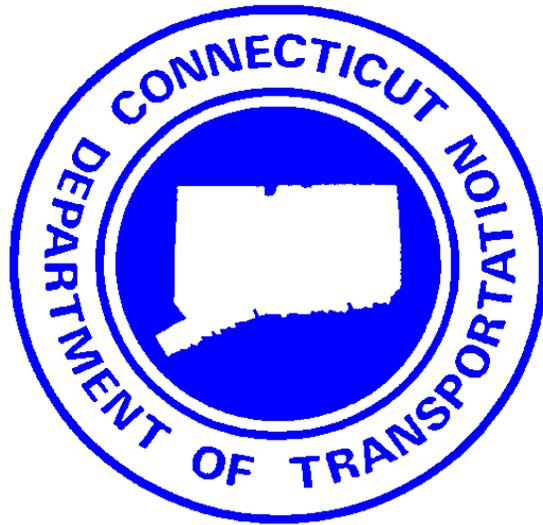


Connecticut Department of Transportation



CONSULTANT SELECTION OFFICE PROCEDURES MANUAL

Prepared By:

**Consultant Selection Office
Office of the Commissioner**

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A. CONSULTANT SELECTION OFFICE OVERVIEW

Consultant Selection Office Function

The Consultant Selection Office (CSO) is a unit of the Office of the Commissioner. It is responsible for the administration and execution of all procedures necessary for the selection of professional consultants utilized by the Connecticut Department of Transportation (Department). It shall provide guidance to Department staff in all procedures in retaining professional service consultants; provide the Selection Panels and the Commissioner with all information necessary to perform their duties in accordance with all relevant State statutes, federal regulations, and Department policy and procedures; and act as a liaison for the Department with the consulting firms.

The process for obtaining professional consulting services for the Department is performed in accordance with Sections 13b-20b through 13b-20k of the Connecticut General Statutes (CGS) and all applicable federal laws, regulations and policies. This process is intended to permit the Department to select the most highly qualified consultant and award contracts for various professional services on an impartial, equitable and rational basis.

Professional Consultant Services

CGS Section 13b-20b defines consultant services as:

- Professional services rendered by architects, professional engineers, landscape architects, land surveyors, accountants, planners or environmental, management or financial specialists, as well as incidental services that members of such professions and those in their employ are authorized to perform.

Federal law: 40 USC §1102 defines architectural and engineering services as:

- Professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
- Other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

NOTE: If the services required are not covered by the definitions above, the consultant selection process contained in this manual does not apply.

Federal Compliance

This process is in compliance with the following federal laws and regulations:

- Federal Law 40 USC 1101 through 1104 (Brooks Act);
- Federal Law 23 UCS 112; and
- Federal Regulation 23 CFR 172

and as such, ensures that the Department advertises for professional consultant services; reviews and ranks the responses received; and selects consultants based on demonstrated competence and qualifications for the type of engineering and design related services being procured, where cost is not a part of the selection process, consistent with the Quality Based Selection requirements as stipulated in the federal regulations, laws, and policies. Any modifications to this document must be coordinated through the Federal Highway Administration.

Consultant Services in a Management Role: When federal funds are to be utilized in a contract that requires consultant services in a 'Management Role' the Originating Unit shall obtain approval from the FHWA Connecticut District Office and provide this to the CSO. For the purposes of this requirement, a consultant in a 'Management Role' shall mean any consultant who will perform management services such as program or project administration roles typically performed by the Department (such as various Consultant Liaison Service Contracts or Program Management). FHWA approval is required prior to submitting the Permission to Retain Consultant request to the Commissioner.

Consultant Services on a Major Project: When federal funds are to be utilized in a contract that requires consultant services for a project that is expected to fall under 23 USC 106(h) (i.e., *a project whose total cost for all phases is equal to or greater than \$500M*), the Originating Unit shall obtain approval from the FHWA Connecticut District Office and provide this to the CSO. FHWA approval is required prior to submitting the Permission to Retain Consultant request to the Commissioner.

B. OPERATIONAL GUIDELINES

The following internal Operational Guidelines have been developed to ensure the integrity of the selection process, and to define the duties and responsibilities of the Selection Panels and the various Bureaus of the Department. It is incumbent upon all Bureaus of the Department to institute appropriate measures as outlined herein that will satisfy our obligations in the hiring of consultants.

Consultant Selection Office

The Commissioner may designate staff as necessary to coordinate and administer the policy and procedures of this program. This staff shall be known as the Consultant Selection Office (CSO).

The staff of the CSO will act as the administrative liaison between the Commissioner and the "Consultant Services Evaluation and Selection Panels" (Selection Panels); coordinate panel activities; review schedules; act as liaison for the Department with consulting firms; and provide the Selection Panels with all the support necessary to promote integrity, equity, and quality in the selection of consultants required by the Department.

The CSO shall review and approve all professional consultant solicitations, rating forms, and notification letters. They shall also be responsible for the coordination of the consultant prequalification process, compilation of consultant past performance evaluations, volume of work information and data, debriefings, and records retention which includes all pertinent information on each Selection Panel's reviews. The CSO exclusively is responsible for discussing any aspect of the selection process with an interested consultant before, during, or after the selection process.

Consultant Services Evaluation and Selection Panels

In accordance with CGS Section 13b-20c, one or more Selection Panels shall be established within the Department to evaluate, interview, and furnish to the Commissioner a list of most qualified consulting firms for each anticipated contract for professional services. The Selection Panel shall be comprised of a minimum of four (4) individuals from within the Department for each selection.

The Commissioner shall appoint individuals from within the Department to serve as either a chairperson or as panel members for the Selection Panels. Each Selection Panel shall be comprised of a chairperson, two (2) panel members whose experience is applicable to the type, nature, and complexities of the assignment for which a consultant is required; and one (1)

individual who is appointed by the Bureau Chief of the Bureau for which the specific project is being performed, subject to the approval of the Commissioner. A fifth (5th) individual may be appointed by the Bureau Chief of any other Bureau if such other Bureau is requesting the specific consultant services and will be responsible for the administration of the consultant contract, also subject to the approval of the Commissioner.

A Selection Panel shall be involved with all proposed consultant selections for professional services except in those situations where the Commissioner deems it necessary to hire consultants under emergency procedures.

The Selection Panels shall report directly to the Commissioner through the CSO. Panel members shall be released from their normal Bureau assignments on an as-needed basis to fulfill their Selection Panel obligations.

Code of Ethics

All members of the Department, including the Selection Panels (both permanent and non-permanent members) and any Department personnel working with or for the Selection Panel shall scrupulously comply with both the letter and the spirit of the Department's Code of Ethics Policy (Policy No. F&A-10 and F&A-10A) and the Code of Ethics provisions contained in the CGS (Chapter 10, Section 1-79 through 1-89.).

Equal Employment Opportunity

It is the policy of the Department to ensure that no person is excluded from participation in, or denied the benefits of, or otherwise subject to discrimination under any contract, agreement, arrangement, program or activity, participated in, funded or sponsored by the Department, on the grounds of age, ancestry, color, genetic information, learning disability, marital status, mental disability (past or present), intellectual disability, national origin, physical disability, race, religious creed, sex, including pregnancy, sexual harassment, gender identity or expression, sexual orientation, criminal record (in state employment or licensing) or previously opposed discrimination unless provisions of Connecticut General Statutes 46a-60(b), 46a-80(b), or 46a-81(b) are controlling or there is a bona fide occupational qualification excluding individuals. In the conduct of its work, the Selection Panel shall adhere to policies contained in the Equal Opportunity provisions in both Federal Regulations and CGS.

C. CONSULTANT SELECTION OFFICE RESPONSIBILITIES

Prequalification

In accordance with CGS Section 13b-20e, every year the CSO shall administer all procedures to implement the prequalification program. A legal notice shall be published during the month of September in various newspapers (or their websites) with a statewide circulation and national trade publications indicating the various categories of expertise likely to be needed by the Department during the next calendar year. Interested firms must submit their qualifications on the required forms and in the required format by November 15th of every year in order to be eligible for projects in those specific categories for the following year. Any expertise required during the year that was not included in the prequalification shall be advertised separately in accordance with CGS Section 13b-20g.

The Department utilizes a two-year cycle, wherein applications for prequalification in even calendar years (2018, 2020, etc.), are full applications with all the necessary supporting materials. In the second year of the cycle (prequalification for odd calendar years – 2017, 2019, etc.), firms who were prequalified for any categories the previous year will be able to submit a reduced application for those categories. Regardless of calendar year, the Department will accept prequalification applications from new firms or from firms who are requesting additional categories.

The Department will analyze all submittals postmarked by the November 15th deadline and, by January 1st, determine which consultants are qualified to perform the services in each category identified by the Department.

The Commissioner shall appoint a Technical Qualifications Panel (typically the Chief Engineer, Engineering Administrator, and the Construction Administrator), by Administrative Memorandum, to review and analyze the consultant prequalification submittals. Prior to January 1st, the Technical Qualifications Panel shall notify the Commissioner of which consultants they recommend as qualified to perform services in the areas of expertise indicated in the legal notice. All submittals shall be retained by the CSO in accordance with record retention and may be referred to by a Selection Panel at any time during a particular selection process.

All consultants shall be notified by mail, from the Technical Qualifications Panel Chairperson, of the approval or rejection of their prequalification request. Any consultant that is rejected may appeal the decision to the Technical Qualification Panel within the time frame indicated in the notification (normally fourteen (14) days).

Selection Process of Consultants for Professional Services

The following process applies when the Department is hiring consultants for professional consultant services as defined in the CGS Sections 13b-20b (b) and (c). These guidelines do not include consultants as defined in:

- a) OPM Statutes Sections 4-205 through 4-211;
- b) DAS Statutes Sections 4a-50 through 4a-60a; and
- c) DPW Statutes Sections 4b-55 through 4b-59.

Municipal administered projects, as overseen by the Department's Local Roads Unit, shall utilize the procedures depicted in the Department's 'Consultant Selection, Negotiation and Contract Monitoring Procedures for Municipal Administered Projects' manual.

i. Permission to Retain Consultants

Any bureau desiring to engage the professional services of a consultant shall obtain prior approval of the Commissioner for such action. A memorandum from the Bureau Chief to the Commissioner requesting the retention of a consulting firm(s) must contain: a description of the project; a scope of services (as extensive as possible); the reason for soliciting outside services; a project cost estimate and funding source; the designated Bureau Representative to serve on the Selection Panel; the established DBE goal or SBE set-aside requirement (as established by the DBE Committee); a cost evaluation determination from the Bureau of Finance and Administration; and the anticipated prequalification category(ies) that should be utilized. However, if a legal notice is necessary due to specialized professional service needs, this must be noted in lieu of the prequalification categories. Whenever feasible, the originating unit will consolidate similar projects for a single solicitation thus enabling a Selection Panel to perform multiple, simultaneous reviews and reduce a duplication of effort. The Bureau must also include the proposed Consultant Solicitation Letter (or Legal Notice if required) and the proposed Submittal Evaluation Rating Form (both marked as drafts). Contact the Consultant Selection Office to obtain the latest versions of these documents.

