



City of Huron

Uniform Guidance Procurement Standards Policy

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Uniform Guidance Procurement Standards Policy

PURPOSE

To comply with the Huron Municipal Code Section ___ "Purchasing Procedures" and "Informal Bidding on Public Works Projects" for the procurement of services, supplies, material, or labor, including capital improvements projects, and to implement changes necessary to conform with the federal procurement requirements set forth in the Office of Management and Budget's Uniform Guidance codified at 2 CFR Sections 200 et seq.

OBJECTIVE

- To ensure the City's existing procurement policies incorporate and comply with local ordinances and state and federal regulations.
- To ensure all procurement solicitation clearly and accurately describe the City's minimum requirements and to assure the quality of supplies and services purchased by the City.
- To monitor contractors to ensure they perform in accordance with the terms, conditions, and specifications of their contracts and/or purchase orders.
- To have written policies about conduct of City's employees involved in the selection, award, and administration of contracts.
- To detail the City's conflict of interest policies to prevent unfair or noncompetitive awards being provided and include disciplinary actions for any violations of the conflict-of-interest standards.
- To make the most efficient and effective approach to purchases, avoid unnecessary or duplicative purchases, and to utilize intergovernmental contracts when appropriate
- To maintain documentation to support the history of the procurement and explain the procurement methodology, including contractor selection or rejection and the basis for contract price.

DEFINITIONS

For the purposes of this Policy, the following words and phrases shall have the meanings respectively ascribed to them by this section, unless the context or the provision clearly requires otherwise.

"Brand name" means a product, item or material described by reference to its manufacturer's name or catalogue number.

"Brand name or equal specification" means a contract or purchase order specification containing a brand name to describe the nature, standard of quality, performance, and other characteristics needed to meet the City's requirements, and which provides for the submission of equivalent products.

"Cost," as applied to a single transaction for the purchase of supplies or services, means the total amount to be expended by the City, exclusive of sales or use taxes.

"Services" means and includes labor, professional services and consulting services. Services shall not include incidental labor such as set-up, testing, and maintenance of supplies where the primary purpose is to purchase the supplies.

"Supplies" means and includes all materials, supplies, equipment, products, and other items of tangible personal property.

POLICY

I. Exclusions

The types of transactions described below are excluded from the provisions of this City's Purchasing System:

- The award of contracts for public projects governed by the provisions of the California Public Contract Code or the provisions of the City's informal bidding
- Ordinance contained in MMC section ____;
- The award of contracts governed by any state or federal law which prescribes a different procedure;
- The granting by the City of franchises, rights, privileges, licenses or permits;
- The purchase of utilities, including, but not limited to, electricity, water, gas, or telephone service;
- Employment contracts or collective bargaining agreements with any employees of the City;
- The purchase of insurance, including coverage provided by any self-insurance pool in which the City is a participant;
- The extension or renewal of any existing contract for technical or professional services to be performed by consultants, unless the City Council elects to award a new contract pursuant to this Policy;
- Contracts for technical or professional services to be performed by consultants, where the cost thereof will be paid in advance by a person applying to the City for a permit, license or other approval;
- Contracts for educational, recreational, travel, or entertainment services furnished by independent contractors or consultants, where the total cost thereof is paid by the persons utilizing the services;
- Contracts for supplies or services to be furnished by any other public agency;
- The purchase of supplies or services made in compliance with the terms and conditions of any grant, gift or bequest to the City that is otherwise consistent with law.

II. Centralized Purchasing System-Purchasing Officer

Except as otherwise provided by this section, all purchases of supplies and services shall be centralized under the Purchasing Officer. The City Manager/Administrator is appointed as the Purchasing Officer for the City and Officer shall have authority to:

- Procure or supervise the procurement of all supplies and services needed by the City, in accordance with the procedures prescribed in this Policy and any administrative rules and regulations as may be adopted by the Purchasing Officer pursuant hereto;
- Exercise direct supervision over the City's central stores and general supervision over all other inventories of supplies belonging to the City;
- Establish or supervise the establishment of specifications for supplies and services required by the City;
- Inspect or supervise the inspection of all supplies purchased by the City to ensure quality, quantity, and conformance with the minimum specifications, and require any tests necessary to determine quality and conformance with specifications;
- Prepare and adopt administrative rules and regulations not in conflict with the provisions of this Policy and all applicable laws for the purpose of implementing the purchasing system established hereunder; and
- Sell trade or otherwise dispose of surplus supplies, in accordance with the provisions of this Policy and all applicable laws.

