



**DATE:** October 5, 2020

**MEMO TO:** Terry Wilke, Chair  
Finance Committee

**Agenda Item#** 9.5

**FROM:** Steve Neaman  
Director of Finance

**RECOMMENDATION:** Recommend approval of an Ordinance approving an amended Purchasing Policy.

**STRATEGIC DIRECTION SUPPORTED:** Organizational Sustainability

**FINANCIAL DATA:** There is no financial impact.

**BACKGROUND:** The District's purchasing policy was last updated in November of 2009. Since that time, State statutes, Federal grant regulations, and other requirements and factors affecting the District's procurement process have changed. Some of the major updates included in the proposed amended policy attached to the attached ordinance include:

1. Adding requirements that consultants who submit proposals for work requiring personal confidence disclose campaign contributions to Commissioners and any family relationships with Commissioners or senior District staff (Executive Director, Chief Operations Officer, Department Director, or Department Supervisor/Manager).
2. Incorporating the federal Brooks Act requirements for purchases using federal grant funds. The Brooks Act is a federal law governing the selection of architects and engineers for certain projects funded in whole or part by federal funds.
3. Including the "Post Federal Award Requirements" of the Code of Federal Regulations, 2 CFR 200, Subpart D, including 2 CFR §200.321, which requires, for certain contracts funded in whole or part by federal funds, the District to take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.
4. Incorporating State law requiring that changes increasing a public works contract or subcontract by 50% or more must be competitively bid.
5. Streamlining of the change order authorization procedure, eliminating the need to bring change orders to Committee or Board for approval, if the resulting contract remains under \$25,000.

The proposed amended policy also includes changes to the organization of the policy, changes to definitions, and language clarification.

Purchasing staff worked closely with the District's Corporate Counsel to revise and update the policy and recommends Committee recommendation and Board approval of the amended policy.

**REVIEW BY OTHERS:** Chief Operations Officer, Purchasing Manager, Corporate Counsel.

STATE OF ILLINOIS     )  
                                  ) SS  
COUNTY OF LAKE     )

**BOARD OF COMMISSIONERS  
LAKE COUNTY FOREST PRESERVE DISTRICT  
REGULAR OCTOBER MEETING  
OCTOBER 13, 2020**

**MISTER PRESIDENT AND MEMBERS OF THE BOARD OF COMMISSIONERS:**

Your **FINANCE COMMITTEE** presents herewith “An Ordinance approving an Amended Purchasing Policy” and requests its approval.

**FINANCE COMMITTEE:**

Date: 10-5-2020      Roll Call Vote: Ayes: 8 Nays: 0  
                                   Voice Vote Majority Ayes; Nays: \_\_\_\_\_

**LAKE COUNTY FOREST PRESERVE DISTRICT  
LAKE COUNTY, ILLINOIS**

**AN ORDINANCE APPROVING AN AMENDED PURCHASING POLICY**

**WHEREAS**, in May of 1991, the Board of Commissioners (the “Board”) of the Lake County Forest Preserve District (the “District”) approved “An Ordinance Setting Forth the Purchasing Policy of the Lake County Forest Preserve District” setting forth requirements governing the District’s purchase of supplies, materials, and work, and such policy has been amended from time to time (as amended, the “1991 Purchasing Policy”); and

**WHEREAS**, the 1991 Purchasing Policy authorizes the Finance Committee of the Board to adopt purchasing procedures consistent with the 1991 Purchasing Policy (the “1991 Purchasing Procedures”); and

**WHEREAS**, it is in the District’s best interest to approve an amended purchasing policy in substantially the form of the policy attached to this Ordinance (the “Amended Purchasing Policy”); and

**WHEREAS**, pursuant to Section 8 of the Downstate Forest Preserve District Act, 70 ILCS 805/8, the District is authorized to adopt all necessary ordinances, rules, and regulations for the management of its property and the conduct of its business;

**NOW, THEREFORE, BE IT ORDAINED** by the Board of Commissioners of the Lake County Forest Preserve District, Lake County, Illinois, THAT:

**Section 1: Recitals.** The recitals set forth above are incorporated as part of this Ordinance by this reference.

**Section 2: Approval of Amended Purchasing Policy.** The Amended Purchasing Policy attached to this Ordinance is hereby approved and incorporated as a part of this Ordinance.

**Section 3: Severability.** The provisions of this Ordinance and the Amended Purchasing Policy shall be deemed to be severable and the invalidity or the unenforceability of any such provision shall not affect the validity or enforceability of the other provisions of this Ordinance or the Amended Purchasing Policy.