The CSO will help the Originating Unit refine the Solicitation Letter and Rating Form. In the case of a solicitation for specialized services that will be advertised by legal notice, the CSO will provide a reduced version for publication that will refer all interested firms to the Department's website for the full-length solicitation.

The Consultant Solicitation Letter (or Legal Notice) must describe: the Department's need; the general scope of the assignment; the experience and expertise required; evaluation criteria and their weighted scoring value; the anticipated contract type and payment method; the DBE/SBE requirement; the submittal due date (which shall be a minimum of fourteen (14) days from the proposed publication date); an estimated schedule for the completions of the selection process;

and any other pertinent information including the expected duration of the assignment and/or anticipated start date.

The Submittal Evaluation Rating Form shall reflect the exact evaluation criteria as stated in the Consultant Solicitation Letter.

Once the Permission to Retain Consultant memorandum is signed by the Bureau Chief, the entire package — consisting of the signed Permission to Retain Consultant, Consultant Solicitation Letter, and the Submittal Evaluation Rating Form— shall be forwarded to the CSO for review. After the CSO has reviewed and signed off, the package shall be forwarded to the Commissioner for approval.

Once the Commissioner has signed off on the Permission to Retain Consultant memorandum, the CSO will return the original signed copy to the originating unit along with any comments on the draft solicitation and Rating Form. The CSO will prepare the distribution copies of the Permission to Retain Consultant memorandum.

ii. Solicitation and Advertisement Procedures

Once the Bureau receives the Commissioner's approval to engage the services of a consultant, the Bureau's originating unit shall finalize the solicitation letter and Rating Form in accordance with the input provided by the CSO. The originating unit shall email the final draft of the solicitation and Rating Form to the CSO for final approval prior to mailing or publishing the notice and shall indicate to the CSO when the solicitation will be mailed or published. The due date for submittals shall be a minimum of fourteen (14) days from the mailing date or latest publication date, however three (3) to four (4) weeks is recommended. The originating unit shall also gather a complete copy of material an interested consultant may want to review prior to submitting for the particular assignment. This information shall be provided to the CSO in a digital format, such that the files can be uploaded to the CSO website for inspection by interested consultant firms. When not possible to digitize/upload the information, the Originating Unit shall provide the CSO with a hard copy of items that will be available for review by interested firms. The CSO will provide notification on the CSO website indicating the availability of hard copy review material. Firms will be required to contact the CSO to coordinate a review time.

If a prequalified list is not available, a legal notice shall be published by the Bureau in accordance with Section 13b-20e (c) and Section 13b-20g of the CGS. The Bureau shall publish the reduced version of the legal notice, as provided by the CSO, a minimum of one day in a newspaper, or its website, that reaches every county in Connecticut (such as the Hartford Courant) and in a national trade publication, or its website, that is applicable to the services being advertised.

The CSO will post all solicitations on the Department of Transportation's website as well as the Department of Administrative Services website.

iii. Consultant Responses

Responses to the Department's solicitation for professional services must be submitted on the CSO 255 Form and be received by the CSO by the assigned due date and time. Late submissions will not be reviewed and will not be considered eligible for the assignment. Additionally, submissions from a non-prequalified firm (when prequalification list was used), or submissions which do not meet the requirements stated in the solicitation letter, will not be considered eligible for the assignment.

The CSO will compile the past performance evaluations of the responding firms. These evaluations will be forwarded with the submittals along with all other information on file relative to the assignment to the Chairperson for distribution to the Panel to be reviewed and scored.

The Selection Panel shall be responsible for the evaluation of all properly submitted consultant submittals utilizing uniform criteria appropriate to the nature of the proposed services. The evaluation and selection process shall be in full compliance with Section 13b-20h thru Section 13b-20j of the CGS and all applicable federal regulations.

The Selection Panel reserves the right to contact outside sources familiar with the consultant's work for additional input and references, especially in the case of firms without a performance evaluation rating in the activity being considered for assignment.

In the case of only one firm submitting for an assignment, the panel shall review the submittal for the appropriate qualifications and experience as requested in the Solicitation Letter and shall forward their score to the CSO to be compiled with a report for the Commissioner to either award the assignment, or request State forces to undertake it, or pursue other options to obtain the necessary services.

The Chairperson is responsible to resolve any outstanding Panel issues or concerns and, if necessary, request assistance from the CSO. The Chairperson may also request information from other sources as necessary to enable an evaluation of the consultant submittals in accordance with all relevant State statutes, federal regulations, and Department policy and procedures.

The Selection Panel shall perform its duties in a timely manner and shall act on requests for consultant services in order of Departmental priority as established by the Commissioner.

iv. Shortlist

Once the consultant submittals have been reviewed and scored by the panel members, the Chairperson shall forward all of the individual scorings and overall rankings to the CSO. The Chairperson shall also establish a date, time, location, and format for the interviews and submit this information to the CSO as well.

The CSO will forward the panels rating information, recent selection, and volume criteria (see below) to the Commissioner for approval of a shortlist of firms to be interviewed. Upon Commissioner approval, the CSO will notify those firms who were shortlisted as to the interview date. If a firm has submitted for multiple assignments, the CSO will inform those firms of the circumstances of their particular situation and how selection for one assignment may affect their eligibility for a later assignment. Firms who are not shortlisted will be notified at this time by the CSO. It is the responsibility of the prime consultant to notify their sub-consultants of the results. The CSO will only provide information to firms who are prime consultants. Shortlisted firms will be interviewed by the Selection Panel who reviewed the initial submittals. If a low number of firms respond to a solicitation, the Commissioner may forego rating the consultant responses and shortlist all firms. It should be noted that the targeted number of firms to be shortlisted, is four plus the number of firms required.

a. Volume and Recent Selection Guidelines

The Commissioner shall be guided by the objective criteria as specified in the CGS Section 13b-20i for selection of consultants. In order to distribute work amongst qualified firms as much as possible, the Commissioner will evaluate a firm's volume of work and selection history when approving the shortlist for an assignment. The Commissioner will typically approve the panel's shortlist recommendation of the top ranked firms unless a firm has over 5% volume of the Department's consultant work, or has been selected for a previous assignment within the last six (6) months. In this case, the Commissioner will utilize discretion to achieve the goal of distributing the work amongst the most highly qualified firms. Firms which are found to have over 5% volume or a recent selection within six (6) months may not be shortlisted. The volume percentage is determined by calculating the firm's total contracted amount over the past three (3) years with the Department, in relation to the total amount of contracted work performed by the Department over the same period of time. The number of firms which submitted proposals, scope of assignment, and nature of the assignment, will guide the Commissioner as to whether it is prudent to waive these guidelines. All determinations shall be documented and kept on file in the CSO.

b. Recent Selection Determination: The six (6) month window begins from the date of when the Commissioner selected the firm, to the interview date of the next assignment being pursued. Assignments which are advertised via Legal Notice are exempt from recent selection criteria, and will not be counted toward this provision.

c. Volume Determination (Fiscal Records): In accordance with CGS Section 13b-20i (4), the Bureau of Finance and Administration will be responsible for assembling and updating the most recent three (3) year volume of work. This will include: the total dollar amount of contracted

work for each firm over the last three years; the volume percentage for each firm; and the projects involved. This information shall be made available to the CSO upon request.

v. Interview

The shortlisted consultant firms are notified of the time, place, and format for the interviews at least two (2) weeks prior to the interview. The interview format will be uniform for all consulting firms interviewing for a particular assignment; however the interview format may vary from one selection assignment to another. The interview format is determined by the Selection Panel Chairperson and the bureau representative, in coordination with the CSO. The Panel Chairperson will conduct each interview to ensure each firm is given equal time to demonstrate their experience, qualifications, and ability to perform the assignment. Panel Members will give an independent, numerical rating to each firm.

vi. Selection

After the interviews, the Panel Chairperson shall prepare a memorandum indicating how the evaluation criteria was applied to determine the most appropriately qualified firms, and forward this with all of the individual ratings and overall rank order of firms to the CSO. The CSO shall compile this information for the Commissioner to make a selection(s). All submittals and documents distributed throughout the process must also be turned over to the CSO for the Commissioner's review and to be filed in accordance with record retention. In addition to the information provided by the Selection Panel, the CSO shall furnish all the background data on the finalists for review by the Commissioner. The Commissioner may request additional information from other sources or individuals that he may deem appropriate to assist him in the final selection process. The Commissioner shall make the final selection from the list of firms submitted by the Selection Panel, and guided by the criteria set forth in CGS Sec. 13b-20i. After the Commissioner has made his selection, the names of the consultant firms who submitted for the assignment shall be available to the public upon request. The Commissioner shall also prepare a memorandum of the final phase of the selection process, indicating how he applied the evaluation criteria to determine the most qualified firm. This memorandum shall be available for public inspection after execution of the negotiated agreement with the selected consultant.

vii. Notification Responsibilities

Upon selection by the Commissioner, the CSO will notify all firms of the selection results via email. The Bureau Chief who will administer the contract shall follow with an official letter which will notify the successful consultant firm(s) of their selection. The Bureau shall also send an official notification to all other consulting firms who were interviewed informing them that they were not selected. Copies of all notifications shall be forwarded to the CSO. Arrangements shall begin for the assignment meetings and negotiations by the Bureau Representative and the Negotiations Committee.

viii. Debriefings

Members of a Selection Panel (as well as Bureau Representatives) shall not discuss any aspect of the Consultant Selection Process with a consultant prior to, during, or upon conclusion of the selection process. The CSO exclusively is responsible for discussing all aspects of the selection process with an interested consultant during or after the selection process. All Rating Forms prepared by the Panel Members are considered strictly confidential by the Department until execution of the negotiated agreement with the selected firm(s); however, firms wishing to discuss, in general terms, their initial proposals or their interview presentation may request feedback from the CSO. Panel members are not allowed to meet or discuss their evaluations with any consultant firm or Department personnel, other than the Commissioner, Deputy Commissioner or the CSO.

ix. Staff Revisions during the Selection Process

After the submittal of a proposal, the Department acknowledges that there are times where substitutions for key individuals are required due to change in employment, unanticipated work load shifts, or schedule changes. If during the selection process, change of a proposed key individual is required, the firm should notify the CSO and the following action should be taken:

1. If a consultant notifies the CSO prior to the completion of scoring the proposals, the consultant may submit the resume of the person who would be replacing the key individual, as well as an updated organizational chart. The Selection Panel will score using the new key individual. For this case, a team member is considered a key individual if they are listed in Section A of the CSO 255 form.
2. If a consultant notifies the CSO of a key individual change after the firm has been shortlisted, but prior to an interview, the consultant may submit the resume of the person who will replace the key individual as well as an updated organizational chart. The Selection Panel must then determine if the new person would affect the shortlist results. If there is no affect, the firm will continue on to the interview. If there is an affect, the selection panel will re-score the firm and revise the recommended shortlisted.

