope of work should detail the purpose and description of the project, services to be performed, deliverables to be provided, estimated schedule for performance of the work, and applicable standards, specifications, and policies;
- (B) Identify the requirements for any discussions that may be conducted with three or more of the most highly qualified consultants following submission and evaluation of proposals;
- (C) Identify evaluation factors including their relative weight of importance in accordance with paragraph (a)(1)(iii) of this section;
- (D) Specify the contract type and method(s) of payment anticipated to contract for the solicited services in accordance with § 172.9;
- (E) Identify any special provisions or contract requirements associated with the solicited services;
- (F) Require that submission of any requested cost proposals or elements of cost be in a concealed format and separate from technical/qualifications proposals, since these shall not be considered in the evaluation, ranking, and selection phase; and
- (G) Provide an estimated schedule for the procurement process and establish a submittal deadline for responses to the RFP that provides sufficient time for interested consultants to receive notice, prepare, and submit a proposal, which except in unusual circumstances shall be not less than 14 calendar days from the date of issuance of the RFP.

(iii) **Evaluation factors.**

- (A) Criteria used for evaluation, ranking, and selection of consultants to perform engineering and design related services must assess the demonstrated competence

and qualifications for the type of professional services solicited. These qualifications-based factors may include, but are not limited to, technical approach (e.g., project understanding, innovative concepts or alternatives, quality control procedures), work experience, specialized expertise, professional licensure, staff capabilities, workload capacity, and past performance.

- (B) Price shall not be used as a factor in the evaluation, ranking, and selection phase. All price or cost related items which include, but are not limited to, cost proposals, direct salaries/wage rates, indirect cost rates, and other direct costs are prohibited from being used as evaluation criteria.
- (C) In-State or local preference shall not be used as a factor in the evaluation, ranking, and selection phase. State licensing laws are not preempted by this provision and professional licensure within a jurisdiction may be established as a requirement for the minimum qualifications and competence of a consultant to perform the solicited services.
- (D) The following non-qualifications based evaluation criteria are permitted under the specified conditions and provided the combined total of these criteria do not exceed a nominal value of 10 percent of the total evaluation criteria to maintain the integrity of a qualifications-based selection:
 - (1) A local presence may be used as a nominal evaluation factor where appropriate. This criteria shall not be based on political or jurisdictional boundaries and may be applied on a project-by-project basis for contracts where a need has been established for a consultant to provide a local presence, a local presence will add value to the quality and efficiency of the project, and application of this criteria leaves an appropriate number of qualified consultants, given the nature and size of the project. If a consultant from outside of the locality area indicates as part of a proposal that it will satisfy the criteria in some manner, such as establishing a local project office, that commitment shall be considered to have satisfied the local presence criteria.
 - (2) The participation of qualified and certified Disadvantaged Business Enterprise (DBE) sub-consultants may be used as a nominal evaluation criterion where appropriate in accordance with 49 CFR part 26 and a contracting agency's FHWA-approved DBE program.

(iv) Evaluation, ranking, and selection.

- (A) The contracting agency shall evaluate consultant proposals based on the criteria established and published within the public solicitation.
- (B) Although the contract will be with the consultant, proposal evaluations shall consider the qualifications of the consultant and any sub-consultants identified within the proposal with respect to the scope of work and established criteria.
- (C) The contracting agency shall specify in the RFP discussion requirements that shall follow submission and evaluation of proposals and based on the size and complexity of the project or as defined in contracting agency written policies and procedures, as specified in § 172.5(c). Discussions, as required by the RFP, may be written, by telephone, video conference, or by oral presentation/interview and shall be with at least three of the most highly qualified consultants to clarify the technical approach, qualifications, and capabilities provided in response to the RFP.
- (D) From the proposal evaluation and any subsequent discussions which may have been conducted, the contracting agency shall rank, in order of preference, at least three consultants determined most highly qualified to perform the solicited services based on the established and published criteria. In instances where only two qualified consultants respond to the solicitation, the contracting agency may proceed with evaluation and selection if it is determined that the solicitation did not contain conditions or requirements that arbitrarily limited competition. Alternatively, a contracting agency may pursue procurement following the noncompetitive method when competition is determined to be inadequate and it is determined to not be feasible or practical to re-compete under a new solicitation as specified in paragraph (a)(3)(iii)(C) of this section.
- (E) Notification must be provided to responding consultants of the final ranking of the three most highly qualified consultants.

