

Federal Highway Administration, DOT

§ 172.5

consistent with this regulation if they intend to utilize Federal-aid highway funds for any of the above contract types. The use of procedures codified in State statutes to select consultant firms is also acceptable. Other types of negotiated contracts should be administered under the requirements of the common grant management rule, 49 CFR 18.

§ 172.3 Definitions.

As used in this part:

Competitive negotiation. Any form of negotiations that utilizes, (1) qualifications-based procedures complying with title IX of the Federal Property and Administrative Services Act of 1949 (Pub. L. 92-582, 86 Stat. 1278 (1972)), (2) equivalent State qualifications-based procedures or (3) a formal procedure permitted by State statute.

Consultant. The individual or firm providing engineering and design related services as a party to the contract.

Contract modification. An agreement modifying the existing contract, such as an agreement to accomplish work beyond the scope of the original contract.

Contracting agency. The State highway agency or local governmental agencies which have responsibility for the procurement.

Engineering and design services. Program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services.

Extra work. Any services or actions required of the consultant above and beyond the obligations of the original or modified contract.

Fixed fee. A dollar amount established to cover the consultant's profit and business expenses not allocable to overhead.

Pre negotiation audit. An examination of a consultant's records made in accordance with generally accepted auditing standards.

Private sector engineering and design firms. Any individual or private firm (including small business concerns and small businesses owned and controlled by socially and economically disadvantaged individuals as defined in 49 CFR

part 23) contracting with a State to provide engineering and design services.

Scope of work. All services and actions required of the consultant by the obligations of the contract.

[56 FR 19802, Apr. 30, 1991, as amended at 59 FR 64848, Dec. 16, 1994]

§ 172.5 General principles.

(a) *Need for consultant services in management roles.* When Federal-aid highway funds participate in the contract, the contracting agency shall receive approval from the FHWA before hiring a consultant to act in a "management" role for the contracting agency. This concept should be limited to situations where unique or unusual circumstances exist and where the contracting agency has provided adequate justification to explain its reason for using a consultant in this role and the reason it cannot perform the work.

(b) *Written procedures.* The contracting agency shall prepare written procedures for each method of procurement it proposes to utilize. These procedures and all revisions shall be approved by the FHWA and describe, as appropriate to the particular method of procurement, each step used:

(1) In preparing a scope of work, evaluation factors and cost estimate for selecting a consultant,

(2) In soliciting proposals from prospective consultants,

(3) In the evaluation of proposals and the ranking/selection of a consultant,

(4) In negotiation of the reimbursement to be paid to the selected consultant,

(5) In monitoring the consultant's work and in preparing a consultant's performance evaluation when completed, and

(6) In determining the extent to which the consultant, who is responsible for the professional quality, technical accuracy, and coordination of services, may be reasonably liable for costs resulting from errors or deficiencies in design furnished under its contract.

(c) *Pre negotiation audits.* The contracting agencies shall prepare pre negotiation audits to provide the necessary data to assure that the consultant has an acceptable accounting

§ 172.7

23 CFR Ch. I (4–1–01 Edition)

system, adequate and proper justification of the various rates charged to perform work and is aware of the FHWA's cost eligibility and documentation requirements.

(1) Prenegotiation audits and the resultant audit opinions are required for all contracts expected to exceed \$250,000 and for contracts of less than \$250,000 where:

- (i) There is insufficient knowledge of the consultant's accounting system,
- (ii) There is previous unfavorable experience regarding the reliability of the consultant's accounting system, or
- (iii) The contract involves procurement of new equipment or supplies for which cost experience is lacking.

(2) The use of an independent audit, an audit performed by another State/Federal agency or an audit performed by another local governmental agency is acceptable if the information is current and of sufficient detail.

(3) Prenegotiation audits may be waived when sufficient audited consultant data is available to permit reasonable comparisons with the cost proposal.

(d) *State responsibility in local agency contracts.* The State highway agency shall ensure that procurement actions by or through other State agencies or local agencies comply with this regulation. When Federal-aid highway funds participate in the contract, a local agency shall use the same procedures as used by the State to administer contracts not under CA, the SRP or the CRP. These contracts shall be subject to the prior approval of the State highway agency and the FHWA. Nothing herein shall be taken as relieving the State of its responsibility under Federal-aid highway laws and regulations for the work to be performed under any agreements entered into by a local agency.

(e) *Disadvantaged Business Enterprise (DBE) program.* The contracting agency shall give consideration to DBE firms in the procurement of engineering and design related service contracts subject to 23 U.S.C. 112(b)(2).

(f) *Contractual responsibilities.* The contracting agency or State highway agency shall be responsible for the settlement of all contractual/administrative issues. All settlements shall be re-

viewed and approved by the FHWA before Federal-aid highway funds can participate in any additional costs.

§ 172.7 Methods of procurement.

This regulation addresses three methods of procurement for the hiring of consultants to perform engineering and design related services specified in 23 U.S.C. 112(b)(2). These methods are: competitive negotiations which follows qualifications-based selection procedures or another selection procedure permitted by State statutes; small purchase procedures for small dollar value contracts; and non-competitive negotiations where specific conditions exist allowing negotiations to take place with a single firm.

(a) *Competitive negotiation.* Competitive negotiation should be used for the selection of a consultant to provide engineering and design related services. The following procedures shall apply to the competitive negotiation process:

(1) *Scope, evaluation factors and cost estimate development.* The contracting agency shall prepare:

(i) A scope of work before issuing a Request for Proposal that reflects a clear, accurate, and detailed description of the technical requirements for the services to be rendered and a list identifying the evaluation factors and their relative importance.

(ii) A detailed cost estimate, except for contracts awarded under small purchase procedures, with an appropriate breakdown of specific types of labor required, work hours, and an estimate of the consultant's fixed fee (considering the risk and complexity of the project) for use during negotiations.

(2) *Soliciting proposals—(i) Solicitation.* The solicitation process shall be by advertisement (project, task or service), by mailing Requests for Proposals to certified/prequalified consultants, or any other method that ensures qualified in-State and out-of-State consultants are given the opportunity to be considered for award of a contract. It shall include a process where either:

(A) General interest is solicited for performing the work; responding consultants are ranked based on an evaluation of their qualification statements (submitted with their letters of interest or on file with the contracting