For this case, a team member is considered a key individual if they are listed in Section A of the CSO 255 form.

3. After the selection process is complete, the selected firm is required to provide staff who are acceptable to the Department. Revisions to staff are at the discretion of the Department. The consultant may be dismissed, and the assignment awarded to the next highest ranked firm, if the consultant fails to provide acceptable staff, after the selection process is complete.
4. Firms who are found to consistently propose personnel who are not available may be subject to temporary loss of their prequalification status.

Consultant Performance Evaluations

In accordance with CGS Section 13b-20f, the performance of all consultants who have active agreements with the Department shall be evaluated by the supervising unit within the Bureau utilizing a consultant service at six-month intervals and at the completion of each project. For projects less than six months in duration, at least one performance evaluation shall be prepared. If multiple projects are being completed under one contract, the supervising unit shall summarize the consultant's performance of all projects into one evaluation for that contract.

Performance evaluations shall be completed in such format and on such forms as developed by the Department specifically for the purposes of this evaluation. The completed and approved evaluation(s) shall be sent from the supervising unit to the project consultant. A copy will be kept in the supervising unit, and a copy will be forwarded to the CSO prior to January 31 and July 31 of each year. The originating Bureau, exclusively, will be responsible for discussing these performance evaluations with the firms if clarification or corrections are required.

The Selection Panels shall consider this data in the selection process when firms are pursuing a new assignment. The Selection Panel reserves the right to contact outside sources familiar with the consultant's work for additional input and references, especially in the case of firms without a performance evaluation rating in the activity being considered for assignment.

Maintenance and Protection of Records

Submittals of consultants selected for interview, and all non-finalists submittals received by the Department and processed by the Selection Panel, shall be returned to the CSO. All materials shall be retained in accordance with the approved Records Retention Schedule.

APPENDIX

NOTICE CONCERNING SUBCONSULTANT and PART-TIME PERSONNEL'S PRESENCE at INTERVIEWS

The Department policy regarding exclusive sub-consultants, and part-time personnel, eligibility to participate in an interview is as follows:

1. The sub-consultant (and/or part-time personnel) must be exclusive to the firm (ie. No other firm being interviewed has listed that sub-consultant as a member of their team); and
2. The sub-consultant (and/or part-time personnel) is undertaking a significant and/or specialized element of the project; and
3. A request for approval to allow the sub-consultant to attend the interview is made to the Consultant Selection Office (CSO) a minimum of five (5) calendar days in advance of the interview date, and the CSO has confirmed that the sub-consultant is exclusive to your team. The request should state the sub-consultant firm name and their anticipated role on the assignment. Names of the individuals from the sub-consultant, who will participate in the interview, are not required. Requests can be made via email to David.Mancini@ct.gov.

Non-exclusive sub-consultants (and/or part-time personnel) may be available at the interview site, outside the interview room. If a question is asked which is specific to the anticipated role of the non-exclusive sub-consultant, they will be allowed to enter the interview room and respond to that question. Upon finishing their answer, the non-exclusive sub-consultant must leave the room. If the same non-exclusive sub-consultant is used by another firm to respond to the same interview question, the scoring of both firms for that particular question will be at the discretion of the Selection Panel.

At the beginning of the interview, you must provide the Chairperson with a list of persons present in the room for the interview and persons available outside the room that may be called upon.

Thank you for your cooperation. Please contact the Consultant Selection Office if you have any questions.

Consultant Selection Office
Phone: (860) 594-3017
fax: (860) 594-3491

Connecticut Department of Transportation

Consultant Selection State Statutes that Govern the Process

Title 13b: Chapter 242

Sec. 13b-20a. Regulations re hiring of consultants. Section 13b-20a is repealed.

(P.A. 79-53; P.A. 83-521, S. 12, 13.)

Sec. 13b-20b. Definitions. As used in sections 13b-20b to 13b-20k, inclusive:

(a) “Commissioner” means the Commissioner of Transportation;

(b) “Consultant” means any architect, professional engineer, landscape architect, land surveyor or accountant who is registered or licensed to practice his profession in accordance with the applicable provisions of the general statutes, any planner or any environmental, management or financial specialist;

(c) “Consultant services” includes those professional services rendered by architects, professional engineers, landscape architects, land surveyors, accountants, planners or environmental, management or financial specialists, as well as incidental services that members of such professions and those in their employ are authorized to perform;

(d) “Firm” means any individual, partnership, corporation, joint venture, association or other legal entity authorized by law to practice the profession of architecture, landscape architecture, engineering, land surveying, accounting, planning or environmental, management or financial specialization;

(e) “Selection panel” means the evaluation and selection panel established under section 13b-20c; and

(f) “Negotiation committee” means the committee established under section 13b-20d.

(P.A. 83-521, S. 1, 13; P.A. 84-546, S. 36, 173.)

History: P.A. 84-546 made technical changes in definition of “consultant”; (Revisor’s note: In 1999 a reference to Sec. 13b-20l was changed editorially by the Revisors to Sec. 13b-20k, since section 13b-20l was repealed by P.A. 98-182).

Sec. 13b-20c. Consultant services evaluation and selection panels. There is established within the Department of Transportation one or more consultant services evaluation and selection panels which shall consist of the following persons from within the department: (1) Three individuals appointed by the commissioner; (2) one individual appointed by the bureau head of the bureau for which the specific project is being performed, subject to the approval of the commissioner; and (3) one individual appointed by the bureau head of any other bureau if such other bureau is requesting the specific consultant services and if such bureau will be responsible for the administration of the consultant contract, subject to the approval of the commissioner.

(P.A. 83-521, S. 2, 13; P.A. 85-613, S. 149, 154; P.A. 91-124, S. 4.)

History: P.A. 85-613 made technical changes, authorizing multiple panels where previously a single panel was mentioned and deleting references to “modal” bureaus; P.A. 91-124 deleted the provision requiring that appointees of the commissioner on the selection panels serve for a one-year term.

Sec. 13b-20d. Negotiation committees. There shall be within the Department of Transportation one or more negotiation committees each of which shall consist of three individuals, appointed by the commissioner from within the department, none of whom shall be members of a selection panel.

(P.A. 83-521, S. 3, 13; July Sp. Sess. P.A. 85-1, S. 12, 15.)

History: July Sp. Sess. P.A. 85-1 authorized multiple committees where previously a single committee was mentioned.

Sec. 13b-20e. Prequalification of consultants. Letters of interest for provision of consultant services. (a) Any consultant who desires to provide consulting services to the department in any calendar year shall be required to submit, not later than the fifteenth day of November immediately preceding such calendar year, information

concerning their qualifications as may be required by the department. Such consultants shall provide the department with additional or updated information upon request by the department. The commissioner shall by January first, annually, analyze the information submitted and determine those consultants qualified to perform services in areas of expertise established by the department. The commissioner shall publish annually, in accordance with the provisions of section 13b-20g, at any time between September first to October first, a notice that any person, firm or corporation which desires to be listed with the department as a consultant shall submit such information as required pursuant to this subsection to the department. Such notice shall also list the areas of expertise likely to be needed by the department during the next calendar year.

(b) Except as provided in subsection (c) of this section, any consultant, who has not submitted his qualifications to the department, pursuant to subsection (a) of this section, shall not be eligible to perform consultant services for the department. Any prequalified consultant, who has submitted his qualifications to the department, pursuant to subsection (a) of this section, who desires to provide consultant services to the department in response to a notice published in accordance with the provisions of section 13b-20g shall submit only a letter of interest to that effect.

(c) If the prequalified list contains less than five consulting firms or does not include a consultant with a particular expertise required by the department, any consultant may submit a letter of interest to the department in response to a notice published, in accordance with the provisions of section 13b-20g. The letter of interest shall set forth the consultant's qualifications for performing the specific service sought by the department. The selection panel shall then develop a qualified list of consultants in accordance with sections 13b-20i and 13b-20j.

(P.A. 83-521, S. 4, 13; P.A. 89-152, S. 1; P.A. 91-124, S. 5.)

History: P.A. 89-152 inserted new Subsec. (a) re process for prequalification of consultants and designated former provisions as Subsec. (b); P.A. 91-124 in Subsec. (a) changed the submittal date from November thirtieth to the fifteenth and deleted the provision requiring consultants moving into the state or expanding their services to submit information to the department, in Subsec. (b) added language making prequalification mandatory for those consultants desiring to provide services to the department and added a new Subsec. (c) establishing procedures for the department to obtain consultant when the prequalification list does not contain a consultant with the necessary expertise or when the list contains less than five consultants.

Sec. 13b-20f. Evaluation of consultants having active agreements with department. The performance of all consultants who have active agreements with the department shall be evaluated by the supervising unit within the bureau utilizing the consultant services, at six-month intervals and upon completion of the consultant services. Each such evaluation shall be kept on file in the supervising unit and a copy filed with the permanent selection panel.

(P.A. 83-521, S. 5, 13.)

Sec. 13b-20g. Notice of need for consultants. Responses. Whenever there is a need to engage a consultant, the commissioner shall publish a notice in appropriate professional magazines, professional newsletters and newspapers indicating the general scope of the assignment and requesting responses in accordance with subsection (b) of section 13b-20e, and at least once in one or more newspapers having a circulation in each county of the state. Responses shall be received at the Department of Transportation not later than fourteen days after the last date on which the notice is published, unless additional time is specifically authorized by the commissioner, or not later than any specific date set forth in such notice. For certain specialized projects the notice may also solicit a full work proposal in addition to the technical qualifications of a firm.

(P.A. 83-521, S. 6, 13; P.A. 89-152, S. 2.)

History: P.A. 89-152 made technical change.

Sec. 13b-20h. Selection panel. Responsibilities. Meetings. (a) A selection panel shall be responsible for the preparation of the evaluation of interested consultants and for the development of a list of prospective consultants for each specific project.

(b) Meetings of a selection panel may be called any time during normal working hours. All motions and decisions shall require for passage the affirmative vote of at least three of the members.

(c) A selection panel shall screen all responses submitted in proper form for a project and shall select five consultant firms for further consideration for appointment and award of a contract. If fewer than five responses are received, all

responses shall be considered as eligible for further consideration.

(P.A. 83-521, S. 7, 13; P.A. 85-613, S. 150, 154; P.A. 89-152, S. 3; P.A. 91-124, S. 6.)

History: P.A. 85-613 made technical changes; P.A. 89-152 made technical change; P.A. 91-124 in Subsec. © changed the number of firms the department shall interview for a project from seven to five.

Sec. 13b-20i. Criteria for selection of consultants. In making the initial review of responses and in all other steps of the selection process, the commissioner and the selection panel shall be guided by the following objective criteria:

- (1) Specialized design and technical competence of the consultant firm regarding the types of service required;
- (2) Capacity and capability of the firm to perform the work, including any specialized services, within the time limitations;
- (3) Past record of performance on contracts with the state and other clients with respect to such factors as control of costs, quality of work, conformance with program and cooperation with client;
- (4) The volume of work performed by the firm within the previous three years for the Department of Transportation and the volume of work to be completed by such firm, if any, with the objective of effecting an equitable distribution of contracts among qualified firms and of assuring that the interest of the public in having available a substantial number of qualified firms is protected, provided, the principle of selection of the most highly qualified firms is not violated; and
- (5) Where a full work proposal process is utilized, the degree to which the consultant's proposal satisfies the requirements of the department.

(P.A. 83-521, S. 8, 13; P.A. 89-152, S. 4.)

History: P.A. 89-152 added provision in Subdiv. (4) re providing department with information re work to be completed by firm for the department.

Sec. 13b-20j. Procedure for selection of consultants. Memorandum re application of evaluation criteria. (a) A selection panel shall conduct interviews with the five consultant firms selected, or if fewer than five responses are received, the panel shall conduct interviews with all such firms and present the names of all the consultant firms responding to the commissioner.

(b) A selection panel shall proceed to furnish a list of the most qualified consultant firms to the commissioner, or the names of all the consultant firms responding if fewer than five respond. A panel shall prepare a memorandum of the selection process, indicating how the evaluation criteria were applied to determine the most qualified firms, which shall be available to the public after execution of the contract with the selected consultant. The commissioner shall select a consultant from among the list of firms submitted by a selection panel. After the commissioner has made his selection, the names of the consultant firms submitted to the commissioner shall be available to the public upon request. The commissioner shall also prepare a memorandum of the final phase of the selection process, indicating how he applied the evaluation criteria to determine the most qualified firm. Such memorandum shall be available to the public after execution of the contract with the selected consultant.

(P.A. 83-521, S. 9, 13; P.A. 85-613, S. 151, 154; P.A. 91-124, S. 7.)

History: P.A. 85-613 made technical changes; P.A. 91-124 in Subsecs. (a) and (b) changed the number of firms the department shall interview for a project from seven to five.

Sec. 13b-20k. Negotiations with selected consultants. Memorandum re negotiations. (a) Upon notification by the commissioner of his selection, the bureau head who will administer the contract shall notify the consultant of his selection. The selected firm shall be audited if necessary prior to negotiations and also during the contract life in accordance with federal statutes, the general statutes and regulations adopted pursuant to such statutes. A member of the negotiation committee shall be present at all such audit meetings.

(b) The selected consultant shall send its fee proposal to the negotiation committee. The appropriate bureau of the department shall prepare a comparative fee proposal that shall also be submitted to a negotiation committee. The committee shall complete negotiations and submit appropriate data to the initiating bureau for the purpose of processing an agreement.

(c) Prior to a contract being executed, the selected consultant shall execute a certificate stating that wage rates and other factual unit costs supporting the compensation are accurate, complete and current at the time of contracting and the consultant firm shall provide to the bureau responsible for administering the project a list of individuals who are expected to contribute to the project.

(d) Any such contract shall contain a provision that the original contract price and any additions thereto shall be adjusted to exclude any significant sums by which the commissioner determines the contract price was increased due to inaccurate, incomplete or noncurrent wage rates and other factual unit costs. All such contract adjustments shall be made within one year following the end of the contract.

(e) If the negotiation committee is unable to negotiate a satisfactory contract with the firm selected by the commissioner, at a price the committee determines to be fair, competitive and reasonable, negotiations with that firm shall be formally terminated. The commissioner shall select a consultant from the remaining firms on the list submitted by the selection panel and the procedure established under this section shall be followed.

(f) Should the negotiation committee be unable to negotiate a satisfactory contract with any of the firms selected by the panel, the panel shall select additional firms and the procedures established under section 13b-20j and this section shall be followed.

(g) After award of a contract under sections 13b-20b to 13b-20k, inclusive, the negotiation committee shall prepare a memorandum setting forth the principal elements of the negotiations with each firm. Such memorandum shall contain sufficient detail to reflect the significant considerations controlling price and other terms of the contract. The memorandum shall be available to the public upon request.

(P.A. 83-521, S. 10, 13; P.A. 85-613, S. 152, 154.)

History: P.A. 85-613 made technical change; (Revisor's note: In 1999 a reference to Sec. 13b-20l in Subsec. (g) was changed editorially by the Revisors to Sec. 13b-20k, since section 13b-20l was repealed by P.A. 98-182).

Sec. 13b-20l. Regulations re selection of consultants. Section 13b-20l is repealed, effective July 1, 1998.

(P.A. 83-521, S. 11, 13; P.A. 98-182, S. 21, 22.)

Sec. 13b-20m. Guidelines for determining reasonableness of consultant services. In order to promote engineering and design quality and ensure maximum competition by firms providing consultant services, as defined in section 13b-20b, the Secretary of the Office of Policy and Management, in consultation with the Commissioner of Transportation, shall establish guidelines for determining the reasonableness and allowability of various cost factors which shall include, but not be limited to, salary limits, benefits and expense reimbursement.

(P.A. 96-222, S. 24, 41.)

History: P.A. 96-222 effective June 4, 1996.

Connecticut Code of Ethics for Public Officials

(Sections Regarding Conflicts of Interest)

Title 1: Chapter 10

Sec. 1-85. (Formerly Sec. 1-68). Interest in conflict with discharge of duties. A public official, including an elected state official, or state employee has an interest which is in substantial conflict with the proper discharge of his duties or employment in the public interest and of his responsibilities as prescribed in the laws of this state, if he has reason to believe or expect that he, his spouse, a dependent child, or a business with which he is associated will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his official activity. A public official, including an elected state official, or state employee does not have an interest which is in substantial conflict with the proper discharge of his duties in the public interest and of his responsibilities as prescribed by the laws of this state, if any benefit or detriment accrues to him, his spouse, a dependent child, or a business with which he, his spouse or such dependent child is associated as a member of a profession, occupation or group to no greater extent than any other member of such profession, occupation or group. A public official, including an elected state official or state employee who has a substantial conflict may not take official action on the matter.

History: P.A. 77-600 changed "person subject to this chapter" to "public official or state employee"; in 1979 Sec. 1-68 transferred to Sec. 1-85; P.A. 84-546 made technical change; P.A. 89-97 amended section to specify applicability to elected state officials, state employees, their spouses and dependent children and businesses with which they are associated and to prohibit an official or employee who has substantial conflict from taking official action on the matter.

Sec. 1-86. Procedure when discharge of duty affects official's or state employee's financial interests. Lobbyists prohibited from accepting employment with General Assembly and General Assembly members forbidden to be lobbyists. (a) Any public official or state employee, other than an elected state official, who, in the discharge of such official's or employee's official duties, would be required to take an action that would affect a financial interest of such official or employee, such official's or employee's spouse, parent, brother, sister, child or the spouse of a child or a business with which such official or employee is associated, other than an interest of a de minimis nature, an interest that is not distinct from that of a substantial segment of the general public or an interest in substantial conflict with the performance of official duties as defined in section 1-85 has a potential conflict of interest. Under such circumstances, such official or employee shall, if such official or employee is a member of a state regulatory agency, either excuse himself or herself from the matter or prepare a written statement signed under penalty of false statement describing the matter requiring action and the nature of the potential conflict and explaining why despite the potential conflict, such official or employee is able to vote and otherwise participate fairly, objectively and in the public interest. Such public official or state employee shall deliver a copy of the statement to the Office of State Ethics and enter a copy of the statement in the journal or minutes of the agency. If such official or employee is not a member of a state regulatory agency, such official or employee shall, in the case of either a substantial or potential conflict, prepare a written statement signed under penalty of false statement describing the matter requiring action and the nature of the conflict and deliver a copy of the statement to such official's or employee's immediate superior, if any, who shall assign the matter to another employee, or if such official or employee has no immediate superior, such official or employee shall take such steps as the Office of State Ethics shall prescribe or advise.

(b) No elected state official shall be affected by subsection (a) of this section.

(c) No person required to register with the Office of State Ethics under section 1-94 shall accept employment with the General Assembly or with any member of the General Assembly in connection with legislative action, as defined in section 1-91. No member of the General Assembly shall be a lobbyist.

History: P.A. 77-604 made technical changes; P.A. 81-53 amended this section to exempt public officials and state employees from compliance with its terms with respect to actions affecting a financial interest of theirs if such interest is not distinct from that of a substantial segment of the public where prior law provided an exemption only where the interest affected was the same as that of the public in general; P.A. 81-472 made technical correction; P.A. 83-249 made technical amendments; P.A. 83-586 eliminated requirement that official or employee refrain from action or decision in all instances in which a potential conflict exists; P.A. 85-369 added Subsec. (b) which prohibits persons required to register with the state ethics commission from accepting employment with the general assembly or a member thereof in connection with legislative action, and prohibits members of the general assembly from being lobbyists; P.A. 89-97 amended Subsec. (a) to limit applicability to public officials or state employees who are not elected state officials, to specify applicability in cases of both substantial and potential conflicts of interest and to rephrase provision re voluntary withdrawal from consideration of such matters, inserted new Subsec. (b) stating that Subsec. (a) does not apply to elected state officials, and relettered the former Subsec. (b) as Subsec. (c); P.A. 05-183 replaced "commission" and "State Ethics Commission" with "Office of State Ethics" throughout the section and in Subsec. (a) made technical changes for the purpose of gender neutrality, effective July 1, 2005.

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CONNECTICUT DEPARTMENT OF TRANSPORTATION POLICY STATEMENT

POLICY NO. F&A-10
June 1, 2007

SUBJECT: Code of Ethics Policy

The purpose of this policy is to establish and maintain high standards of honesty, integrity, and quality of performance for all employees of the Department of Transportation ("DOT" or "Department"). Individuals in government service have positions of significant trust and responsibility that require them to adhere to the highest ethical standards. Standards that might be acceptable in other public or private organizations are not necessarily acceptable for the DOT.