The Purchasing Officer may authorize any department head to investigate, solicit bids, or negotiate the purchase or award of contracts for or services independently of the centralized purchasing system, provided that all such actions shall be done in conformity with the procedures prescribed by this Policy or by duly adopted administrative rules and regulations pertaining thereto.

The City Council may, by resolution, delegate the authority of the Purchasing Officer to the subordinate of the City Manager/Administrator responsible for the financial management of the City.

III. Contracting with Small Businesses, Minority-owned Businesses, Women-owned Businesses, and Labor Surplus Area Firms

The procurement standards also emphasize contracting with small businesses, minority-owned businesses, women-owned business enterprises, and labor surplus area firms, as defined below. (2 CFR § 200.321.) The City must use these firms when possible. Methods for inclusion include placing these businesses on the vendor list, soliciting pricing from them when they are potential sources, breaking up projects or orders into smaller tasks to permit participation by these firms or requiring contractors to follow these guidelines for subcontracts.

Generally, the Small Business Administration defines a small business as one that is independently owned and operated, is organized for profit, and is not dominant in its field. "Small business" is more precisely defined by the size standards established for different types of economic activity or industry; these size standards are updated annually in the Federal Register. (13 CFR § 121.101.) Certification is required.

Minority-owned businesses are for-profit enterprises, regardless of size, owned, operated and controlled by someone who is Asian, Black, Hispanic and Native American. (40 CFR § 33.103.)

Ownership and control are specifically defined in 13 CFR 124.105 and 13 CFR 124.106, respectively. Certification is required.

Women-owned business enterprise is a business concern which is at least 51% owned or controlled by women. (40 CFR § 33.103.) Certification is required.

Labor surplus area firms are business that, together with first-tier subcontractors, will substantially perform in labor surplus areas. (40 CFR § 33.103.) The list of civil jurisdictions that qualify as labor surplus areas is published each year by the Department of Labor's Employment and Training Administration. (See 20 CFR part 654.)

METHODS OF PROCUREMENT

As described below, the five procurement methods provided for in this Policy are contingent on the cost of the item(s) being purchased. Documentation must be kept to support any procurement methodology or decision, e.g., maintain printouts of internet searches for quotes or documenting in a memo the reasons for acceptance or rejection of bidders in sealed bids or competitive proposals.

I. Micro-Purchase Procedure

The "Micro-purchase" procedure is the method used to expedite the completion of its lowest-dollar, small purchase transactions and to minimize the associated administrative burden and cost. A micro-purchase is one in which the aggregate dollar amount does not exceed the threshold defined in OMB's Uniform Guidance. (See 2 CFR § 200.320(a).) Micro-purchases can be made by the Purchasing Officer or other authorized City employee without a purchase order, cost or price analysis, or bid if management determines that the price is reasonable. A petty cash fund can be used for such micro-purchases. The Purchasing Officer must sign the invoice as confirmation of receipt of supplies, materials or services and approval of the expense amount.

II. Small Purchases/Open-Market Purchases Procedure

A "small purchase" is the procedure for making purchases above the micro-purchase threshold, but below the Simplified Acquisition Threshold, as defined in OMB's Uniform Guidance. (2 CFR § 200.320(b) 2 CFR § 200.320(a).) The method is meant to be simple and informal, and must be authorized by either the Purchasing Officer or the City Council as provided in MMC section ____.

Per § 200.320 (a) Methods of procurement to be followed. The non-Federal entity must have and use documented procurement procedures, consistent with the standards of this section and §§ 200.317, 200.318, and 200.319 for any of the following methods of procurement used for the acquisition of property or services required under a Federal award or sub-award.