**Section 4: Repealer.** The 1991 Purchasing Policy, the 1991 Purchasing Procedures, and (to the extent they are inconsistent with all or any part of this Ordinance or the Amended Purchasing Policy) the provisions of other District ordinances, resolutions, policies, regulations, and requirements are repealed.

**Section 5: Effective Date.** This Ordinance shall be in full force and effect from and after its passage and approval in the manner provided by law.

PASSED this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

AYES:

NAYS:

APPROVED this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

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Angelo D. Kyle, President  
Lake County Forest Preserve District

ATTEST:

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Julie Gragnani, Board Secretary  
Lake County Forest Preserve District

Exhibit # \_\_\_\_\_



# Lake County Forest Preserves

## Purchasing Policy

*Adopted: March 4, 1983*  
*Amended: March 17, 1989*  
*Amended: May 17, 1991*  
*Amended: April 16, 1993*  
*Amended: April 15, 1994*  
*Amended: January 21, 2005*  
*Amended: November 10, 2009*  
*Amended: October 13, 2020*

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## 1.0 Definitions.

The following words have the following meanings when used in this Policy, the General Purchasing Procedures, and the P-Card Procedures:

Act. The Downstate Forest Preserve District Act, 70 ILCS 805/0.001 et seq.

Appropriations Ordinance. An annual District appropriations ordinance approved by the Board pursuant to Section 13.3(a) of the Act, as such ordinance may be amended from time to time.

Approved Vendors. Vendors, suppliers, and contractors with which the District has a contract or agreed pricing for recurring Open Market Purchases.

Architectural, Engineering, and Land Surveying Services. Architectural services, engineering services, or land surveying services, as defined by the Local Government Professional Services Selection Act, 50 ILCS 510/1 et seq.

Bid Appeal Panel. The following people: (i) the Chair of the Finance Committee (or, in their absence, the Vice-Chair of the Finance Committee), who serves as Chair of the Bid Appeal Panel; (ii) a District Commissioner (other than the District President) appointed by the District President on an ad hoc basis; and (iii) the Executive Director or their designee. A Bid Appeal Panel member may withdraw from serving on the Bid Appeal Panel if he or she (i) believes that serving creates a conflict of interest or the appearance of impropriety or (ii) is unavailable for service.

Bid Protest. A written protest by an actual or prospective bidder or proposer protesting any act or omission by the Purchasing Manager, a Department Director, or other District employee related to a proposed contract for a Large District Purchase that is to be awarded by the District to the lowest responsible bidder.

Bid Security. A bond or a cashier's check submitted to the District by a Competitive Bidder equal to 10% of the Competitive Bidder's proposed contract price, that provides security to the District if the Competitive Bidder fails to accept the District's award of a contract.

Board. The Board of Commissioners of the District.

Brooks Act Procedures. This term is defined in Section 2.C. The Brooks Act Procedures are attached to this Policy as Exhibit A.

Budget. The annual District budget approved by the Board pursuant to Section VII.B of the Rules, as such annual budget may be amended from time to time.

Campaign Contribution. A "contribution" as defined in Section 9-1.4 of the Election Code, 10 ILCS 5/9-1.4, made to (i) a Lake County Board member (in their capacity as a County Board member, a District Commissioner, or both) or (ii) a Candidate Political Committee of a Lake County Board member.



Candidate Political Committee. A “candidate political committee” as defined in Section 9-1.8(b) of the Election Code, 10 ILCS 5/9-1.8(b).

Change Order. A change in a contract term other than as specifically provided for in the contract which authorizes or necessitates any increase or decrease in the cost of or the time to complete that contract.

Chief Operations Officer. The District employee designated by the Executive Director as the District’s chief operations officer.

Commissioner. A commissioner of the Board.

Competitive Bidder. A person or entity that submits a competitive, sealed bid to the District in response to the District’s solicitation of the same.

Consultant. A person or entity that submits a proposal to enter into a contract with the District that calls for the person or entity to perform Work Requiring Personal Confidence.

Corporate Counsel. An attorney, appointed by the District President, pursuant to the Rules, as the District’s corporate counsel.

Department Director. A District employee designated by the Executive Director as the director of an organizational department established by the District.

Department Supervisor/Manager. A District employee designated by the Executive Director as a supervisor or manager within an organizational department established by the District.

Director of Administration. The Department Director designated by the Executive Director as the director of the District administration department.