It is expected that all DOT employees will comply with this policy as well as the Code of Ethics for Public Officials, and strive to avoid even the appearance of impropriety in their relationships with members of the public, other agencies, private vendors, consultants, and contractors. This policy is, as is permitted by law, in some cases stricter than the Code of Ethics for Public Officials. Where that is true, employees are required to comply with the more stringent DOT policy.

The Code of Ethics for Public Officials is State law and governs the conduct of all State employees and public officials regardless of the agency in which they serve. The entire Code, as well as a summary of its provisions, may be found at the Office of State Ethics' web site: www.ct.gov/ethics/site/default.asp. For formal and informal interpretations of the Code of Ethics, DOT employees should contact the Office of State Ethics or the DOT's Ethics Compliance Officer or her designee.

All State agencies are required by law to have an ethics policy statement. Additionally, all State agencies are required by law to have an Ethics Liaison or Ethics Compliance Officer. The DOT, because of the size and scope of its procurement activities, has an Ethics Compliance Officer who is responsible for the Department's: development of ethics policies; coordination of ethics training programs; and monitoring of programs for agency compliance with its ethics policies and the Code of Ethics for Public Officials. At least annually, the Ethics Compliance Officer shall provide ethics training to agency personnel involved in contractor selection, evaluation, and supervision. A DOT employee who has a question or is unsure about the provisions of this policy, or who would like assistance contacting the Office of State Ethics, should contact the Ethics Compliance Officer or her designee.

The DOT Ethics Compliance Officer is:

Denise Rodosevich, Managing Attorney
Office of Legal Services

**For questions, contact the Ethics
Compliance Officer's Designee:**

Alice M. Sexton, Principal Attorney
Office of Legal Services
2800 Berlin Turnpike
Newington, CT 06131-7546
Tel. (860) 594-3045

To contact the Office of State Ethics:

Office of State Ethics
20 Trinity Street, Suite 205
Hartford, CT 06106
Tel. (860) 566-4472
Facs. (860) 566-3806
Web: www.ethics.state.ct.us

Enforcement

The Department expects that all employees will comply with all laws and policies regarding ethical conduct. Violations of the law may subject an employee to sanctions from agencies or authorities outside the DOT. Whether or not another agency or authority imposes such sanctions, the Department retains the independent right to review and respond to any ethics violation or alleged ethics violation by its employees. Violations of this policy or ethics statutes, as construed by the DOT, may result in disciplinary action up to and including dismissal from State service.

Prohibited Activities

1. **Gifts:** DOT employees (and in some cases their family members) are prohibited by the Code of Ethics and this Policy from accepting a gift from anyone who is: (1) doing business with, or seeking to do business with, the DOT; (2) directly regulated by the DOT; (3) prequalified as a contractor pursuant to Conn. Gen. Stat. §4a-100 by the Commissioner of the Department of Administrative Services (DAS); or (4) known to be a registered lobbyist or a lobbyist's representative. These four categories of people/entities are referred to as "restricted donors." A list of registered lobbyists can be found on the web site of the Office of State Ethics (www.ct.gov/ethics/site/default.asp). A list of prequalified consultants and contractors, *i.e.*, those seeking to do business with the DOT, can be found on the DOT's Internet site under "Consultant Information" and "Doing Business with ConnDOT," respectively.

The term "gift" is defined in the Code of Ethics for Public Officials, Conn. Gen. Stat. §1-79(e), and has numerous exceptions. For example, one exception permits the acceptance of food and/or beverages valued up to \$50 per calendar year from any one donor and consumed on an occasion or occasions while the person paying or his representative is present. Therefore, such food and/or beverage is not a "gift." Another exception permits the acceptance of items having a value up to ten dollars (\$10) provided the aggregate value of all things provided by the donor to the recipient during a calendar year does not exceed fifty dollars (\$50). Therefore, such items are not a "gift." Depending on the circumstances, the "donor" may be an individual if the individual is bearing the expense, or a donor may be the individual's employer/group if the individual is passing the expense back to the employer/group he/she represents.

This policy requires DOT employees to immediately return any gift (as defined in the Code of Ethics) that any person or entity attempts to give to the employee(s). If any such gift or other item of value is received by other than personal delivery from the subject person or entity, the item shall be taken to the Office of Human Resources along with the name and address of the person or entity who gave the item. The Office of Human Resources, along with the recipient of the item of value, will arrange for the donation of the item to a local charity (e.g., Foodshare, local soup kitchens, etc.). The Office of Human Resources will then send a letter to the gift's donor advising the person of the item's donation to charity and requesting that no such gifts be given to DOT employees in the future.

2. **Contracting for Goods or Services for Personal Use With Department Contractors, Consultants, or Vendors:** Executive Order 7C provides that: "Appointed officials and state employees in the Executive Branch are prohibited from contracting for goods and services, for personal use, with any person doing business with or seeking business with his or her agency, unless the goods or services are readily available to the general public for the price which the official or state employee paid or would pay."

3. ***Gift Exchanges Between Subordinates and Supervisors/Senior Staff:*** A recent change in the Code of Ethics prohibits exchanges of gifts valued at \$100 or more between (*i.e.*, to and from) supervisors and employees under their supervision. The Citizen’s Ethics Advisory Board has advised that: (1) the monetary limit imposed by this provision is a per-gift amount; (2) gifts given between supervisors and subordinates (or *vice versa*) in celebration of a “major life event,” as defined in the Code of Ethics, need not comply with the \$100 limit; and (3) the limitations imposed by this provision apply to a direct supervisor and subordinate *and to any individual up or down the chain of command*. The Citizen’s Ethics Advisory Board has also advised that supervisors or subordinates may not pool their money to give a collective or group gift valued at \$100 or more, even though each of the individual contributions is less than \$100.

4. ***Acceptance of Gifts to the State:*** A recent change to the Code of Ethics for Public Officials modified the definition of the term “gift” to limit the application of the so-called “gift to the State” exception. In general, “gifts to the State” are goods or services given to a State agency for use on State property or to support an event and which facilitate State action or functions. Before accepting any benefit as a “gift to the State,” DOT employees should contact the Ethics Compliance Officer.

5. ***Charitable Organizations and Events:*** No DOT employee shall knowingly accept any gift, discount, or other item of monetary value for the benefit of a charitable organization from any person or entity seeking official action from, doing or seeking business with, or conducting activities regulated by, the Department.

6. ***Use of Office/Position for Financial Gain:*** DOT employees shall not use their public office, position, or influence from holding their State office/position, nor any information gained in the course of their State duties, for private financial gain (or the prevention of financial loss) for themselves, any family member, any member of their household, nor any “business with which they are associated.” In general, a business with which one is associated includes any entity of which a DOT employee or his/her immediate family member is a director, owner, limited or general partner, beneficiary of a trust, holder of 5 percent or more stock, or an officer (president, treasurer, or executive or senior vice president).

 DOT employees shall not use or distribute State information (except as permitted by the Freedom of Information Act), nor use State time, personnel, equipment, or materials, for other than State business purposes.

7. ***Other Employment:*** DOT employees shall not engage in, nor accept, other employment that will either impair their independence of judgment with regard to their State duties or require or induce them to disclose confidential information gained through their State duties.

Any DOT employee who engages in or accepts other employment (including as an independent contractor), or has direct ownership in an outside business or sole proprietorship, shall complete an Employment/Outside Business Disclosure Form (see attached) and submit it to the Department’s Human Resources Administrator. Disclosure of other employment to the DOT Human Resources Administrator shall *not* constitute approval of the other employment for purposes of the Code of Ethics for Public Officials.

Inquiries concerning the propriety of a DOT employee’s other employment shall be directed to the Office of State Ethics to assure compliance with the Code of Ethics for Public Officials. Employees anticipating accepting other employment as described above should give ample time (at least one month) to the Office of State Ethics to respond to such outside employment inquiries.

No employee of the DOT shall allow any private obligation of employment or enterprise to take precedence over his/her responsibility to the Department.

8. **Outside Business Interests:** Any DOT employee who holds, directly or indirectly, a financial interest in any business, firm, or enterprise shall complete an Employment/Outside Business Disclosure Form (see attached) and submit it to the Department's Human Resources Administrator. An indirect financial interest includes situations where a DOT employee's spouse has a financial interest in a business, firm, or enterprise. A financial interest means that the employee or his spouse is an owner, member, partner, or shareholder in a non-publicly traded entity. Disclosure of such outside business interests to the DOT Human Resources Administrator shall *not* constitute approval of the outside business interest under this Policy or the Code of Ethics for Public Officials. DOT employees shall not have a financial interest in any business, firm, or enterprise which will either impair their independence of judgment with regard to their State duties or require or induce them to disclose confidential information gained through their State duties. Inquiries concerning the propriety of a DOT employee's outside business interests shall be directed to the Office of State Ethics to assure compliance with the Code of Ethics for Public Officials.
9. **Contracts With the State:** DOT employees, their immediate family members, and/or a business with which a DOT employee is associated, may not enter into a contract with the State, other than pursuant to a court appointment, valued at \$100 or more unless the contract has been awarded through an open and public process.
10. **Sanctioning Another Person's Ethics Violation:** No DOT official or employee shall counsel, authorize, or otherwise sanction action that violates any provision of the Code of Ethics.
11. **Certain Persons Have an Obligation to Report Ethics Violations:** If the DOT Commissioner, Deputy Commissioner, or "person in charge of State agency procurement" and contracting has reasonable cause to believe that a person has violated the Code of Ethics or any law or regulation concerning ethics in State contracting, he/she *must* report such belief to the Office of State Ethics. All DOT employees are encouraged to disclose waste, fraud, abuse, and corruption about which they become aware to the appropriate authority (see also Policy Statement EX.O.-23 dated March 31, 2004), including, but not limited to, their immediate supervisor or a superior of their immediate supervisor, the DOT Office of Management Services, the Ethics Compliance Officer, the Auditors of Public Accounts, the Office of the Attorney General, or the Office of the Chief State's Attorney.
12. **Post-State Employment Restrictions:** In addition to the above-stated policies of the Department, DOT employees are advised that the Code of Ethics for Public Officials bars certain conduct by State employees *after they leave State service. Upon leaving State service:*
 - **Confidential Information:** DOT employees must never disclose or use confidential information gained in State service for the financial benefit of any person.
 - **Prohibited Representation:** DOT employees must *never* represent anyone (other than the State) concerning any "particular matter" in which they participated personally and substantially while in State service and in which the State has a substantial interest.