- (F) The contracting agency shall retain supporting documentation of the solicitation, proposal, evaluation, and selection of the consultant in accordance with this section and the provisions of 2 CFR 200.333.

(v) Negotiation.

- (A) The process for negotiation of the contract shall comply with the requirements codified in 40 U.S.C. 1104(b) for the order of negotiation.
 - (B) **Independent estimate.** Prior to receipt or review of the most highly qualified consultant's cost proposal, the contracting agency shall prepare a detailed independent estimate with an appropriate breakdown of the work or labor hours, types or classifications of labor required, other direct costs, and consultant's fixed fee for the defined scope of work. The independent estimate shall serve as the basis for negotiation.
 - (C) The contracting agency shall establish elements of contract costs (e.g., indirect cost rates, direct salary or wage rates, fixed fee, and other direct costs) separately in accordance with § 172.11. The use of the independent estimate and determination of cost allowance in accordance with § 172.11 shall ensure contracts for the consultant services are obtained at a fair and reasonable cost, as specified in 40 U.S.C. 1104(a).
 - (D) If concealed cost proposals were submitted in conjunction with technical/qualifications proposals, the contracting agency may consider only the cost proposal of the consultant with which negotiations are initiated. Due to the confidential nature of this data, as specified in 23 U.S.C. 112(b)(2)(E), concealed cost proposals of unsuccessful consultants may be disposed of in accordance with written policies and procedures established under § 172.5(c).
 - (E) The contracting agency shall retain documentation of negotiation activities and resources used in the analysis of costs to establish elements of the contract in accordance with the provisions of 2 CFR 200.333. This documentation shall include the consultant cost certification and documentation supporting the acceptance of the indirect cost rate to be applied to the contract, as specified in § 172.11(c).
- (2) **Small purchases.** The contracting agency may use the State's small purchase procedures that reflect applicable State laws and regulations for the procurement of engineering and design related services provided the total contract costs do not exceed the Federal simplified acquisition threshold (as defined in 48 CFR 2.101). When a lower threshold for use of small purchase procedures is established in State law, regulation, or policy, the lower threshold shall apply to the use of FAHP funds. The following additional requirements shall apply to the small purchase procurement method:
- (i) The scope of work, project phases, and contract requirements shall not be broken down into smaller components merely to permit the use of small purchase procedures.
 - (ii) A minimum of three consultants are required to satisfy the adequate number of qualified sources reviewed. In instances where only two qualified consultants respond to the solicitation, the contracting agency may proceed with evaluation and selection if it is determined that the solicitation did not contain conditions or requirements which arbitrarily limited competition. Alternatively, a contracting agency may pursue procurement following the noncompetitive method when competition is determined to be inadequate and it is determined to not be feasible or practical to re compete under a new solicitation as specified in § 172.7(a)(3)(iii)(C).
 - (iii) Contract costs may be negotiated in accordance with State small purchase procedures; however, the allowability of costs shall be determined in accordance with the Federal cost principles.
 - (iv) The full amount of any contract modification or amendment that would cause the total contract amount to exceed the established simplified acquisition threshold is ineligible for Federal-aid funding. The FHWA may withdraw all Federal-aid from a contract if it is modified or amended above the applicable established simplified acquisition threshold.
- (3) **Noncompetitive.** The following requirements shall apply to the noncompetitive procurement method:
- (i) A contracting agency may use its own noncompetitive procedures that reflect applicable State and local laws and regulations and conform to applicable Federal requirements.
 - (ii) A contracting agency shall establish a process to determine when noncompetitive procedures will be used and shall submit justification to, and receive approval from FHWA before using this form of contracting.
 - (iii) A contracting agency may award a contract by noncompetitive procedures under the following limited circumstances:
 - (A) The service is available only from a single source;
 - (B) There is an emergency which will not permit the time necessary to conduct competitive negotiations; or
 - (C) After solicitation of a number of sources, competition is determined to be inadequate.