(a) Informal procurement methods. When the value of the procurement for property or services under a Federal award does not exceed the simplified acquisition threshold (SAT), as defined in § 200.1, or a lower threshold established by a non-Federal entity, formal procurement methods are not required. The non-Federal entity may use informal procurement methods to expedite the completion of its transactions and minimize the associated

administrative burden and cost. The informal methods used for procurement of property or services at or below the SAT include:

(1) Micro-purchases -

(i) Distribution. The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (See the definition of micro-purchase in § 200.1). To the maximum extent practicable, the non-Federal entity should distribute micro-purchases equitably among qualified suppliers.

(ii) Micro-purchase awards. Micro-purchases may be awarded without soliciting competitive price or rate quotations if the non-Federal entity considers the price to be reasonable based on research, experience, purchase history or other information and documents it files accordingly. Purchase cards can be used for micro-purchases if procedures are documented and approved by the non-Federal entity.

(iii) Micro-purchase thresholds. The non-Federal entity is responsible for determining and documenting an appropriate micro-purchase threshold based on internal controls, an evaluation of risk, and its documented procurement procedures. The micro-purchase threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations. Non-Federal entities may establish a threshold higher than the Federal threshold established in the Federal Acquisition Regulations (FAR) in accordance with paragraphs (a)(1)(iv) and (v) of this section.

(iv) Non-Federal entity increase to the micro-purchase threshold up to \$50,000. Non-Federal entities may establish a threshold higher than the micro-purchase threshold identified in the FAR in accordance with the requirements of this section. The non-Federal entity may self-certify a threshold up to \$50,000 on an annual basis and must maintain documentation to be made available to the Federal awarding agency and auditors in accordance with § 200.334. The self-certification must include a justification, clear identification of the threshold, and supporting documentation of any of the following:

(A) A qualification as a low-risk auditee, in accordance with the criteria in § 200.520 for the most recent audit;

(B) An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; or,

(C) For public institutions, a higher threshold consistent with State law.

(v) Non-Federal entity increase to the micro-purchase threshold over \$50,000. Micro-purchase thresholds higher than \$50,000 must be approved by the cognizant agency for indirect costs. The non-federal entity must submit a request with the requirements included in paragraph (a)(1)(iv) of this section. The increased threshold is valid until there is a change in status in which the justification was approved.

(2) Small purchases -

(i) Small purchase procedures. The acquisition of property or services, the aggregate dollar amount of which is higher than the micro-purchase threshold but does not exceed

the simplified acquisition threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources as determined appropriate by the non-Federal entity.

(ii) Simplified acquisition thresholds. The non-Federal entity is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk and its documented procurement procedures which must not exceed the threshold established in the FAR. When applicable, a lower simplified acquisition threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations.

Price or rate quotes must be obtained from an adequate number of qualified sources, but no cost or price analysis is required. Quotes may be obtained from a variety of simple sources (internet search, vendor price listing, verbal quotes, etc.), and a purchase order may be required. Whenever possible, any purchase involving a cost of five thousand dollars (\$5,000) or more shall be based upon at least three informal price quotations and shall be awarded on the basis of the price quotation most advantageous to the City. The Purchasing Officer may solicit price quotations either orally or in writing, or may utilize price information on file with the City or available elsewhere.

Purchase Orders: Notwithstanding the "Small Purchases" provision within this Policy, purchases of supplies or services having a cost of five thousand dollars (\$5,000) or more shall be made only by purchase orders signed by the Purchasing Officer or their designee. Nothing herein shall preclude the use of authorized petty cash funds for purposes intended by their establishment.

However, purchase orders may be issued regardless of amount when required by the vendor or when the complexity of the contract demands a formal document. Purchases or vendor contracts of \$25,000 or more are approved by the City Council. Prior to year-end, Finance staff shall review all the purchase orders to be closed or carried over to the new fiscal year.

Availability of Funds: Except in case of an emergency, the purchasing officer shall not issue any purchase order for supplies or services unless there exists an unencumbered appropriation in the fund account against which such purchase is to be charged. The appropriate account and funds shall be encumbered immediately after the issuance of the purchase order.

Authorization for Purchase Orders and Contracts-Emergencies: The Purchasing Officer is authorized to issue purchase orders and award contracts for supplies or services where the cost thereof does not exceed twenty-five thousand dollars (\$25,000). Contracts or purchase orders for supplies or services involving a cost in excess of twenty-five thousand dollars (\$25,000) must be approved or awarded by the City Council.

Notwithstanding subsections A and B of this section or any other provision of this Policy, the Purchasing Officer may purchase supplies or services having a cost in excess of twenty-five thousand dollars (\$25,000) in the event of emergency requiring the immediate preservation of the public peace, health or safety, and precluding action by the City Council. In such instances,

the Purchasing Officer shall submit to the City Council at its next succeeding meeting a written report describing the circumstances of the emergency, the supplies or services purchased, and the cost thereof.

III. Sealed Bids

A. Formal Bidding Procedure

~~Pursuant to MMC section ___ and 2 CFR section 200.320(c), the following method shall be followed for Sealed Bids/Formal Bidding Procedure:~~

Pursuant to MMC section ___ and 2 CFR 200.320(b)(1), Methods of procurement to be followed. (b) Formal procurement methods. When the value of the procurement for property or services under a Federal financial assistance award exceeds the SAT, or a lower threshold established by a non-Federal entity, formal procurement methods are required. Formal procurement methods require following documented procedures. Formal procurement methods also require public advertising unless a non-competitive procurement can be used in accordance with § 200.319 or paragraph (c) of this section. The following formal methods of procurement are used for procurement of property or services above the simplified acquisition threshold or a value below the simplified acquisition threshold the non-Federal entity determines to be appropriate:

(1) Sealed bids. A procurement method in which bids are publicly solicited and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bids method is the preferred method for procuring construction, if the conditions.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

- (A) A complete, adequate, and realistic specification or purchase description is available;
- (B) Two or more responsible bidders are willing and able to compete effectively for the business; and
- (C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

- (A) Bids must be solicited from an adequate number of qualified sources, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised;
- (B) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;
- (C) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly;
- (D) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is

lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

Notices Inviting Bids: Notices inviting bids shall include a general description of the supplies or services to be purchased, the place where bid forms and specifications can be obtained, the time and place for opening bids, whether a bid deposit or bond will be required, and whether a performance bond will be required. The notice shall be published at least once, not less than ten (10) days prior to the date set for final receipt of bids, in a newspaper having general circulation in the City, and shall be posted at the City Hall location used for the posting of legal notices. Notices shall also be sent to persons who have submitted a written request to the City to be notified of such bidding opportunities, and notices may be sent at the discretion of the purchasing officer to any additional persons.

Bidder's Security: When deemed necessary by the purchasing officer, bids shall be accompanied by a bidder's security in the form of a cashier's check, certificate of deposit, money order, or unconditional an irrevocable letter of credit, payable at sight to the City, or a surety bond in favor of the City, in such amounts as determined by the purchasing officer to be adequate for protection of the City's interests. Bidders shall be entitled to return of their bid security. A successful bidder shall forfeit his or her bid security upon failure or refusal to execute a contract within ten (10) days after mailing the notice of the award, unless the City is responsible for the delay. The City Council may, on failure or refusal of the successful bidder to execute the contract, award it to the next lowest responsible bidder, in which event, the lowest bidder's security shall be applied by the City first to the difference between the low bid and the second lowest bid, then toward payment of any other costs, expenses or damages incurred by the City as a result of such failure or refusal, and the balance of the security, if any, shall be returned to the lowest bidder.

Bid Opening Procedure: Sealed bids shall be submitted to the purchasing officer and shall be identified as bids on the envelope. Bids received after the deadline for submitting the same shall not be accepted and shall be returned to the bidder unopened. The bids shall be opened in public at the time and place stated in the public notice. All opened bids shall be available for public inspection during regular business hours from the time of bid opening until the contract has been awarded by the City Council.

Rejection of Bids: If, in the opinion of the City Council, none of the bids is satisfactory, the Council may reject all bids and either purchase the supplies or services in the open market or re-advertise for new bids.

Award of Contract: Except as otherwise provided herein, a contract shall be awarded to the lowest responsible bidder, taking into consideration the criteria listed in MMC section ____.

Tie Bids: If two or more bids received are for the same total amount or unit price, quality and service being equal, and if a delay for re-advertisement would not be in the public interest, the

City Council may accept the bid it chooses or it may accept the lowest bid made by negotiation with the tie bidders at the time of the bid opening.

Performance Bond: The City Council may require that a performance bond be furnished before entering into a contract with a successful bidder. The performance bond shall be in a form satisfactory to the City Attorney. The performance bond amount will be satisfactory to the purchasing officer and in compliance with the contract specifications.

Waive Irregularities: The City Council may waive any minor irregularities in the bids, based upon a determination that the same have no material impact upon the bidding process or other bids submitted.

No Bids: If no bids are received in response to the notice inviting bids, the City Council may proceed to purchase the supplies or services without further competitive bidding.

Exceptions to the Seal Bids/Formal Bidding Procedure: A contract for the purchase of supplies or services involving a cost of twenty-five thousand dollars (\$25,000) or more may be awarded by the City Council without competitive bidding in each of the following cases:

- I. Where the City Council determines that the immediate preservation of the public peace, health or safety requires the purchase to be made without competitive bids;
- II. Where the supply or service required by the City can only be obtained from a single source;
- III. Where the contract is for specialized or professional services such as, but not limited to, services rendered by architects, engineers, attorneys, appraisers, geologists, and other specialized consultants;
- IV. Where the City Council determines that use of the competitive bidding process is impracticable or impossible, or would not be likely to result in a lower price to the City from a responsible bidder, or would cause unnecessary expense or delay under the circumstances;
- V. Where the City Council utilizes the request for proposal method of purchase, as set forth in MMC section ____.

B. Informal Bidding Procedure for Public Works Projects

Pursuant to MMC section ____, the following method shall be followed for Sealed Bids/Informal Bidding Procedure for Public Works Projects.

Definition: In addition to the definitions provided in this Policy, additional definitions provided in MMC section ____ apply to the Informal Bidding Procedure for Public Works Projects.

Applicability: This Procedure applies to public projects with a cost in excess of the dollar amount specified in Public Contract Code section 22032(a), but not exceeding the dollar amount specified in Section 22032(b). Any public project with a cost less than the dollar amount specified in Section 22032(a) may be performed by the employees of the city by force account, by negotiated contract, or by purchase order as authorized by Section 22032(a), unless

the City Council shall specifically direct that the provisions of this chapter be followed with respect to such project.

The provisions of this chapter shall in no way restrict the right of the city to perform all necessary repair or replacement work in cases of great emergency, without adopting plans, specifications, strain sheets, or working details, or giving notice for bids to let contracts, as authorized by and in accordance with the procedures set forth in of the Public Contract Code Section 22035.

List of Qualified Contractors: The City shall maintain a list of qualified contractors, identified according to categories of work. The list shall be developed and maintained in compliance with such minimum requirements as may be specified from time to time by the Commission. The public works director is designated as the City official having primary responsibility for preparation and maintenance of the list of qualified contractors.

Notice Inviting Informal Bids: Where public project is to be performed which is subject to the provisions of this Policy, the public works director shall mail a notice of work to be bid to the List of Qualified Contractors, as described in MMC section 3.04.110, and to all construction trade journals for the category of work as determined by the commission pursuant to Public Contract Code section 22036.

All mailing of notices to contractors and construction trade journals pursuant to subsection A of this section shall be completed not less than ten (10) calendar days before bids are due.

The notice inviting informal bids shall describe the public project in general terms, shall indicate the name, address and telephone number of the person from whom detailed information concerning the project can be obtained, and shall state the time and place for the submissions of bids.

If there is no existing list of qualified contractors maintained by the City for the particular category of work to be performed, the notice inviting informal bids shall be sent only to the construction trade journals specified by the commission. If the product or service is proprietary in nature such that it can be obtained only from a certain contractor or contractors, the notice inviting informal bids may be sent exclusively to such contractor or contractors.

Award of Contracts: Contracts on which informal bids have been obtained shall be awarded in accordance with the same policies and standards customarily followed by the City for public projects requiring formal bids. For contracts based on informal bids, in particular, consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. (2 CFR § 200.318(h).) The City Council may, by resolution, delegate to the City Manager/Administrator or the public works director or other designated employee of the City the authority to award any particular contract for which informal bids will be obtained.

IV. Competitive Proposal/Request for Proposals Procedure

This procedure is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. (2 CFR § 200.320(b) (2).) Pursuant to MMC section ____, the City Council may utilize this method of purchasing supplies or services upon a determination that competitive bidding is not practical or advantageous to the city because:

- Quality, capability, performance or qualification is overriding in relation to price;
- Delivery, installation, service, maintenance, reliability or replacement is overriding in relation to price; or
- In the opinion of the City Council, the marketplace will respond better to a solicitation permitting a range of alternative proposals or evaluation and discussion of proposals before entering the contract.

Requirements: Proposals shall be solicited in such manner as directed or approved by the City Council, but must be solicited from an adequate number of qualified sources. The identity of persons responding to the request for proposals and the content of proposals submitted to the city may be kept confidential during the process of negotiation and until a contract is awarded.

Requests for Proposals must be publicized and identify all evaluation factors and their relative importance. Discussions may be conducted with responsible offerors and revisions to proposals, based upon such discussions, may be accepted. Any response to publicized requests for proposals must be considered to the maximum extent practical.

The contract award shall be based upon the proposal determined by the City Council to be most advantageous to the city, taking into consideration price and the evaluation factors set forth in the request for proposals.

The City Council may reject any and all proposals if such rejection is deemed to be in the best interests of the city. The Council may thereupon direct that proposals be solicited or utilize any other purchasing method set forth in this Policy.

V. Noncompetitive Proposal/Sole Source Procedure

Procurement by noncompetitive proposal is used when the items are only available from a single source. (2 CFR § 200.320.) One or more of the following circumstances must apply:

- Item is available from only one source;
- Public emergency will not permit a delay resulting from competitive solicitation;
- Awarding agency has expressly authorized a noncompetitive process, or after solicitation of a number of sources;
- After solicitation of a number of sources, competition is deemed inadequate.

Sole Source Justification: Under the OMB's Uniform Guidance (2 CFR § 200.320), when a purchase is made under this exception, a written justification is required and must be maintained with the procurement records. The justification must answer the following questions:

- Why is this purchase necessary? Explain why this contract could not be competitively bid.
- Why was this vendor selected? Does the City have prior experience with the vendor? Is the service to be provided unique or proprietary in nature?
- How was a fair price established? Provide details and supporting documentation about the vendor's competitors and pricing.
- What would happen if this exception was not approved? Clarify ramifications of not taking action, including the delay involved in the formal bidding procedure.

Use of Brand Names: Pursuant to MMC section ____, the Purchasing Officer may determine that an article of a specified brand or trade name is the only article that will properly meet the needs of the City. Specifically, brand name or equal specifications may be used when the Purchasing Officer determines one of the following:

- a. No other design or performance specification or products list is available; or
- b. Time does not permit the preparation of another form of purchase description which does not include a brand name specification; or
- c. The nature of the product or the nature of the city's requirements makes use of a brand name or equal specification suitable for the procurement; or
- d. Use of a brand name or equal specification is in the city's best interests.

Where a brand name or equal specification is used in a solicitation, the solicitation shall state that substantially equivalent products to those designated will be considered for award.

Additionally, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance and characteristics desired and is not intended to limit or restrict competition.

Non-Federal Entity:

The non-Federal entity must use one of the following methods of procurement.

(a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (§ 200.67 Micro-purchase). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

(b) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

(c) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose

bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If sealed bids are used, the following requirements apply:

(i) Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised;

(ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(iii) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly;

(iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(v) Any or all bids may be rejected if there is a sound documented reason.

(d) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

- (1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;
- (2) Proposals must be solicited from an adequate number of qualified sources;
- (3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;
- (4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and
- (5) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(e) For Federally funded contracts for engineering and design related services for projects subject to the provision of 23 U.S.C. 112(a) (related to construction)/ highway construction projects follow 23 CFR Part 172. (see page 17)

(f) Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

- (1) The item is available only from a single source;
- (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
- (3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or
- (4) After solicitation of a number of sources, competition is determined inadequate.