Director of Finance. The Department Director designated by the Executive Director as the director of the District finance department.

Disclosure-Covered Employee. An employee or independent contractor of a Consultant, that has submitted or is submitting a proposal to enter into a contract for a Large District Purchase, if the employee or independent contractor will receive a direct financial benefit from the District awarding such contract to the Consultant, including, without limitation, a commission, bonus, or salary increase.

Disclosure-Covered Owner. A person or entity that, directly or indirectly (including without limitation ownership through a corporation, limited liability company, joint venture, or partnership), owns at least seven and one half percent (7.5%) of a Consultant.

District. The Lake County Forest Preserve District.

District Purchase. A procurement, with public funds, by the Board or a District officer or employee, of supplies, material, or work for use by the District. A District Purchase includes a

Change Order that approves the expenditure of public funds. For purposes of this Policy, a District Purchase does not include the purchase of legal services, as such purchases are separately governed by the Act and the Rules.

*Emergency.* A situation in which (i) adherence to this Policy (a) is reasonably likely to result in personal injury or substantial damage to property or (b) threatens the public health, safety, or welfare, and (ii) the likelihood of such injury or damage or such threat can be abated by a District Purchase that does not comply with this Policy.

*Executive Director.* The District employee appointed by the District President as the District's executive director.

*Exempt Architectural, Engineering, or Land Surveying Services.* Architectural, Engineering, or Land Surveying Services (i) with an expected cost less than the Statutory Professional Services Price Threshold, (ii) to be performed by a person or entity with which the District has a satisfactory relationship for Architectural, Engineering, or Land Surveying Services, or (iii) that are necessary to address an Emergency, and the Board determines, by resolution approved either before or after such Emergency has been abated, that an Emergency exists that necessitates the District Purchase of such services in an expeditious manner that could not be completed under the otherwise applicable requirements of this Policy.

*Family Member.* A person related to an individual as a parent; child; sibling; uncle or aunt; great aunt or great uncle; first cousin; nephew or niece; spouse or civil union partner; grandparent; grandchild; parent-in-law, child-in-law, sibling-in-law, or grandparent-in-law, whether that in-law relationship is created by marriage or civil union; stepparent; stepchild; stepsibling; half sibling; or fiancé or fiancée.

*Finance Committee.* The Board's Finance Committee.

*General Purchasing Procedures.* This term is defined in Section 3.A.

*Large District Purchase.* A District Purchase that costs more than the Statutory Competitive Bidding Threshold.

*Open Market District Purchase.* A District Purchase that costs the same as or less than the Statutory Competitive Bidding Threshold.

*P-Card.* A credit card or debit card issued by a District bank or credit card provider that can be used by certain District employees to approve certain Open Market District Purchases.

*P-Card Procedures.* This term is defined in Section 3.B.

*Payment Security.* A performance bond, cash bond, irrevocable letter of credit, letter of commitment, or other instrument that complies with the Illinois Public Construction Bond Act, 30 ILCS 550/0.01 et seq., that provides security for a contractor's payment of material used in the work and for all labor performed in the work, whether by subcontractor or otherwise and that is (i) in a form satisfactory to the District, (ii) in an amount not less than 110 percent of the

contract price of such contract (or such lower amount approved by the Purchasing Manager), (iii) issued by (a) if a performance bond, a surety or insurance company authorized by the Illinois Department of Insurance to sell and issue sureties in Illinois or (b) if a letter of credit or letter of commitment, by a financial institution acceptable to the District.

Performance Security. A performance bond, cash bond, irrevocable letter of credit, letter of commitment, or other instrument that complies with the Illinois Public Construction Bond Act, 30 ILCS 550/0.01 et seq., that provides security for a contractor's performance of a contract and that is (i) in a form satisfactory to the District, (ii) in an amount not less than 110 percent of the contract price of such contract (or such lower amount approved by the Purchasing Manager), (iii) issued by (a) if a performance bond, a surety or insurance company authorized by the Illinois Department of Insurance to sell and issue sureties in Illinois or (b) if a letter of credit or letter of commitment, by a financial institution acceptable to the District.

Procurement Authorization Lists. The following lists, each of which must be approved not less than annually:

- (i) a list approved by the Executive Director and the Director of Finance identifying (a) each employee that reports directly to the Executive Director, (b) the maximum dollar amount that each such employee may expend on any single purchase, and (c) the types of purchase requests that each such employee may approve (e.g., requisitions, invoices, check requests),
- (ii) a list approved by the Chief Operations Officer and the Director of Finance identifying (a) each employee that reports directly to the Chief Operations Officer, (b) the maximum dollar amount that each such employee may expend on any single purchase, and (c) the types of purchase requests that each such employee may approve, and
- (iii) a list approved by each Department Director and the Director of Finance identifying (a) each employee within the Department Director's department who is authorized to make purchases, (b) the maximum dollar amount that each such employee may expend on any single purchase, and (c) the types of purchase requests that each such employee may approve.

Public Works Contract. A contract between the District and a contractor for the construction or demolition of a fixed work.

Purchasing Manager. The District employee designated by the Executive Director as the District's purchasing manager.

Rules. The District's Rules of Order and Operational Procedures.

Standing Committee. A standing committee of the Board, as established by the Rules.

Statutory Competitive Bidding Threshold. The dollar amount that, if expended on a District

Purchase, requires letting to the lowest responsible bidder pursuant to the Act.

*Statutory Professional Services Price Threshold.* A dollar amount equal to \$40,000.00, adjusted annually, with the first adjustment effective as of January 1, 2020, by a percentage equal to the annual unadjusted percentage increase, if any, as determined by the consumer price index-u, which is the index published by the Bureau of Labor Statistics of the United States Department of Labor that measures the average change in prices of goods and services purchased by all urban consumers, United States city average, all items, 1982-84=100, unless a different index is established pursuant to the Local Government Professional Services Selection Act, 50 ILCS 510/0.01 et seq, in which case such different index will be used.

*Work Requiring Personal Confidence.* Work or services requiring (i) a high degree of professional skill or technical knowledge and (ii) for their timely and accurate completion, a high level of dependence on the specific ability of the individuals or entity performing the work or services; Work Requiring Personal Confidence includes, but is not limited to, Architectural, Engineering, and Land Surveying Services and may include other professional services; for purposes of this Policy, Work Requiring Personal Confidence does not include legal services, as such purchases are separately governed by the Act and the Rules.

## **2.0 General Requirements**

**A. General Application.** Each District Purchase, and each contract for such District Purchase, must comply with this Policy.

**B. Interpretation and Administration.** The Purchasing Manager is responsible for interpreting and administering this Policy.

**C. Additional Authority Under Applicable Laws.** If this Policy conflicts with the requirements of any applicable federal or state law, such federal or state law prevails. Also, if a federal or state law authorizes a District Purchase to be made in a manner that is different than this Policy, then the District may follow such federal or state law. Without limiting the first two sentences of this Section 2.C, (i) if the District uses federal funds for engineering or design related consultants' services and, as a condition of accepting such funds, the District is required to utilize the quality-based selection procedures mandated by 23 CFR 172 and the Brooks Act, then the District shall utilize such procedures, which are attached to this Policy and incorporated in this Policy (the "Brooks Act Procedures") and, if an authorized federal agency changes such procedures, the Purchasing Manager is authorized to make corresponding changes to the procedures attached hereto and such changed procedures will be incorporated in this Policy and (ii) if the District uses federal funds for a District Purchase, it must follow federal requirements applicable to the District Purchase, including without limitation Sections 200.318 (General procurement standards) through 200.326 (Contract provisions) of the "Post Federal Award Requirements" of the Code of Federal Regulations, 2 CFR 200, Subpart D, including 2 CFR §200.321, which requires the District to take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

**D. Appropriation and Budget Required.** The District shall not approve a District Purchase unless the District's Budget budgets for, and a District's Appropriations Ordinance appropriates, the funds for such District Purchase.

**E. Limited Waiver.** The Board may waive the requirements of this Policy as they would otherwise apply to a District Purchase, if such requirement is not also required by another applicable federal or state law.

**F. Reorganization of District Departments.** This Policy authorizes and directs certain District employees to act on behalf of the District, such as its Executive Director, Chief Operations Officer, Department Directors, and Department Supervisors/Managers. If, through a reorganization of the District's organizational departments, employee title changes, or other changes, the title of such an authorized District employee is changed or eliminated, then (i) if the title of Executive Director no longer exists, the District President shall determine which District employee will be authorized to exercise the authority of the Executive Director and (ii) in all other cases, the District's Executive Director shall determine which class or category of District employees will be authorized to exercise the authority of the formerly authorized District employee following such reorganization, title change, or other change.