- (iv) Contract costs may be negotiated in accordance with contracting agency noncompetitive procedures; however, the allowability of costs shall be determined in accordance with the Federal cost principles.

(b) Additional procurement requirements

(1) Uniform administrative requirements, cost principles and audit requirements for Federal awards.

- (i) STAs or other recipients and their sub-recipients shall comply with procurement requirements established in State and local laws, regulations, policies, and procedures that are not addressed by or are not in conflict with applicable Federal laws and regulations, as specified in 2 CFR part 1201.
- (ii) When State and local procurement laws, regulations, policies, or procedures are in conflict with applicable Federal laws and regulations, a contracting agency shall comply with Federal requirements to be eligible for Federal-aid reimbursement of the associated costs of the services incurred following FHWA authorization, as specified in 2 CFR 200.102(c).

(2) Disadvantaged Business Enterprise (DBE) program.

- (i) A contracting agency shall give consideration to DBE consultants in the procurement of engineering and design related service contracts subject to 23 U.S.C. 112(b)(2) in accordance with 49 CFR part 26. When DBE program participation goals cannot be met through race-neutral measures, additional DBE participation on engineering and design related services contracts may be achieved in accordance with a contracting agency's FHWA approved DBE program through either:
 - (A) Use of an evaluation criterion in the qualifications-based selection of consultants, as specified in § 172.7(a)(1)(iii)(D); or
 - (B) Establishment of a contract participation goal.
- (ii) The use of quotas or exclusive set asides for DBE consultants is prohibited, as specified in 49 CFR 26.43.

(3) Suspension and debarment. A contracting agency shall verify suspension and debarment actions and eligibility status of consultants and sub-consultants prior to entering into an agreement or contract in accordance with 2 CFR part 1200 and 2 CFR part 180.

(4) Conflicts of interest.

- (i) A contracting agency shall maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of engineering and design related services contracts under this part and governing the conduct and roles of consultants in the performance of services under such contracts to prevent, identify, and mitigate conflicts of interest in accordance with 2 CFR 200.112, 23 CFR 1.33 and the provisions of this paragraph (b)(4).
- (ii) No employee, officer, or agent of the contracting agency shall participate in selection, or in the award or administration of a contract supported by Federal-aid funds if a conflict of interest, real or apparent, would be involved. Such a conflict arises when there is a financial or other interest in the consultant selected for award by:
 - (A) The employee, officer, or agent;
 - (B) Any member of his or her immediate family;
 - (C) His or her partner; or
 - (D) An organization that employs or is about to employ any of the above.
- (iii) The contracting agency's officers, employees, or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from consultants, potential consultants, or parties to subagreements. A contracting agency may establish dollar thresholds where the financial interest is not substantial or the gift is an unsolicited item of nominal value.
- (iv) A contracting agency may provide additional prohibitions relative to real, apparent, or potential conflicts of interest.
- (v) To the extent permitted by State or local law or regulations, the standards of conduct required by this paragraph shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the contracting agency's officers, employees, or agents, or by consultants or their agents.
- (vi) A contracting agency shall promptly disclose in writing any potential conflict of interest to FHWA.

(5) Consultant services in management support roles.

