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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-

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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

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agency); and proposals are requested from three or more firms starting with the highest ranked firm, or

(B) Proposals are solicited from all consultants that are interested in being considered for the work.

(ii) *Request for proposal.* The request for proposal shall:

(A) Provide a description of the scope of work and identification of the evaluation factors including their relative importance as included in paragraph (a)(1) of this section.

(B) Specify the method(s) of payment (lump sum, cost plus a fixed fee, cost per unit of work, or specific rate(s) of compensation).

(C) Request the submission of a proposal. Priced proposals may be used in the selection phase if allowed for under a State statute, but shall not be used in the selection phase when qualifications-based procedures are used.

(D) Allow sufficient time for the consultant to prepare and submit the proposal.

(3) *Analysis and selection*—(i) The consultants' proposals, containing the information required by paragraph (a)(2) of this section, shall be evaluated and ranked by the contracting agency. This process shall include an analysis of the proposals in comparison to the evaluation factors. In addition, the consultants' applicable work experience, present workload, past performance, staffing capabilities, etc., should be evaluated and included in the ranking process.

(ii) The award of engineering and design related services shall:

(A) Utilize qualifications-based procedures that either comply with the provisions of Title IX of the Federal Property and Administrative Services Act of 1949 (Pub. L. 92-582, 86 Stat. 1278 (1972), as amended) or utilize equivalent State qualifications-based procedures, or

(B) Utilize a formal procurement procedure that is established by State statute or is subsequently established by State statute.

(iii) The contracting agency shall retain acceptable documentation of the proposal, evaluation and selection of the consultant. Records shall be maintained in accordance with the provisions of 49 CFR 18.42.

(4) *Negotiation responsibilities.* (i) The negotiator shall use all resources available to conduct effective negotiations, including but not limited to, the refined scope of work, the evaluation factors and their relative importance, the agency's cost estimate as required in paragraph (a)(1) of this section and the audit opinion issued as a result of the prenegotiation audit required in § 172.5(c) of this part.

(ii) The negotiator shall separately negotiate the dollar amounts for elements of cost and a fixed fee except for services normally negotiated on a per unit (includes costs and fees) cost.

(iii) The contracting agency shall maintain records of negotiations to document negotiation activities and set forth the resources considered by the negotiator. Records shall be maintained in accordance with the provisions of 49 CFR 18.42.

(5) *Execution of contracts.* The proposed contract including the agreed upon cost figures shall be submitted to the FHWA for approval prior to its execution.

(b) *Small purchases.* Contracting agencies may use small purchase procedures for the procurement of engineering and design related services when the contract cost does not exceed \$25,000.

(c) *Noncompetitive negotiation.* Noncompetitive negotiation may be used to obtain engineering and design related services when the award of a contract is not feasible under small purchase or competitive negotiation procedures. The contracting agency shall submit justification and receive approval from the FHWA before using this form of contracting when Federal-aid highway funds are used in the contract.

(1) Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

(i) The service is available only from a single source, or

(ii) There is an emergency which will not permit the time necessary to conduct competitive negotiations, or

(iii) After solicitation of a number of sources, competition is determined inadequate.

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(2) The contracting agency shall comply with the following procedures for noncompetitive negotiations:

(i) Establish a process to determine when noncompetitive negotiation will be used,

(ii) Develop an adequate scope of work, evaluation factors and cost estimate as required in paragraph (a)(1) of this section,

(iii) Conduct negotiations as required in paragraph (a)(4) of this section, and

(iv) Submit the proposed contract and cost estimate to the FHWA for approval.

### § 172.9 Compensation.

(a) Contracting agencies may establish cost principles for determining the reasonableness and allowability of costs. Federal reimbursement shall be limited to the Federal share of the costs allowable under the cost principles in 48 CFR part 31 (Federal Acquisition Regulations). Any references included in 48 CFR part 31 to other parts of 48 CFR do not apply to these contracts.

(b) Applicable cost principles shall be referenced in each contractual document.

(c) *Methods of payment.* (1) The method of payment to compensate the consultant for all work required shall be set forth in the original contract and in any contract modifications thereto. It may be a single method for all work or may involve different methods for different elements of work. The methods of payment which shall be used are: lump sum, cost plus fixed fee, cost per unit of work or specific rates of compensation.

(2) Compensation based on cost plus a percentage of cost or percentage of construction cost shall not be used.

(3) When the method of payment is other than a lump sum, the contract shall specify a maximum amount payable which shall not be exceeded unless adjusted by a contract modification.

(4) The lump sum method shall not be used to compensate a consultant for construction engineering and inspection services except when the agency has established the extent, scope, complexity, character and duration of the work to be required to a degree that

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fair and reasonable compensation including a fixed fee can be determined.

(d) *Fixed fees.* (1) The determination of the amount of the fixed fee shall take into account the size, complexity, duration, and degree of risk involved in the work. The establishment of the fixed fee shall be project specific.

(2) Fixed fees normally range from 6 to 15 percent of the total direct and indirect cost. Subject to the approval of the FHWA, a fixed fee over 15 percent may be justified when exceptional circumstances exist.

### § 172.11 Contract modifications.

(a) Contract modifications are required for any modification in the terms of the original 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.

(b) A contract modification shall clearly outline the changes made and determine a method of compensation. FHWA approval of contract modifications shall be obtained prior to beginning the work except as discussed in paragraph (d) of this section.

(c) Overruns in the costs of the work shall not warrant an increase in the fixed fee portion of a cost plus fixed fee contract. Significant changes to the Scope of Work may require adjustment of the fixed fee portion in a cost plus fixed fee contract or in a lump sum contract.

(d) In unusual circumstances, the consultant may be authorized to proceed with work prior to agreement on the amount of compensation and execution of the contract modification, provided the FHWA has previously approved the work and has concurred that additional compensation is warranted.

### § 172.13 Monitoring the contract work.

(a) A public employee qualified to ensure that the work being pursued is complete, accurate and consistent with the terms, conditions, and specifications of the contract shall be in responsible charge of each contract or project. The employee's responsibilities include: