

TDOT Policy 301-01 Standard Procurement, Management and Administration of Engineering and Design Related Services

Frequently Asked Questions

The following provides supplemental guidance for TDOT Policy 301-01 relating to the procurement of engineering and design related service contracts

Questions and Answers Regarding the Administration of Engineering and Design Related Services Contracts

A. Questions and Answers Regarding Revisions to Policy 301-01

1. **What is the effective date of the revised TDOT Policy 301-01?**
The Policy is effective July 15, 2020 for Consultant Contracts using 100% State funds and August 3, 2020 for consulting contracts using Federal-aid highway funding.
2. **Will the revised Policy 301-01 be retroactive? Apply to existing contracts?**
Existing contracts will not be affected. However, the updated Policy 301-01 will be used going forward for new contracts, contract amendments, or supplements to existing contracts.
3. **Will the revised TDOT Policy 301-01 affect T.C.A. § 54-1-130?**
T.C.A. § 54-1-130 which caps overhead at 145% remains in effect on 100% State funded consultant contracts.
4. **What fixed fee rate will apply to supplemental agreements for existing contracts?**
Unless specifically addressed and prohibited in the original agreement, the new fixed fee rate calculator (Attachment D) should be used on any Supplemental Agreements negotiated after August 3, 2020.
5. **What overhead rate should be used with the Attachment D Fixed Fee Calculator on CEI type contracts for firms with both an Office and a Field (CEI) overhead rate?**
Field Overhead Rates should be used for CEI type contracts for firms that have both an Office and a Field Overhead rate.
6. **What overhead rate should be used in Fixed Fee Calculator (Attachment D) on State funded projects or work orders for firms with their overhead capped at 145% pursuant to T.C.A. § 54-1-130?**
For any State funded contracts or work orders with firms with overhead rates capped at 145%, the capped overhead rate should be used when completing the fixed fee calculator.
7. **Will the fixed fee rate calculated by Attachment D be used by both the prime and any subconsultants?**
Yes. The establishment of the prime's fixed fee shall be contract or task order specific.

B. Questions and Answers Regarding Qualifications Based (Brooks Act) Selection Procedures

1. What is the competitive negotiation procedure?

Competitive negotiation is the preferred method of procurement for engineering related services and is based on the Brooks Act. As stated in the Brooks Act the congressional intent 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.

2. When must qualification-based procedures (Brooks Act) be used for procuring design related services?

In general, competitive negotiation procedures must be used when procuring design related services with Federal-aid highway funds and those services are directly related to a construction project. See Title 23 U.S.C. § 112 for additional information. Additionally, T.C.A. § 12-4-107 requires state and local government agencies to use a qualifications-based selection process when procuring architectural or engineering services.

3. What are Engineering and Design Related Services?

Design Related services are defined in the Policy 301-01 definitions. If the proposed advertised scope of work is NOT listed in the definition additional guidance should be requested from the TDOT Legal Office.

4. If there are no Federal-aid funds in the design services contract, are the federal qualifications-based procurement procedures still applicable?

The specific federal qualifications-based procurement procedures do not directly apply as a matter of law if no federal-aid funds are used to procure design related services. However, T.C.A. § 12-4-107 requires state and local government agencies to use a qualifications-based selection process when procuring architectural or engineering services, and under Policy 301-01 the Department will use the same competitive negotiation procedures to procure engineering and design related services irrespective of funding.

5. Do engineering services contracts have to be advertised under competitive negotiation procedures?

Yes. The contracting agency must, by public advertisement, assure that in-state and out-of-state consultants are given a fair opportunity to be considered for award of the contract. The advertisement must include the criteria that will be used to rate the firms for their competency and qualifications to perform the type of work requested. The advertisement should have a clear and precise statement of the work to be done and allow enough time for firms to submit a proposal.

6. Can price be a selection criterion under the competitive negotiation procedures?

No. The cost cannot be a criterion during the evaluation phase of the selection process or in the ranking/selection of the most highly qualified firms.

7. Can price be used in the negotiation and final selection process?

Price cannot be used as an evaluation criterion in a competitive process to make a final selection from among the most highly qualified firms. However, the contracting agency must prepare an independent cost estimate of the services to be performed and consider the selected firm's cost proposal before entering into a contract. Upon completion of the qualifications based evaluation and ranking of consultant firms, the contracting agency initiates negotiations with the most highly qualified (highest ranked) consulting firm to arrive at a compensation that is fair and reasonable in consideration of the scope, complexity, professional nature, and estimated value of the services to be rendered. Overall cost or bottom line price alone are not justification to terminate negotiations with a firm, as the contracting agency must make a good faith effort to negotiate the scope, level of effort, and reasonable price with the highest ranked firm. If the contracting agency and the most highly qualified firm are unable to negotiate a fair and reasonable contract, the contracting agency may formally terminate negotiations and undertake negotiations with the next most qualified firm, continuing the process until an agreement is reached.

8. Can an in-state preference be used in the advertisement and selection phase?

No. An in-state preference does not assess the qualifications of potential service providers and its application would limit competition from qualified out-of-state firms. The intent of the Brooks Act is to develop a wide pool of potential service providers to select from. Therefore, the use of in-state preference as a criterion cannot be used.

9. Can a locality preference be used during the selection phase?

Yes. Although a locality factor is not directly a qualification factor, a nominal local office preference criterion of no more than 10% of the total evaluation criteria may be used on projects where a local presence will add value to the quality and efficiency of the services to be performed. This criterion cannot be based on political boundaries and should only be used on a project-by-project basis for projects where a need for the consultant to have a local office presence has been established and application of the criterion will leave an appropriate number of qualified firms available to compete for the contract. Further, if a firm currently outside the locality criteria indicates as part of its proposal that it will satisfy that criteria in some manner, such as establishing a local project office, it should be considered to have met the locality criteria.

10. Can the State require that consultants doing engineering work have a State Professional Engineer license to work in that State?

Yes.

11. Can a contract be modified to add work that was not included in the qualification-based selection criteria used to evaluate proposals?

No. The addition of work not included in the advertised scope of services and evaluation criteria would be contrary to the competitive negotiation/qualifications-based selection process. Any modification of the contract to add services beyond the scope of services included in the original advertisement for which the consultant was selected as the most highly qualified would in effect circumvent the Brooks Act qualification-based evaluation and selection procedures.

Example: If a firm was selected for an environmental EIS and the selection criteria related to environmental work only, the contract could not be modified to include design tasks. However, if the selection criteria also included design elements for the evaluation and ranking of consultants, then it would be permissible to modify the contract to include some design.

Example: If a firm was selected to complete the design of a roadway and the advertised scope and evaluation criteria included only geometric, drainage, and other roadway design elements, the contract could not be modified to include the design of a bridge unless structure/bridge design was included in the advertised scope and evaluation criteria from which the firm was selected based on qualifications to perform.

C. Other Selection Procedures

1. What are small purchase procedures?

Small purchase procedures are simple procedures that may be used for the procurement of services with a total contract cost below the Federal simplified acquisition threshold, as specified in 48 CFR § 2.101 and currently set at \$250,000. Project phases or contract requirements cannot be broken down into smaller components merely to permit the use of small purchase procedures. These procedures do not have to follow the Brooks Act competitive negotiation process. However, state and local agencies must follow the State's laws, regulations, and procedures, and T.C.A. § 12-4-107 requires government agencies to use a qualifications-based selection process to procure architectural or engineering services. Under Policy 301-01, the Department may solicit proposals from an appropriate number of qualified firms, but not less than three, and then proceed with evaluation, ranking, and selection. If no more than two firms respond, the selection process may still proceed if it is determined that the solicitation did not contain conditions or requirements that arbitrarily limited competition. The award will be made to the responsible firm whose proposal is most advantageous to the program.

2. What happens if a contract modification causes a small purchase contract to exceed the federal threshold?

The full amount of any contract modification or amendment that would cause the total contract amount to exceed the federal small purchase threshold would be ineligible for Federal-aid. The FHWA reserves the right to withdraw all Federal-aid from a contract if it is modified or amended above the federal threshold.

D. Compensation Methods

1. What compensation methods are allowed for Federal-aid contracts?

Lump sum, cost plus fixed fee, cost per unit of work, and specific rates of compensation may be used as payment methods. A single contract may contain different payment methods as appropriate for different elements of work. The payment method(s) to be used must be described in the advertisement for project-specific or multiphase contracts, and the payment method(s) must be specified in the original contract and any subsequent contract modifications.

2. When may the lump sum payment method be used?

The lump sum payment method shall only be used when the extent, scope, complexity, character, and duration of the work to be performed are sufficiently established to a degree that fair and reasonable compensation, including a fixed fee, can be determined at the time of negotiation of the contract or work order.

3. When may the specific rates of compensation payment method be used?

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. This payment method shall only be used when it is not possible at the time of procurement to estimate the extent or duration of work or to estimate costs with any reasonable degree of accuracy. This method should be limited to contracts or components of contracts for specialized 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 method, the contracting agency shall manage and monitor the consultant's level of effort and classification of employees used to perform the services.

4. Is the compensation payable under a contract subject to a maximum amount?

When the method of payment is other than lump sum, the contract shall specify a maximum amount payable that shall not be exceeded unless adjusted by a contract modification (See 23 CFR § 172.9(b)(4)). For on-call contracts, the maximum contract amount specified in the contract or any contract modification shall not exceed the maximum contract amount described in the advertisement for the contract (See 23 CFR §172.9(a)(3)(ii)).

5. What compensation methods are prohibited for Federal-aid contracts?

The cost plus a percentage of cost and percentage of construction cost methods of payment shall not be used.

E. Audits

1. Are pre-negotiation audits or reviews allowed?

Yes. States may perform pre-negotiation audits or reviews and have the costs of those audits or reviews eligible for Federal-aid. In some cases the state may have to perform a pre-negotiation review to assure that the consulting firm has an acceptable accounting system and adequate and proper justification for the various rates charged to perform work and is aware of the FHWA's cost eligibility and documentation requirements.

2. May a contracting agency accept a lower indirect cost rate voluntarily offered by a firm?

Yes. A consulting firm can, of its own volition, offer a lower indirect cost rate and the contracting agency may accept it as either part of the original cost proposal or as part of a negotiation point initiated by the consultant.

3. How long is an audited indirect cost rate valid?

One year. The one-year applicable accounting period is defined in the 23 CFR 172 to mean the annual accounting period for which financial statements are regularly prepared for the consultant.

4. What happens if an audited indirect cost rate expires during the contract period?

In general, and in accordance with the FAR (48 CFR 31.203(e)) a new indirect cost rate should be established by a cognizant agency. However, 23 CFR 172.7(b) allows an indirect cost rate established for a contract to be extended beyond the one-year applicable accounting period provided all concerned parties agree. This is only on a contract-by-contract basis where all concerned parties agree, and such an agreement shall not be a requirement of the contract.

5. How do you obtain an indirect cost rate if the rate determined by a cognizant agency audit is under dispute?

If an audit for indirect cost rate is under dispute, the contracting agency does not have to accept the rate. The state can conduct its own indirect cost audits or negotiate a provisional indirect cost rate.

6. Who can dispute an audited indirect cost 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, any prospective user may dispute the rate. The term error does not refer to differing and legitimate interpretations of the FAR within the broad principles therein. Errors may consist of complete misinterpretation or misapplication of the FAR principles or simple mathematical errors of calculation.

7. What if no audited indirect cost rate has been established?

A state may conduct its own indirect cost audits or negotiate a provisional indirect cost rate until a cognizant audit is done.