- (i) When FAHP funds participate in a consultant services contract, the contracting agency shall receive approval from FHWA, or the recipient as appropriate, before utilizing a consultant to act in a management support role for the

- contracting agency; unless an alternate approval procedure has been approved. Use of consultants in management support roles does not relieve the contracting agency of responsibilities associated with the use of FAHP funds, as specified in 23 U.S.C. 302(a) and 23 U.S.C. 106(g)(4) and should be limited to large projects or circumstances where unusual cost or time constraints exist, unique technical or managerial expertise is required, and/or an increase in contracting agency staff is not a viable option.
- (ii) Management support roles may include, but are not limited to, providing oversight of an element of a highway program, function, or service on behalf of the contracting agency or may involve managing or providing oversight of a project, series of projects, or the work of other consultants and contractors on behalf of the contracting agency. Contracting agency written policies and procedures as specified in § 172.5(c) may further define allowable management roles and services a consultant may provide, specific approval responsibilities, and associated controls necessary to ensure compliance with Federal requirements.
 - (iii) Use of consultants or sub-consultants in management support roles requires appropriate conflicts of interest standards as specified in paragraph (b)(4) of this section and adequate contracting agency staffing to administer and monitor the management consultant contract, as specified in § 172.9(d). A consultant serving in a management support role may be precluded from providing additional services on projects, activities, or contracts under its oversight due to potential conflicts of interest.
 - (iv) FAHP funds shall not participate in the costs of a consultant serving in a management support role where the consultant was not procured in accordance with Federal and State requirements, as specified in 23 CFR 1.9(a).
 - (v) Where benefiting more than a single Federal-aid project, allocability of consultant contract costs for services related to a management support role shall be distributed consistent with the cost principles applicable to the contracting agency, as specified in 2 CFR part 200, subpart E—Cost Principles.

§ 172.9 Contracts and administration.

(a) **Contract types.** The contracting agency shall use the following types of contracts:

- (1) **Project-specific.** A contract between the contracting agency and consultant for the performance of services and defined scope of work related to a specific project or projects.
- (2) **Multiphase.** A project-specific contract where the solicited services are divided into phases whereby the specific scope of work and associated costs may be negotiated and authorized by phase as the project progresses.
- (3) **On-call or indefinite delivery/ indefinite quantity (IDIQ).** A contract for the performance of services for a number of projects, under task or work orders issued on an as-needed or on-call basis, for an established contract period. The procurement of services to be performed under on-call or IDIQ contracts shall follow either competitive negotiation or small purchase procurement procedures, as specified in § 172.7. The solicitation and contract provisions shall address the following requirements:

- (i) Specify a reasonable maximum length of contract period, including the number and period of any allowable contract extensions, which shall not exceed 5 years;
- (ii) Specify a maximum total contract dollar amount that may be awarded under a contract;
- (iii) Include a statement of work, requirements, specifications, or other description to define the general scope, complexity, and professional nature of the services; and
- (iv) If multiple consultants are to be selected and multiple on-call or IDIQ contracts awarded through a single solicitation for specific services:

- (A) Identify the number of consultants that may be selected or contracts that may be awarded from the solicitation; and
- (B) Specify the procedures the contracting agency will use in competing and awarding task or work orders among the selected, qualified consultants. Task or work orders shall not be competed and awarded among the selected, qualified consultants on the basis of costs under on-call or IDIQ contracts for services procured with competitive negotiation procedures. Under competitive negotiation procurement, each specific task or work order shall be awarded to the selected, qualified consultants:

- (1) Through an additional qualifications-based selection procedure, which may include, but does not require, a formal RFP in accordance with § 172.5(a)(1)(ii); or
- (2) On a regional basis whereby the State is divided into regions and consultants are selected to provide on-call or IDIQ services for an assigned region(s) identified within the solicitation.

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(b) **Payment methods**

- (1) The method of payment to the consultant shall be set forth in the original solicitation, contract, and in any contract modification thereto. The methods of payment shall be: Lump sum, cost plus fixed fee, cost per unit of work, or specific rates of compensation. A single contract may contain different payment methods as appropriate for compensation of different elements of work.
- (2) The cost plus a percentage of cost and percentage of construction cost methods of payment shall not be used.

- (3) The lump sum payment method shall only be used when the contracting agency has established the extent, scope, complexity, character, and duration of the work to be required to a degree that fair and reasonable compensation, including a fixed fee, can be determined at the time of negotiation.
- (4) When the method of payment is other than lump sum, the contract shall specify a maximum amount payable which shall not be exceeded unless adjusted by a contract modification.
- (5) The specific rates of compensation payment method provides for reimbursement on the basis of direct labor hours at specified fixed hourly rates, including direct labor costs, indirect costs, and fee or profit, plus any other direct expenses or costs, subject to an agreement maximum amount. This payment method shall only be used when it is not possible at the time of procurement to estimate the extent or duration of the work or to estimate costs with any reasonable degree of accuracy. This specific rates of compensation payment method should be limited to contracts or components of contracts for specialized or support type services where the consultant is not in direct control of the number of hours worked, such as construction engineering and inspection. When using this payment method, the contracting agency shall manage and monitor the consultant's level of effort and classification of employees used to perform the contracted services.(6) A contracting agency may withhold retainage from payments in accordance with prompt pay requirements, as specified in 49 CFR 26.29. When retainage is used, the terms and conditions of the contract shall clearly define agency requirements, including periodic reduction in retention and the conditions for release of retention.

(c) Contract provisions.

- (1) All contracts and subcontracts shall include the following provisions, either by reference or by physical incorporation into the language of each contract or subcontract, as applicable:
 - (i) Administrative, contractual, or legal remedies in instances where consultants violate or breach contract terms and conditions, and provide for such sanctions and penalties as may be appropriate;
 - (ii) Notice of contracting agency requirements and regulations pertaining to reporting;
 - (iii) Contracting agency requirements and regulations pertaining to copyrights and rights in data;
 - (iv) Access by recipient, the sub-recipient, FHWA, the U.S. Department of Transportation's Inspector General, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the consultant which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions;
 - (iv) Retention of all required records for not less than 3 years after the contracting agency makes final payment and all other pending matters are closed;
 - (v) Standard DOT Title VI Assurances (DOT Order 1050.2);
 - (vi) Disadvantaged Business Enterprise (DBE) assurance, as specified in 49 CFR 26.13(b);
 - (vii) Prompt pay requirements, as specified in 49 CFR 26.29;
 - (ix) Determination of allowable costs in accordance with the Federal cost principles;
 - (x) Contracting agency requirements pertaining to consultant errors and omissions;
 - (xi) Contracting agency requirements pertaining to conflicts of interest, as specified in 23 CFR 1.33 and the requirements of this part; and
 - (xii) A provision for termination for cause and termination for convenience by the contracting agency including the manner by which it will be effected and the basis for settlement.
- (2) All contracts and subcontracts exceeding \$100,000 shall contain, either by reference or by physical incorporation into the language of each contract, a provision for lobbying certification and disclosure, as specified in 49 CFR part 20.

d) Contract administration and monitoring

(1) Responsible charge.

A full-time, public employee of the contracting agency qualified to ensure that the work delivered under contract is complete, accurate, and consistent with the terms, conditions, and specifications of the contract shall be in responsible charge of each contract or project. While an independent consultant may be procured to serve in a program or project management support role, as specified in § 172.7(b)(5), or to provide technical assistance in review and acceptance of engineering and design related services performed and products developed by other consultants, the contracting agency shall designate a public employee as being in responsible charge. A public employee may serve in responsible charge of multiple projects and contracting agencies may use multiple public employees to fulfill monitoring responsibilities. The term responsible charge is intended to be applied only in the context defined within this regulation. It may or may not correspond to its usage in State laws regulating the licensure and/or conduct of professional engineers. The public employee's responsibilities shall include:

- (i) Administering inherently governmental activities including, but not limited to, contract negotiation, contract payment, and evaluation of compliance, performance, and quality of services provided by consultant;
- (ii) Being familiar with the contract requirements, scope of services to be performed, and products to be produced by the consultant;
- (iii) Being familiar with the qualifications and responsibilities of the consultant's staff and evaluating any requested changes in key personnel;

- (iv) Scheduling and attending progress and project review meetings, commensurate with the magnitude, complexity, and type of work, to ensure the work is progressing in accordance with established scope of work and schedule milestones;
- (iv) Ensuring consultant costs billed are allowable in accordance with the Federal cost principles and consistent with the contract terms as well as the acceptability and progress of the consultant's work;
- (v) Evaluating and participating in decisions for contract modifications; and
- (vii) Documenting contract monitoring activities and maintaining supporting contract records, as specified in 2 CFR 200.333.