§ 200.324 Contract cost and price.

(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and, in all cases, where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E - Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

CONFLICTS OF INTEREST

Pursuant to City Administrative Guideline No. 3.4.1, no City employee, officer, or agent may participate in the selection, award, or administration of a contract if he or she has a real or apparent conflict of interest. (See also 2 CFR § 200.318 (c).) Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract.

The City requires full disclosure for the positions which participate in making decisions that may foreseeably have a material effect on financial interests. (City Resolution No. 18-12.) These "designated positions" must file Statement of Economic Interests with the City Clerk. The City Clerk will perform the duties of filing officer for the City of Huron and will maintain the original filings in the City Clerk's office. Full Disclosure includes all interests in real property in the City of Huron, as well as investments, business positions, and sources of income, including gifts, loans, and travel payments.

The following are examples of conduct that the City deems to be conflicts of interest and as such are prohibited:

Favoritism: No employee shall engage in any transactions or have any personal or financial interest, direct or indirect, which would lead the objective, reasonable person to believe the independence of judgment or action in the performance of official duties is or could be impaired.

Incompatibility: Engaging in private employment or rendering services for private interests when incompatible with the proper discharge of official duties;

Judgment: Engaging in activities that give the appearance that independence of judgment or actions in the performance of official duties are or could be impaired.

Improper Use of Position: Without legal authorization, using official influence, insignia of office or disclosing information, either confidential or not generally known or readily available to the public, concerning the property or business of the City for the purpose of furthering or influencing any private interest.

Influence: Appearing on behalf of or attempting to influence any unit, committee or official body of the City for the benefit of any private interest except for appearances by the employee as a member of the general public for self-representation on matters related solely to his or her personal interests.

Personal Financial Gain: Knowingly participate in any City decision that could affect his or her personal or financial interests. Upon learning of a possible conflict pursuant to this paragraph, the employee must immediately make such facts known to his or her supervisor and/or the Administrative Services Director.

Gifts and Favors: Soliciting or accepting, in the course of employment, directly or indirectly for the employee's personal use, any gift, gratuity, favor, discount not available to all City employees; entertainment, loan, or other things of value. (See the City's Administrative Guideline on Acceptance of Gifts.)

A. Conflicts of Interest and Consultants

Consultants shall be included in the list of designated employees and shall disclose pursuant to the broadest disclosure category in the code subject to the following limitation: The City Manager/Administrator may determine in writing that a particular consultant, although a "designated position," is hired to perform a range of duties that is limited in scope and thus is not required to fully comply with the disclosure requirements described in this section. Such written determination must include a description of the consultant's duties and, based upon the description, a statement of the extent of disclosure requirements. The City Manager's/Administrator's determination is a public record and must be retained for public inspection in the same manner and location as this Conflict of Interest Code.

B. Disciplinary Action

Prior to the suspension, demotion, reduction in pay, or termination of a regular employee for disciplinary purposes ("disciplinary action"), the City will comply with the procedure set forth in City Administrative Guideline. A conflict of interest by a City employee could result in any of the following disciplinary actions including, but not limited to:

- Failure to perform or properly perform assigned duties;
- Violation of administrative policies and procedures or these Rules;
- Insubordination;
- Excessive tardiness;
- Unauthorized absence from employment;

- Abuse of leave privileges;
- Acceptance of money or favors from anyone for the performance of any act which is required or expected during the performance of regular City duties;
- Falsification of an application for employment or of any other information provided to the City;
- Use of employee's official position or of the City's time, facilities, equipment or supplies for personal gain or advantage;
- Disclosure of confidential information acquired by or available to the employee in the course of employment with the City, or use of confidential information for personal gain;
- Reporting for work, or being at work under the influence of or in possession of alcohol or non-prescribed controlled substances; or being at work in possession of non-prescribed controlled substances;
- Conviction of a felony, or conviction of a misdemeanor relating to the employee's fitness to perform assigned duties;
- Theft or improper use of City funds or property;
- Failure to work satisfactorily with other employees or the public in a responsible and courteous manner; or
- Sexual harassment or other unlawful harassment of another employee or a member of the public.