DOT employees also must not, for one year after leaving State service, represent anyone other than the State for compensation before the DOT concerning a matter in which the State has a substantial interest. In this context, the term "represent" has been very broadly defined. Therefore, any former DOT employee contemplating post-State employment work that might involve interaction with any bureau of DOT (or any Board or Commission administratively under the DOT) within

their first year after leaving State employment should contact the DOT Ethics Compliance Officer and/or the Office of State Ethics.

- **Employment With State Vendors:** DOT employees who participated substantially in, or supervised, the negotiation or award of a State contract valued at \$50,000 or more must not accept employment with a party to the contract (other than the State) for a period of one year after resigning from State service, if the resignation occurs within one year after the contract was signed.

13. **Ethical Considerations Concerning Bidding and State Contracts:** DOT employees also should be aware of various provisions of Part IV of the Code of Ethics that affect any person or firm who: (1) is, or is seeking to be, prequalified by DAS under Conn. Gen. Stat. §4a-100; (2) is a party to a large State construction or procurement contract, or seeking to enter into such a contract, with a State agency; or (3) is a party to a consultant services contract, or seeking to enter into such a contract, with a State agency. These persons or firms shall not:

- With the intent to obtain a competitive advantage over other bidders, solicit any information from an employee or official that the contractor knows is not and will not be available to other bidders for a large State construction or procurement contract that the contractor is seeking;
- Intentionally, willfully, or with reckless disregard for the truth, charge a State agency for work not performed or goods not provided, including submitting meritless change orders in bad faith with the sole intention of increasing the contract price, as well as falsifying invoices or bills or charging unreasonable and unsubstantiated rates for services or goods to a State agency; and
- Intentionally or willfully violate or attempt to circumvent State competitive bidding and ethics laws.

Firms or persons that violate the above provisions may be deemed a nonresponsible bidder by the DOT.

In addition, no person with whom a State agency has contracted to provide consulting services to plan specifications for any contract, and no business with which such person is associated, may serve as a consultant to any person seeking to obtain such contract, serve as a contractor for such contract, or serve as a subcontractor or consultant to the person awarded such contract.

DOT employees who believe that a contractor or consultant may be in violation of any of these provisions should bring it to the attention of their manager.

Training for DOT Employees

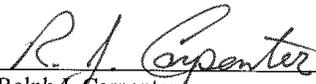
A copy of this policy will be posted throughout the Department, and provided to each employee either in hard copy or by e-mail. As set forth above, State law requires that certain employees involved in contractor/consultant/vendor selection, evaluation, or supervision must undergo annual ethics training coordinated or provided by the Ethics Compliance Officer. If you believe your duties meet these criteria, you should notify your Bureau Chief to facilitate compilation of a training schedule. In addition, the DOT Ethics Compliance Officer can arrange for periodic ethics training provided by the Office of State Ethics. Finally, the Department will make available, on its web site or otherwise, a copy of this policy to all vendors, contractors, and other business entities doing business with the Department.

Important Ethics Reference Materials

It is strongly recommended that every DOT employee read and review the following:

- Code of Ethics for Public Officials, Chapter 10, Part 1, Conn. General Statutes Sections 1-79 through 1-89a found at: www.ct.gov/ethics/site/default.asp
- Ethics Regulations Sections 1-81-14 through 1-81-38, found at: www.ct.gov/ethics/site/default.asp
- The Office of State Ethics web site includes summaries and the full text of formal ethics advisory opinions interpreting the Code of Ethics, as well as summaries of previous enforcement actions: www.ct.gov/ethics/site/default.asp. DOT employees are strongly encouraged to contact the Department's Ethics Compliance Officer or her designee, or the Office of State Ethics with any questions or concerns they may have.

(This Policy Statement supersedes Policy Statement No. F&A-10 dated January 6, 2006)



Ralph J. Carpenter
COMMISSIONER

Attachment

List 1 and List 3

(Managers and supervisors are requested to distribute a copy of this Policy Statement to all employees under their supervision.)

cc: Office of the Governor, Department of Administrative Services, Office of State Ethics

Department of Transportation Employment & Outside Business Disclosure Form

In accordance with Department of Transportation (Department) Policy Statement No. F&A-10, Code of Ethics Policy, I am hereby advising the Department that in addition to my current DOT position, I have other employment and/or a direct or indirect financial interest in an outside business as follows:

1. Full name of outside employer, or entity in which I or my spouse have a financial interest (e.g., ownership or member/partner): _____

2. Location of Employer/Entity disclosed above: _____

3. Nature of my/my spouse's relationship to employer/entity disclosed above (check at least one):

- Employee or Independent Contractor (circle one)
- Owner/Member/Partner/etc.
- Family Member of Owner/Member/Partner/etc.

4. State agency(ies) with which above employer/entity is doing business or seeking Business (write "N/A" if not applicable): _____

5. Job Title at Outside Employer: _____

6. Job Responsibilities at Outside Employer: _____

7. Current State Title: _____

8. Current State Job Responsibilities: _____

9. Name/Title of Current State Supervisor: _____

I understand that the filing of this Disclosure with the DOT Human Resources Administrator does not relieve me of any obligations I have to comply with the Code of Ethics for Public Officials, and does not constitute approval of my outside employment and/or financial interests under the Code of Ethics for Public Officials. *Employees engaging in outside employment are strongly urged to seek written approval of their outside employment from the Office of State Ethics, 20 Trinity Street, Hartford, CT 06106.* I also understand that if either my State or outside employment/financial interest changes in location or function I am required to notify the Department immediately.

Signed: _____

Date: _____

Printed Name: _____



CONNECTICUT DEPARTMENT OF TRANSPORTATION POLICY STATEMENT

POLICY NO. F&A-10A
September 1, 2015

SUBJECT: Code of Ethics Policy Supplement

This policy supplements and reaffirms the Department's Code of Ethics Policy (F&A-10).

In order to establish and maintain high standards of integrity and quality of performance for all employees, it is the policy of the Department that all employees immediately disclose situations where the employment of one of their Family Members could conflict with the employee's role for the Department. To implement this policy, each employee is expected to complete the Family Member Employment Disclosure Form (attached) by November 1, 2015, or upon being hired. Department employees should send the completed Family Member Employment Disclosure Form to Human Resources and give a copy to his/her manager.

Thereafter, there are four other situations that will require an employee to fill out a new Family Member Employment Disclosure Form, as follows:

- The Department Employee's supervisor changes;
- The Department Employee changes jobs or units if the change could trigger a conflict of interest with the Employee's Family Members' employment;
- The Department Employee is assigned to work on a matter which involves the employer of one of his/her Family Members;
- The Department Employee learns that one or more of his/her Family Members has had a change of employment which could create or eliminate a conflict of interest. This includes; (1) a change of the Family Member's role for his/her employer, such as a promotion to an officer, director, partner or principal with the firm; (2) the Family Member obtaining employment with a contractor, consultant or vendor that is doing business with, or seeking to do business with, the Department; and (3) the Family Member leaving his or job with a Department contractor, consultant or vendor.

Disclosure shall be made on the attached Family Member Employment Disclosure Form at the time the employee learns of the basis for disclosure. For purposes of this Policy and completion of the Family Member Employment Disclosure Form, the term "Family Member" is broader than other Department policies and includes the employee's spouse or domestic partner, child (including stepchild), brother, sister (including stepbrother, stepsister, half brother, and half sister), mother, father, or brother-in-law, sister-in-law, mother in-law, or father-in-law (collectively "Family Member").

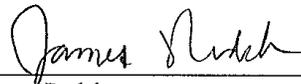
Department employees must disclose when any Family Member is working for a contractor, consultant or vendor that is doing business with, or seeking to do business with, the Department

of Transportation. This disclosure is required whether or not the Family Member is actually working on any matter involving the Department.

Upon receipt of a disclosure form revealing that a Department employee's Family Member is working for a firm with which the employee is expected to work in his/her state job, the employee's manager will consult with the Department's Ethics Compliance Officer, or her designee, and a representative of Human Resources, and together they will make a determination about whether the Department employee may continue to work on the matter involving his/her Family Member's employer and document the reasons for such decision. The Department employee's ability to continue to work on that project will depend on what the Department employee's role in the matter is and the Family Member's ability to obtain financial gain as a result of the matter involving the Department.

If the employee is permitted to work on a matter involving the employer of his/her Family Member, that determination shall be revisited if circumstances of the employee's role in the matter *or* the role of his/her Family Member changes. Such manager shall consult with the Ethics Compliance Officer's Designee (Alice M. Sexton) and a representative of Human Resources to document any change in circumstances and/or any change in decision.

The Department expects that all employees will comply with all laws and policies regarding ethical conduct. Violation of the law may subject an employee to sanctions by the Department and/or authorities outside the Department. Whether or not another authority imposes such sanctions, the Department retains the independent right to review and respond to any alleged ethics violation by its employees. Violations of this policy or any ethics policy or statute, as construed by the Department, may result in disciplinary action up to and including dismissal from State service.



James Redeker
COMMISSIONER

Attachment

cc: Office of State Ethics

FEDERAL LAW: 40 USC 1101 THRU 1104 (Brooks Act)

Chapter 11 – Selection of Architects and Engineers

§ 1101. Policy (Formerly 40 U.S.C. § 541)

The policy of the Federal Government is to publicly announce all requirements for architectural and engineering services and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

§ 1102. Definitions (Formerly 40 U.S.C. § 542)

In this chapter, the following definitions apply:

(1.) Agency Head. – The term "agency head" means the head of a department, agency, or bureau of the Federal Government.

(2.) Architectural and Engineering Services. – The term "architectural and engineering services" means –

(A.) professional services of an architectural or engineering nature, as defined by state law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide the services described in this paragraph;

(B.) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

(C.) other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

(3.) Firm. – The term "firm" means an individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the profession of architecture or engineering.

§ 1103. Selection procedure (Formerly 40 U.S.C. § 543)

(a) In General. – These procedures apply to the procurement of architectural and engineering services by an agency head.

(b) Annual Statements. – The agency head shall encourage firms to submit annually a statement of qualifications and performance data.

(c) Evaluation. – For each proposed project, the agency head shall evaluate current statements of qualifications and performance data on file with the agency, together with statements submitted by other firms regarding the proposed project. The agency head shall conduct discussions with at least 3 firms to consider anticipated concepts and compare alternative methods for furnishing services.

(d) Selection. – From the firms with which discussions have been conducted, the agency head shall select, in order of preference, at least 3 firms that the agency head considers most highly qualified to provide the services required. Selection shall be based on criteria established and published by the agency head.

§ 1104. Negotiation of contract (Formerly 40 U.S.C. § 544)

(a) In General. – The agency head shall negotiate a contract for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Federal Government. In determining fair and reasonable compensation, the agency head shall consider the scope, complexity, professional nature, and estimated value of the services to be rendered.