(2) **Performance evaluation.** The contracting agency shall prepare an evaluation summarizing the consultant's performance on a contract. The performance evaluation should include, but not be limited to, an assessment of the timely completion of work, adherence to contract scope and budget, and quality of the work conducted. The contracting agency shall provide the consultant a copy of the performance evaluation and an opportunity to provide written comments to be attached to the evaluation. The contracting agency should prepare additional interim performance evaluations based on the scope, complexity, and size of the contract as a means to provide feedback, foster communication, and achieve desired changes or improvements. Completed performance evaluations should be archived for consideration as an element of past performance in the future evaluation of the consultant to provide similar services.

(e) **Contract modification.**

- (1) Contract modifications are required for any amendments to the terms of the existing contract that change the cost of the contract; significantly change the character, scope, complexity, or duration of the work; or significantly change the conditions under which the work is required to be performed.
- (2) A contract modification shall clearly define and document the changes made to the contract, establish the method of payment for any adjustments in contract costs, and be in compliance with the terms and conditions of the contract and original procurement.
- (3) A contracting agency shall negotiate contract modifications following the same procedures as the negotiation of the original contract.
- (4) A contracting agency may add to a contract only the type of services and work included within the scope of services of the original solicitation from which a qualifications-based selection was made.
- (5) For any additional engineering and design related services outside of the scope of work established in the original request for proposal, a contracting agency shall:
 - (i) Procure the services under a new solicitation;
 - (ii) Perform the work itself using contracting agency staff; or
 - (iii) Use a different, existing contract under which the services would be within the scope of work.
- (6) Overruns in the costs of the work shall not automatically warrant an increase in the fixed fee portion of a cost plus fixed fee reimbursed contract. Permitted changes to the scope of work or duration may warrant consideration for adjustment of the fixed fee portion of cost plus fixed fee or lump sum reimbursed contracts.

§ 172.11 Allowable costs and oversight.

(a) **Allowable costs.**

- (1) Costs or prices based on estimated costs for contracts 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.
- (2) Consultants shall be responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with Federal cost principles.

(b) **Elements of contract costs.**

The following requirements shall apply to the establishment of the specified elements of contract costs:

(1) **Indirect cost rates.**

- (i) Indirect cost rates shall be updated on an annual basis in accordance with the consultant's annual accounting period and in compliance with the Federal cost principles.
- (ii) Contracting agencies shall accept a consultant's or sub-consultant's indirect cost rate(s) established for a 1-year applicable accounting period by a cognizant agency that has:
 - (A) Performed an audit in accordance with generally accepted government auditing standards to test compliance with the requirements of the Federal cost principles and issued an audit report of the consultant's indirect cost rate(s); or

(B) Conducted a review of an audit report and related work papers prepared by a certified public accountant and issued a letter of concurrence with the related audited indirect cost rate(s).

(iii) When the indirect cost rate has not been established by a cognizant agency in accordance with paragraph (b)(1)(ii) of this section, a STA or other recipient shall perform an evaluation of a consultant's or sub-consultant's indirect cost rate prior to acceptance and application of the rate to contracts administered by the recipient or its sub-recipients. The evaluation performed by STAs or other recipients to establish or accept an indirect cost rate shall provide assurance of compliance with the Federal cost principles and may consist of one or more of the following:

- (A) Performing an audit in accordance with generally accepted government auditing standards and issuing an audit report;
- (B) Reviewing and accepting an audit report and related work papers prepared by a certified public accountant or another STA;
- (C) Establishing a provisional indirect cost rate for the specific contract and adjusting contract costs based upon an audited final rate at the completion of the contract; or
- (D) Conducting other evaluations in accordance with a risk-based oversight process as specified in paragraph (c)(2) of this section and within the agency's approved written policies and procedures, as specified in § 172.5(c).

