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## Federal-aid Program Overview

### Consultant Services

# Hiring a Consultant Using Competitive Negotiation Procedures

[www.fhwa.dot.gov/federal-aidessentials](http://www.fhwa.dot.gov/federal-aidessentials)

*Consultants are selected based on qualifications and experience when competitive negotiation procedures are required*



In many cases, as buyers in both our professional and private lives, we assume that most service providers are essentially the same and it is appropriate to choose the lowest-cost option. However, when we require the professional medical services of a surgeon, for example, the cheapest option may not be our first choice. In this case, qualifications and experience become more important than the lowest price. The same is true for selecting consultants to engineer and design your highway construction projects using Federal-aid funds.

As the local public agency, or LPA, when you need to hire a consultant for engineering and design-related services using Federal-aid funds, you must follow Federal requirements for competitive negotiation procurement procedures, unless your State department of transportation, or State DOT, allows alternate procedures for lower-cost contract amounts. The Federal Highway Administration, or FHWA, defines “engineering and design-related services” as program management, construction management, preliminary engineering, engineering, design, surveying and mapping, and architectural-related services. If your State provides a broader definition of engineering services in law or regulation for you to follow, these additional services are also subject to Federal requirements.



## The foundation for competitive negotiation procurement requirements is the Brooks Act.

The Brooks Act is a Federal law that establishes the qualifications-based selection requirements for procuring engineering and design-related services. The process for hiring a consultant under the Brooks Act and competitive negotiation procurement requirements can be broken down to three simple steps:

1. Issuing a request for proposal, or RFP, to publically solicit the need and requirements for services
2. Selecting a consultant based on qualifications to provide the needed engineering services
3. Negotiating a fair and reasonable cost and contract terms with the selected consultant

Before you hire a consultant, you must first detail how your agency will administer this process by establishing written procedures, unless your State prescribes the procedure for you to use. When you develop your own written procedures, your State DOT must approve them before they are permitted to be used on Federal-aid projects. Let's take a closer look at some of the required steps of the competitive negotiation procurement process.

The first step in hiring a consultant involves issuing an RFP. Just as hiring a contractor requires a set of plans, specifications, and construction documents for soliciting bids, hiring a consultant starts with developing an RFP. Your RFP must clearly detail the scope of work, qualifications, responsibilities, and deliverables that you seek from a consultant. The RFP must detail the estimated schedule for the performance and delivery of the services, and the method of contract payment.



Your RFP must clearly define the evaluation criteria used to assess and rate the qualifications of responding consultant firms, along with the scoring weight for each of the assigned criteria. The evaluation criteria must relate to the qualifications needed to provide the advertised scope of work and services. The qualifications-based evaluation criteria listed in your RFP may include, but are not necessarily limited to, the qualifications of staff, prior similar work experience, past performance, workload capacity, and technical project approach. Federal requirements prohibit the use of in-State or local-hiring preferences and do not allow you to consider price or any element of cost in the evaluation, ranking, and selection of the most highly qualified consultant.

Like other solicitations, the RFP to hire a consultant must be advertised for a sufficient amount of time in order to solicit proposals from as many qualified consultants as possible. You must allow fair and open competition by providing equal opportunity for in-State and out-of-State consultants to compete. Check with your State DOT to make sure you meet all requirements for advertising the RFP in your State.

The second step begins after the close of the advertisement period. All submitted proposals are evaluated and ranked according to the evaluation criteria and scoring basis outlined in the RFP. List in order of preference at least three consultants you determine to be the most qualified.

As you prepare for negotiations, you must develop an independent cost estimate that reflects the advertised scope of work. This estimate is used as the basis for negotiation with the selected consultant.

Now you may begin the third step of negotiating cost and contract terms with the number-one ranked, most highly qualified consultant. Your negotiations should focus on the level of effort and experience of staff required to complete the scope of work and perform the needed tasks. Only tasks included within the scope of work advertised in the RFP may be incorporated into the selected consultant's contract.

Ultimately, you are required to determine and agree to contract terms for “fair and reasonable” compensation, considering the scope and complexity of the needed work.

The cost principles of the Federal Acquisition Regulation, or FAR, are the set of rules that govern the costs of goods and services using Federal funds. You are required to ensure compliance with the FAR cost principles for determining allowable costs on consultant services contracts when Federal funds are used.

These costs include those directly associated with a specific contract, as well as a consultant's

overhead costs, which are formally referred to as their indirect cost rate.

Each consultant is required to annually establish its indirect cost rate in compliance with the FAR cost principles. A consultant's indirect cost rate can only be approved for use by either a Federal agency or State DOT. Once approved, the consultant's indirect cost rate must be used for purposes of estimating, negotiating, and making payment on the contract. As the LPA, you are not permitted to negotiate or arbitrarily cap a FAR compliant-indirect cost rate. Contact your State DOT to verify that any proposed indirect cost rate is in compliance with the FAR cost principles.



In some situations, negotiations may break down if a satisfactory contract cannot be negotiated. If this happens, you must first formally terminate negotiations before you begin negotiations with the next highest ranked consultant. It is important to understand you can only negotiate with one consultant at a time.

**Negotiations with another consultant should only occur after officially terminating negotiations with the prior firm.**

Once you have successfully negotiated a fair and reasonable compensation for the needed services, a contract can be executed in accordance with your State's required procedures. As with any contract, your role is to monitor the consultant's work throughout the life of the contract for quality and completeness. Additionally, consultant invoices must be reviewed to ensure the costs are consistent with the FAR cost principles, contract terms, and progress of the consultant's work.

When the contract is completed, you are required to evaluate the consultant's performance of the scope of work items listed in the contract. You will use this information to assess a consultant's past performance if they compete for future Federal-aid work. All records pertaining to the consultant procurement and executed contract for services are required to be kept on file a minimum of three years following submittal of your final voucher to FHWA by your State DOT. You will find these helpful if asked to demonstrate compliance with all the requirements just covered.

Under most circumstances, you must follow competitive negotiation procurement procedures for hiring a consultant to provide engineering and design related services funded by Federal-aid. As defined within the Brooks Act, competitive negotiation requires you to select consultants based on qualifications and experience.

**Contract award occurs only after the negotiation of a fair and reasonable cost with the selected consultant.**



**Oversight Responsibility**  
for Procuring & Administering  
**Consultant Services**

Your State DOT has the oversight responsibility for procuring and administering consultant services. Prior to contracting with a consultant when using Federal-aid funds, contact your State DOT for assistance to ensure you meet all Federal and State laws and regulations that apply.

### Web Resources

- Information on consultant services policy and guidance  
<http://www.fhwa.dot.gov/programadmin/consultant.cfm>
- Information on consultant services in Q & A format  
<http://www.fhwa.dot.gov/programadmin/172qa.cfm>
- Federal regulations on administration of engineering and design-related service contracts  
<http://www.ecfr.gov/cgi/t/text/text-idx?c=ecfr&sid=88df046e4fbcfb189a147f0e13d2e15&rqn=div5&view=ext&node=23:1.0.1.2.3&idno=23>
- Federal regulations on administration of engineering and design-related service contracts  
<http://www.ecfr.gov/cgi/t/text/text-idx?c=ecfr&sid=2d0307d68fc3ad4e117788370d178f2e&rqn=div5&view=text&node=48:1.0.1.5.30&idno=48>

The content of this document is not a substitute for information obtained from State departments of transportation, appropriate FHWA Division Offices, and applicable laws. Scenarios have been simplified for emphasis and do not necessarily reflect the actual range of requirements applicable to the scenario or this topic. This document was created under contract number DTFH63-12-F-00025 by the Federal Highway Administration, U.S. Department of Transportation, and is offered to the public to heighten and focus awareness of Federal-aid requirements within the local public agencies community and reinforces the importance of these necessary policies, procedures, and practices.

This companion resource is the script content for the video production of the same name.