(b) Order of Negotiation. – The agency head shall attempt to negotiate a contract, as provided in subsection (a), with the most highly qualified firm selected under section 1103 of this title. If the agency head is unable to negotiate a satisfactory contract with the firm, the agency head shall formally terminate negotiations and then undertake negotiations with the next most qualified of the selected firms, continuing the process until an agreement is reached. If the agency head is unable to negotiate a satisfactory contract with any of the selected firms, the agency head shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached.

FEDERAL LAW: 23 USC 112

Title 23 – Highways

§ 112. Letting of contracts

(a) In all cases where the construction is to be performed by the State transportation department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.

(b) Bidding Requirements. -

(1) In General. – Subject to paragraphs (2) and (3), construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

(2) Contracting for Engineering and Design Services. –

(A) General Rule. – Subject to paragraph (3), each contract for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services with respect to a project subject to the provisions of subsection (a) of this section shall be awarded in the same manner as a contract for architectural and engineering services is negotiated under chapter 11 of title 40.

(B) Performance and Audits. – Any contract or subcontract awarded in accordance with subparagraph (A), whether funded in whole or in part with Federal-aid highway funds, shall be performed and audited in compliance with cost principles contained in the Federal Acquisition Regulations of part 31 of title 48, Code of Federal Regulations.

(C) Indirect Cost Rates. – Instead of performing its own audits, a recipient of funds under a contract or subcontract awarded in accordance with subparagraph (A) shall accept indirect cost rates established in accordance with the Federal Acquisition Regulations for 1-year applicable accounting periods by a cognizant Federal or State government agency, if such rates are not currently under dispute.

(D) Application of Rates. – Once a firm's indirect cost rates are accepted under this paragraph, the recipient of the funds shall apply such rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment and shall not be limited by administrative or de facto ceilings of any kind.

(E) Prenotification; Confidentiality of Data. – A recipient of funds requesting or using the cost and rate data described in subparagraph (D) shall notify any affected firm before such request or use. Such data shall be confidential and shall not be accessible or provided, in whole or in part, to another firm or to any government agency which is not part of the group of agencies sharing cost data under this paragraph, except by written permission of the audited firm. If prohibited by law, such cost and rate data shall not be disclosed under any circumstances.

(F)(F) (1) Subparagraphs (B), (C), (D) and (E) herein shall not apply to the States of West Virginia or Minnesota.

(3) Design-Build Contracting. –

(A) In General. – A State transportation department or local transportation agency may award a design-build contract for a qualified project described in subparagraph (C) using any procurement process permitted by applicable State and local law.

(B) Limitation on Final Design. – Final design under a design-build contract referred to in subparagraph (A) shall not commence before compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(C) Qualified Projects. – A qualified project referred to in subparagraph (A) is a project under this chapter (including intermodal projects) for which the Secretary has approved the use of design-build contracting under criteria specified in regulations issued by the Secretary.

(D) Regulatory Process. – Not later than 90 days after the date of enactment of the SAFETEA-LU, the Secretary shall issue revised regulations under section 1307(c) of the Transportation Equity Act for 21st

Century (23 U.S.C. 112 note; 112 Stat. 230) that –

(i) do not preclude a State transportation department or local transportation agency, prior to compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332), from –

(I) issuing requests for proposals;

(II) proceeding with awards of design-build contracts; or

(III) issuing notices to proceed with preliminary design work under design-build contracts;

(ii) require that the State transportation department or local transportation agency receive concurrence from the Secretary before carrying out an activity under clause (i); and

(iii) preclude the design-build contractor from proceeding with final design or construction of any permanent improvement prior to completion of the process under such section 102.

(E) Design-Build Contract Defined. – In this paragraph, the term "design-build contract" means an agreement that provides for design and construction of a project by a contractor, regardless of whether the agreement is in the form of a design-build contract, a franchise agreement, or any other form of contract approved by the Secretary.

(c) The Secretary shall require as a condition precedent to his approval of each contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement, executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract.

(d) No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State transportation department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

(e) Standardized Contract Clause Concerning Site Conditions. –

(1) General Rule. – The Secretary shall issue regulations establishing and requiring, for inclusion in each contract entered into with respect to any project approved under section 106 of this title a contract clause, developed in accordance with guidelines established by the Secretary, which equitably addresses each of the following:

(A) Site conditions.

(B) Suspensions of work ordered by the State (other than a suspension of work caused by the fault of the contractor or by weather).

(C) Material changes in the scope of work specified in the contract.

The guidelines established by the Secretary shall not require arbitration.

(2) Limitation on Applicability. –

(A) State Law. – Paragraph (1) shall apply in a State except to the extent that such State adopts or has adopted by statute a formal procedure for the development of a contract clause described in paragraph (1) or adopts or has adopted a statute which does not permit inclusion of such a contract clause.

(B) Design-Build Contracts. – Paragraph (1) shall not apply to any design-build contract approved under subsection (b)(3).

(f) Selection Process. – A State may procure, under a single contract, the services of a consultant to prepare any environmental impact assessments or analyses required for a project, including environmental impact statements, as well as subsequent engineering and design work on the project if the State conducts a review that assesses the objectivity of the environmental assessment, environmental analysis, or environmental impact statement prior to its submission to the Secretary.

(g) Temporary Traffic Control Devices. –

(1) Issuance of Regulations. – The Secretary, after consultation with appropriate Federal and State officials, shall issue regulations establishing the conditions for the appropriate use of, and expenditure of funds for, uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations.

(2) Effects of Regulations. – Based on regulations issued under paragraph (1), a State shall –

(A) develop separate pay items for the use of uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations; and

(B) incorporate such pay items into contract provisions to be included in each contract entered into by the State with respect to a highway project to ensure compliance with section 109(e)(2).

(3) Limitation. – Nothing in the regulations shall prohibit a State from implementing standards that are more stringent than those required under the regulations.

(4) Positive Protective Measures Defined. – In this subsection, the term "positive protective measures" means temporary traffic barriers, crash cushions, and other strategies to avoid traffic accidents in work zones, including full road closures.

(Pub. L. 85-767, Aug. 27, 1958, 72 Stat. 895; Pub. L. 90-495, Sec. 22(c), Aug. 23, 1968, 82 Stat. 827; Pub. L. 96-470, title I, Sec. 112(b)(1), Oct. 19, 1980, 94 Stat. 2239; Pub. L. 97-424, title I, Sec. 112, Jan. 6, 1983, 96 Stat. 2106; Pub. L. 100-17, title I, Sec. 111, Apr. 2, 1987, 101 Stat. 147; Pub. L. 104-59, title III, Sec. 307(a), Nov. 28, 1995, 109 Stat. 581; Pub. L. 105-178, title I, Secs. 1205, 1212(a)(2)(A)(i), 1307(a), (b), June 9, 1998, 112 Stat. 184, 193, 229, 230; Pub. L. 107-217, Sec. 3(e)(1), Aug. 21, 2002, 116 Stat. 1299; Pub. L. 109-59, title I, Secs. 1110(b), 1503, Aug. 10, 2005, 119 Stat. 1170, 1238; Pub. L. 109-115, div. A, title I, Sec. 174, Nov. 30, 2005, 119 Stat. 2426.)

REFERENCES IN TEXT

The date of enactment of the SAFETEA-LU, referred to in subsec. (b)(3)(D), is the date of enactment of Pub. L. 109-59, which was approved Aug. 10, 2005.

Section 1307(c) of the Transportation Equity Act for 21st Century, referred to in subsec. (b)(3)(D), is section 1307(c) of Pub. L. 105-178, which is set out as a note below.

AMENDMENTS

2005 - Subsec. (b)(2)(A). Pub. L. 109-115, Sec. 174(1), substituted "title 40" for "title 40 or equivalent State qualifications-based requirements".

Subsec. (b)(2)(B) to (D). Pub. L. 109-115, Sec. 174(2), (3), redesignated subpars. (C) to (E) as (B) to (D), respectively, and struck out heading and text of former subpar. (B). Text read as follows:

"(i) In a Complying State. – If, on the date of the enactment of this paragraph, the services described in subparagraph (A) may be awarded in a State in the manner described in subparagraph (A), subparagraph (A) shall apply in such State beginning on such date of enactment.

"(ii) In a Noncomplying State. – In the case of any other State, subparagraph (A) shall apply in such State beginning on the earlier of (I) August 1, 1989, or (II) the 10th day following the close of the 1st regular session of the legislature of a State which begins after the date of the enactment of this paragraph."

Subsec. (b)(2)(E). Pub. L. 109-115, Sec. 174(3), (4), redesignated subpar. (F) as (E) and substituted subparagraph (D)" for "subparagraph (E)". Former subpar. (E) redesignated (D).

Subsec. (b)(2)(F). Pub. L. 109-115, Sec. 174(5), which directed that subpar. (F) be amended by substituting "(F) Subparagraphs (B), (C), (D) and (E) herein shall not apply to the States of West Virginia or Minnesota." for " 'State Option' and all that follows through the period", was executed by making the substitution for "State option. - Subparagraphs (C), (D), (E), and (F) shall take effect 1 year after the date of the enactment of this subparagraph; except that if a State, during such 1-year period, adopts by statute an alternative process intended to promote engineering and design quality and ensure maximum competition by professional companies of all sizes providing engineering and design services, such subparagraphs shall not apply with respect to the State. If the Secretary determines that the legislature of the State did not convene and adjourn a full regular session during such 1-year period, the Secretary may extend such 1-year period until the adjournment of the next regular session of the legislature.", to reflect the probable intent of Congress.

Pub. L. 109-115, Sec. 174(3), redesignated subpar. (G) as (F). Former subpar. (F) redesignated (E).

Subsec. (b)(2)(G). Pub. L. 109-115, Sec. 174(3), redesignated subpar. (G) as (F).

Subsec. (b)(3)(C) to (E). Pub. L. 109-59, Sec. 1503, added subpars. (C) and (D), redesignated former subpar. (D) as (E), and struck out former subpar. (C), which described a qualified project as one for which the Secretary had approved the use of design-build contracting under criteria specified in regulations and for which total costs had been estimated to exceed specified amounts.

Subsecs. (f), (g). Pub. L. 109-59, Sec. 1110(b), added subsec. (g), redesignated former subsec. (g) as (f), and struck out former subsec. (f) which read as follows: "The provisions of this section shall not be applicable to contracts for projects on the Federal-aid secondary system in those States where the Secretary has discharged his responsibility pursuant to section 117 of this title, except where employees of a political subdivision of a State are working on a project outside of such political subdivision."

2002 - Subsec. (b)(2)(A). Pub. L. 107-217 substituted "chapter 11 of title 40" for "title IX of the Federal Property and Administrative Services Act of 1949".