(iv) A lower indirect cost rate may be accepted for use on a contract if submitted voluntarily by a consultant; however, the consultant's offer of a lower indirect cost rate shall not be a condition or qualification to be considered for the work or contract award.

(v) Once accepted in accordance with paragraphs (b)(1)(ii) through (iv) of this section, contracting agencies shall apply such indirect cost rate for the purposes of contract estimation, negotiation, administration, reporting, and contract payment and the indirect cost rate shall not be limited by administrative or defacto ceilings of any kind.

(vi) A consultant's accepted indirect cost rate for its 1-year applicable accounting period shall be applied to contracts; however, once an indirect cost rate is established for a contract, it may be extended beyond the 1-year applicable period, through the duration of the specific contract, provided all concerned parties agree. Agreement to the extension of the 1-year applicable period shall not be a condition or qualification to be considered for the work or contract award.

(vii) **Disputed rates.** If an indirect cost rate established by a cognizant agency in paragraph (b)(1)(ii) of this section is in dispute, the contracting agency does not have to accept the rate. A contracting agency may perform its own audit or other evaluation of the consultant's indirect cost rate for application to the specific contract, until or unless the dispute is resolved. A contracting agency may alternatively negotiate a provisional indirect cost rate for the specific contract and adjust contract costs based upon an audited final rate. Only the consultant and the parties involved in performing the indirect cost audit may dispute the established indirect cost rate. If an error is discovered in the established indirect cost rate, the rate may be disputed by any prospective contracting agency.

(2) **Direct salary or wage rates.**

(i) Compensation for each employee or classification of employee must be reasonable for the work performed in accordance with the Federal cost principles.

(ii) To provide for fair and reasonable compensation, considering the classification, experience, and responsibility of employees necessary to provide the desired engineering and design related services, contracting agencies may establish consultant direct salary or wage rate limitations or "benchmarks" based upon an objective assessment of the reasonableness of proposed rates performed in accordance with the reasonableness provisions of the Federal cost principles.

(iii) When an assessment of reasonableness in accordance with the Federal cost principles has not been performed, contracting agencies shall use and apply the consultant's actual direct salary or wage rates for estimation, negotiation, administration, and payment of contracts and contract modifications.

(3) **Fixed fee.**

(i) The determination of the amount of fixed fee shall consider the scope, complexity, contract duration, degree of risk borne by the consultant, amount of subcontracting, and professional nature of the services as well as the size and type of contract.

(ii) (ii) The establishment of fixed fee shall be contract or task order specific.

(iii) (iii) Fixed fees in excess of 15 percent of the total direct labor and indirect costs of the contract may be justified only when exceptional circumstances exist.

(4) **Other direct costs.** A contracting agency shall use the Federal cost principles in determining the reasonableness, allowability, and allocability of other direct contract costs.