RECYCLED PAPER

The Purchasing Officer shall establish and maintain procedures and specifications for the purchase of paper and paper products which give preference to the purchase of recycled paper and paper products containing recycled paper, whenever such products are available at no more than the total cost of unrecycled paper and paper products and when fitness and quality are equal. Additionally, the purchasing officer may provide a preference to the suppliers of recycled paper or paper products equal to five percent of the lowest bid or price quoted by suppliers offering unrecycled paper or paper products.

The term "recycled paper," as used in this section, shall have the same meaning as defined in Public Contract Code section 10391.

JOINT PURCHASE WITH OTHER AGENCIES

Notwithstanding any other provision of this Policy, the Purchasing Officer may issue a joint purchase order together with any other city, county, or public agency in the state for the purchase of supplies or services. The specifications for such supplies or services shall have been approved by the Purchasing Officer if the cost thereof is less than twenty-five thousand dollars (\$25,000), or by the City Council if the cost thereof is twenty-five thousand dollars (\$25,000) or more. At least one of the other agencies shall have solicited or advertised for bids in a manner similar to the applicable procedures set forth in this Policy.

DISPOSAL OF PERSONAL PROPERTY

The Purchasing Officer shall have authority to dispose of personal property of the City which cannot be used by any department or has become obsolete or worn out. The disposition may be accomplished by negotiated sale, public auction, exchange or trade-in for other supplies or, upon a determination by the purchasing officer that the property has no commercial value, by abandonment, destruction or donation to a public body or a nonprofit charitable or civic organization. The disposition of any property having a value of five hundred dollars (\$500) or more shall first be authorized by the City Council. All surplus property shall be sold or donated on an "as-is" basis. Sale of surplus property shall first be offered for purchase to City employees and residents of Huron. Property offered for sale to the general public shall be done through a bid process. If no bids are received, other methods of disposal as determined by the purchasing officer shall be employed.

PURCHASING WITH A CITY CREDIT CARD

Credit cards should never be used to circumvent established competitive purchasing procedures. (City Administrative Guideline) This means no purchases for goods or services should be made in excess of \$25,000 that would otherwise require competitive bidding. Credit cards may be used in paying for travel expenses; however, the City's Travel Policy still applies to all such credit card payments.

Charging personal expenses on City cards is a misuse of City funds and a serious breach of the City's ethics policy. Employees may not use City credit cards for personal expenses, even if the intent is to reimburse the City later. The use of City credit cards for personal expenses will result in disciplinary action, up to and including termination.

Department specific regulations may further restrict the use of credit cards. Department Heads are responsible for all disciplinary action surrounding misuse of cards, including requesting cancellation of card privileges. The following list covers purchases for which credit card use is expressly prohibited, unless approved in advance by the employee's Department Head:

- Cash advances
- Services
- Rentals, EXCEPT for small equipment and not exceeding a week in duration
- Machinery that requires a maintenance agreement
- Items available from vendors that give us a citywide discount
- Air phone
- Wire transfers, Money Orders
- Direct Marketing Insurance Services
- Financial Institutions: Manual Cash Advances
- Financial Institutions: Automatic Cash Advances
- Non-Financial Institutions: Foreign Currency, Money Orders, Travelers Checks
- Security Brokers/Dealers
- Overpayments
- Savings Bonds
- Timeshares

- Betting, Casino Gaming Chips, Off-Track Betting
- Political Organizations
- Court Costs, Alimony, Child Support
- Fines
- Bail Bonds and Payments
- Tax Payments/Government Loan Programs

23 CFR Part 172 - PROCUREMENT, MANAGEMENT, AND ADMINISTRATION OF ENGINEERING AND DESIGN RELATED SERVICES

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) / highway construction projects.

For Federally funded contracts for engineering and design related services for projects subject to the provision of 23 U.S.C. 112(a) (related to construction)/ highway construction projects:

§ 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:

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

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.

§ 172.3 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:

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

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 sub consultants 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 sub consultants 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 provide 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 sub contracts 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 sub contracts 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 sub consultants 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.

False Claims Act