1998 - Subsec. (a). Pub. L. 105-178, Sec. 1212(a)(2)(A)(i), substituted "State transportation department" for "State highway department".

Subsec. (b)(1). Pub. L. 105-178, Sec. 1307(a)(1), substituted "paragraphs (2) and (3)" for "paragraph (2)".

Pub. L. 105-178, Sec. 1212(a)(2)(A)(i), substituted "State transportation department" for "State highway department".

Subsec. (b)(2)(A). Pub. L. 105-178, Sec. 1307(a)(2), substituted "Subject to paragraph (3), each contract" for "Each contract".

Subsec. (b)(2)(B)(i). Pub. L. 105-178, Sec. 1205(a), struck out before period at end ", except to the extent that such State adopts by statute a formal procedure for the procurement of such services".

Subsec. (b)(2)(B)(ii). Pub. L. 105-178, Sec. 1205(a), struck out before period at end ", except to the extent that such State adopts or has adopted by statute a formal procedure for the procurement of the services described in subparagraph (A)".

Subsec. (b)(3). Pub. L. 105-178, Sec. 1307(a)(3), added par. (3).

Subsec. (d). Pub. L. 105-178, Sec. 1212(a)(2)(A)(i), substituted "State transportation department" for "State highway department".

Subsec. (e)(2). Pub. L. 105-178, Sec. 1307(b), designated existing provisions as subpar. (A), inserted heading, realigned margins, and added subpar. (B).

Subsec. (g). Pub. L. 105-178, Sec. 1205(b), added subsec. (g).

1995 - Subsec. (b)(2)(C) to (G). Pub. L. 104-59 added subpars. (C) to (G).

1987 - Subsec. (b). Pub. L. 100-17, Sec. 111(a), (b), (d), inserted subsec. heading, designated existing provisions as par. (1), inserted par. (1) heading, substituted "Subject to paragraph (2), construction" for "Construction" and inserted "or that an emergency exists", added par. (2), and realigned margins.

Subsecs. (e), (f). Pub. L. 100-17, Sec. 111(c), added subsec. (e) and redesignated former subsec. (e) as (f).

1983 - Subsec. (b). Pub. L. 97-424, Sec. 112(1), substituted "unless the State highway department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective" for "unless the Secretary shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest" after "by competitive bidding,".

Subsec. (e). Pub. L. 97-424, Sec. 112(2), inserted exception relating to a situation where employees of a political subdivision of a State are working on a project outside of such political subdivision.

1980 - Subsec. (b). Pub. L. 96-470 struck out provision that all findings by the Secretary that a method other than competitive bidding is in the public interest be reported in writing to the Committees on Public Works of the Senate and the House of Representatives.

1968 - Subsec. (b). Pub. L. 90-495 required that contracts for the construction of each project be awarded only on the basis of the lowest responsive bid by a bidder meeting established criteria of responsibility and required that, to be imposed as a condition precedent, requirements and obligations have been specifically set forth in the advertised specifications.

EFFECTIVE DATE OF 1998 AMENDMENT

Pub. L. 105-178, title I, Sec. 1307(e), June 9, 1998, 112 Stat. 231, provided that:

"(1) In General. - The amendments made by this section [amending this section] take effect 3 years after the date of enactment of this Act [June 9, 1998].

"(2) Transition provision. -

"(A) In General. - During the period before issuance of the regulations under subsection (c) [set out below], the Secretary may approve, in accordance with an experimental program described in subsection (d) [set out below], design-build contracts to be awarded using any process permitted by applicable State and local law; except that final design under any such contract shall not commence before compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

"(B) Previously awarded contracts. - The Secretary may approve design-build contracts awarded before the date of enactment of this Act.

"(C) Design-build contract defined. - In this paragraph, the term 'design-build contract' means an agreement that provides for design and construction of a project by a contractor, regardless of whether the agreement is in the form of a design-build contract, a franchise agreement, or any other form of contract approved by the Secretary."

EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-495 effective Aug. 23, 1968, see section 37 of Pub. L. 90-495, set out as a note under section 101 of this title.

REGULATIONS

Pub. L. 105-178, title I, Sec. 1307(c), June 9, 1998, 112 Stat. 230, provided that:

"(1) In general. – Not later than the effective date specified in subsection (e) [see Effective Date of 1998 Amendment note above], after consultation with the American Association of State Highway and Transportation Officials and representatives from affected industries, the Secretary shall issue regulations to carry out the amendments made by this section [amending this section].

"(2) Contents. – The regulations shall –

"(A) identify the criteria to be used by the Secretary in approving the use by a State transportation department or local transportation agency of design-build contracting; and

"(B) establish the procedures to be followed by a State transportation department or local transportation agency for obtaining the Secretary's approval of the use of design-build contracting by the department or agency."

EFFECT ON EXPERIMENTAL PROGRAM

Pub. L. 105-178, title I, Sec. 1307(d), June 9, 1998, 112 Stat. 231, provided that: "Nothing in this section [amending this section and enacting provisions set out as notes under this section] or the amendments made by this section affects the authority to carry out, or any project carried out under, any experimental program concerning design-build contracting that is being carried out by the Secretary as of the date of enactment of this Act [June 9, 1998]."

REPORT TO CONGRESS

Pub. L. 105-178, title I, Sec. 1307(f), June 9, 1998, 112 Stat. 231, provided that:

"(1) In general. - Not later than 5 years after the date of enactment of this Act [June 9, 1998], the Secretary shall submit to Congress a report on the effectiveness of design-build contracting procedures.

"(2) Contents. - The report shall contain –

"(A) an assessment of the effect of design-build contracting on project quality, project cost, and timeliness of project delivery;

"(B) recommendations on the appropriate level of design for design-build procurements;

"(C) an assessment of the impact of design-build contracting on small businesses;

"(D) assessment of the subjectivity used in design-build contracting; and

"(E) such recommendations concerning design-build contracting procedures as the Secretary determines to be appropriate."

PRIVATE SECTOR INVOLVEMENT PROGRAM

Pub. L. 102-240, title I, Sec. 1060, Dec. 18, 1991, 105 Stat. 2003, provided that:

"(a) Establishment. – The Secretary shall establish a private sector involvement program to encourage States to contract with private firms for engineering and design services in carrying out Federal-aid highway projects when it would be cost effective.

"(b) Grants to States. –

"(1) In General. – In conducting the program under this section, the Secretary may make grants in each of fiscal years 1992, 1993, 1994, 1995, 1996, and 1997 to not less than 3 States which the Secretary determines have implemented in the fiscal year preceding the fiscal year of the grant the most effective programs for increasing the percentage of funds expended for contracting with private firms (including small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals) for engineering and design services in carrying out Federal-aid highway projects.

"(2) Use of Grants. – A grant received by a State under this subsection may be used by the State only for awarding contracts for engineering and design services to carry out projects and activities for which Federal funds may be obligated under title 23, United States Code.

"(3) Funding. – There are authorized to be appropriated to carry out this section \$5,000,000 for each of fiscal years 1992 through 1997. Such sums shall remain available until expended.

"(c) Report by FHWA. – Not later than 120 days after the date of the enactment of this Act [Dec. 18, 1991], the Administrator of the Federal Highway Administration shall submit to the Secretary a report on the amount of funds expended by each State in fiscal years 1980 through 1990 on contracts with private sector engineering and design

firms in carrying out Federal-aid highway projects. The Secretary shall use information in the report to evaluate State engineering and design programs for the purpose of awarding grants under subsection (b).

"(d) Report to Congress. – Not later than 2 years after the date of the enactment of this Act [Dec. 18, 1991], the Secretary shall transmit to Congress a report on implementation of the program established under this section.

"(e) Engineering and Design Services Defined. – The term 'engineering and design services' means any category of service described in section 112(b) of title 23, United States Code.

"(f) Regulations. – Not later than 180 days after the date of the enactment of this Act [Dec. 18, 1991], the Secretary shall issue regulations to carry out this section."

PILOT PROGRAM FOR UNIFORM AUDIT PROCEDURES

Pub. L. 102-240, title I, Sec. 1092, Dec. 18, 1991, 105 Stat. 2024, directed Secretary to establish pilot program to include no more than 10 States under which any contract or subcontract awarded in accordance with subsec. (b)(2)(A) of this section was to be performed and audited in compliance with cost principles contained in Federal acquisition regulations of part 41 of title 48 of Code of Federal Regulations, provided for indirect cost rates in lieu of performing audits, and required each State participating in pilot program to report to Secretary not later than 3 years after Dec. 18, 1991, on results of program, prior to repeal by Pub. L. 104-59, title III, Sec. 307(b), Nov. 28, 1995, 109 Stat. 582. See subsec. (b)(2)(C) to (F) of this section.

EVALUATION OF STATE PROCUREMENT PRACTICES

Pub. L. 102-240, title VI, Sec. 6014, Dec. 18, 1991, 105 Stat. 2181, directed Secretary to conduct a study to evaluate whether or not current procurement practices of State departments and agencies were adequate to ensure that highway and transit systems were designed, constructed, and maintained so as to achieve a high quality for such systems at the lowest overall cost and, not later than 2 years after Dec. 18, 1991, to transmit to Congress a report on the results of the study, together with an assessment of the need for establishing a national policy on transportation quality assurance and recommendations for appropriate legislative and administrative actions.

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

Contents

- §172.1 Purpose and applicability.
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§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 subrecipients 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:

Audit 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 workpapers 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 agency identified in paragraph (2) of 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 subrecipient 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 subgrant 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 subrecipients 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.

Subconsultant 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 subrecipient (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 subawards 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 subawards includes providing

oversight of the procurement, management, and administration of engineering and design related consultant services by subrecipients 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 subrecipient.

(b) *Subrecipient responsibilities.* Subrecipients 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;

(2) 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).

(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 subrecipient 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 nonqualifications-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) subconsultants 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 subconsultants 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 subrecipients 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 subconsultants 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 subconsultants 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.

(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 subrecipient, 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;
- (v) 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;
- (vi) Standard DOT Title VI Assurances (DOT Order 1050.2);
- (vii) Disadvantaged Business Enterprise (DBE) assurance, as specified in 49 CFR 26.13(b);
- (viii) 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;
- (v) 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;
- (vi) 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 subconsultant'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 workpapers 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 subconsultant's indirect cost rate prior to acceptance and application of the rate to contracts administered by the recipient or its subrecipients. 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 workpapers 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 de facto 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) The establishment of fixed fee shall be contract or task order specific.

(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 subconsultant 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 workpaper 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 subconsultants for acceptance by a STA or other recipient. Each consultant or subconsultant 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.