(c) **Oversight**

- (1) **Agency controls.** Contracting agencies shall provide reasonable assurance that consultant costs on contracts reimbursed in whole or in part with FAHP funding are allowable in accordance with the Federal cost principles and consistent with the contract terms considering the contract type and payment method. Contracting agency written policies, procedures, contract documents, and other controls, as specified in §§ 172.5(c) and 172.9 shall address the establishment, acceptance, and administration of contract costs to assure compliance with the Federal cost principles and requirements of this section.
- (2) **Risk-based analysis.** The STAs or other recipient may employ a risk-based oversight process to provide reasonable assurance of consultant compliance with Federal cost principles on FAHP funded contracts administered by the recipient or its subrecipients. If employed, this risk-based oversight process shall be incorporated into STA or other recipient written policies and procedures, as specified in § 172.5(c). In addition to ensuring allowability of direct contract costs, the risk-based oversight process shall address the evaluation and acceptance of consultant and sub-consultant indirect cost rates for application to contracts. A risk-based oversight process shall consist of the following:
- (i) **Risk assessments.** Conducting and documenting an annual assessment of risks of noncompliance with the Federal cost principles per consultant doing business with the agency, considering the following factors:
 - (A) Consultant's contract volume within the State;
 - (B) Number of States in which the consultant operates;
 - (C) Experience of consultant with FAHP contracts;
 - (D) History and professional reputation of consultant;
 - (E) Audit history of consultant;
 - (F) Type and complexity of consultant accounting system;
 - (G) Size (number of employees or annual revenues) of consultant;
 - (H) Relevant experience of certified public accountant performing audit of consultant;
 - (I) Assessment of consultant's internal controls;
 - (J) Changes in consultant organizational structure; and
 - (K) Other factors as appropriate.
 - (ii) **Risk mitigation and evaluation procedures.** Allocating resources, as considered necessary based on the results of the annual risk assessment, to provide reasonable assurance of compliance with the Federal cost principles through application of the following types of risk mitigation and evaluation procedures appropriate to the consultant and circumstances:
 - (A) Audits performed in accordance with generally accepted government audit standards to test compliance with the requirements of the Federal cost principles;
 - (B) Certified public accountant or other STA work paper reviews;
 - (C) Other analytical procedures;
 - (D) Consultant cost certifications in accordance with paragraph (c)(3) of this section; and
 - (E) Consultant and certified public accountant training on the Federal cost principles.
 - (iii) **Documentation.** Maintaining supporting documentation of the risk based analysis procedures performed to support the allowability and acceptance of consultant costs on FAHP funded contracts.
- (3) **Consultant cost certification.**
- (i) Indirect cost rate proposals for the consultant's 1-year applicable accounting period shall not be accepted and no agreement shall be made by a contracting agency to establish final indirect cost rates, unless the costs have been certified by an official of the consultant as being allowable in accordance with the Federal cost principles. The certification requirement shall apply to all indirect cost rate proposals submitted by consultants and sub-consultants for acceptance by a STA or other recipient. Each consultant or sub-consultant is responsible for certification of its own indirect cost rate and may not certify the rate of another firm.
 - (ii) The certifying official shall be an individual executive or financial officer of the consultant's organization at a level no lower than a Vice President or Chief Financial Officer, or equivalent, who has the authority to represent the financial information utilized to establish the indirect cost rate proposal submitted for acceptance. (iii) 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: ■■■■■■■■

(4) **Sanctions and penalties.**

Contracting agency written policies, procedures, and contract documents, as specified in §§ 172.5(c) and 172.9(c), shall address the range of administrative, contractual, or legal remedies that may be assessed in accordance with Federal and State laws and regulations where consultants violate or breach contract terms and conditions. Where consultants knowingly charge unallowable costs to a FAHP funded contract:

- (i) Contracting agencies shall pursue administrative, contractual, or legal remedies and provide for such sanctions and penalties as may be appropriate; and
- (ii) Consultants are subject to suspension and debarment actions as specified in 2 CFR part 1200 and 2 CFR part 180, potential cause of action under the False Claims Act as specified in 32 U.S.C. 3729-3733, and prosecution for making a false statement as specified in 18 U.S.C. 1020.

(d) **Prenotification; confidentiality of data.** FHWA, recipients, and subrecipients of FAHP funds may share audit information in complying with the recipient's or subrecipient's acceptance of a consultant's indirect cost rates pursuant to 23 U.S.C. 112 and this part provided that the consultant is given notice of each use and transfer. Audit information shall not be provided to other consultants or any other government agency not sharing the cost data, or to any firm or government agency for purposes other than complying with the recipient's or subrecipient's acceptance of a consultant's indirect cost rates pursuant to 23 U.S.C. 112 and this part without the written permission of the affected consultants. If prohibited by law, such cost and rate data shall not be disclosed under any circumstance; however, should a release be required by law or court order, such release shall make note of the confidential nature of the data.