**G. Contracts and Records.**

**1. Form of Contract.** Each contract for a District Purchase must be in writing, except that, if the circumstances of an Emergency do not allow sufficient time for a written contract, the President (or, if possessed of the District President's authority and obligations under and pursuant to Section 6.C, the District Vice-President or the Chair of the Board's Finance Committee) may approve an oral contract for a District Purchase to abate the Emergency. Written contracts must be on forms approved by the Purchasing Manager.

**2. Retention of Records.** All bids, quotes, proposals, and other records related to District Purchases shall be retained as required by the Local Records Act 50 ILCS 205/1 et seq.

**3.0 Purchasing Procedures**

**A. General Purchasing Procedures.** The District's Executive Director, upon recommendation of the Director of Finance and Purchasing Manager, may establish and, from time to time, amend procedures that are consistent with this Policy and that provide further details and processes for District Purchases (the "General Purchasing Procedures"). The Purchasing Manager shall administer any General Purchasing Procedures.

**B. P-Card Procedures.** If the District utilizes P-Cards, it shall do so only pursuant to procedures governing the use of such P-Cards that have been approved by the Executive Director and that, at a minimum, provide a mechanism for establishing (i) the manner in which P-Cards will be assigned for use by District employees, (ii) pre-established maximum spending limits for each day and for each billing cycle (or other periods of time approved in the procedures), and (iii) a reconciliation process, under which each authorized employee's P-Card purchases are reviewed on a not-less-than monthly basis (the "P-Card Procedures").

#### **4.0 Purchasing Authority**

##### **A. Open Market Purchases.**

**1. Up to \$1,000.00:** A District Purchase up to and including \$1,000.00 may be approved by, and a contract for such District Purchase may be executed, by (i) a District employee, if and to the extent authorized on a Procurement Authorization List, (ii) a Department Supervisor/Manager, or (iii) a Department Director.

**2. Up to \$14,999.99:** A District Purchase up to and including \$14,999.99, may be approved by (i) a District employee, if and to the extent authorized by the Department Director on a Procurement Authorization List or (ii) the combined approval of (a) either a Department Supervisor/Manager or a Department Director, (b) the Purchasing Manager, and (c) the Director of Finance. A contract for such a District Purchase is valid only if executed by (i) a District employee who is authorized to approve the District Purchase on a Procurement Authorization List, (ii) a Department Supervisor/Manager, or a (iii) Department Director.

**3. Up to \$20,000.00:** A District Purchase up to and including \$20,000.00 may be approved by the Chief Operations Officer. A contract for such a District Purchase may be executed by the Chief Operations Officer.

**4. Up to Statutory Competitive Bidding Threshold:** A District Purchase up to and including the Statutory Competitive Bidding Threshold may be approved by the Executive Director. A contract for such a District Purchase may be executed by the Executive Director.

**5. Employees' Cumulative Authority:** The purchasing authorities of District employees set forth in Sections 4.A.1 through 4.A.4 are cumulative. By way of illustration, but not limitation, a District Purchase of \$12,000.00 may be approved (i) by a District employee extent authorized by the Department Director on a Procurement Authorization List, pursuant to Section 4.A.2 (because it does not exceed \$14,999.99), (ii) by the Chief Operations Officer pursuant to Section 4.A.3 (because it does not exceed \$20,000.00), and (iii) by the Executive Director pursuant to Section 4.A.4 (because it does not exceed the Statutory Competitive Bidding Threshold).

**6. Board's Cumulative Authority:** The Board may approve any Open Market District Purchase.

**B. Large District Purchases.** Except for an Emergency purchase, as provided in Section 6.C, a Large District Purchase may be approved only by the Board, which shall consider any recommendation regarding the Large District Purchase from a Department Director or the Executive Director. A contract for a Large District Purchase may be executed by the District President, the Executive Director, or any other officer or employee designated by the Board.

**C. Modified Authority.** Pursuant to a Board resolution or ordinance approving a District Purchase, the Board may (i) modify or (ii) delegate (to a Standing Committee or a District employee) the approval and contract execution authority set forth in this Section.

#### **5.0 District Purchases That Do Not Require Competitive Bidding**



## A. Open Market Purchases

**1. Competitive Quotes Required.** Before a District employee, or employees, approve an Open Market Purchase, they shall first, wherever practicable, obtain at least three competitive quotes for the District Purchase in accordance with the applicable provisions of the General Purchasing Procedures and the P-Card Procedures. Competitive quotes may (i) include agreed prices provided in advance by Approved Vendors on the Approved Vendor List and (ii) be obtained by the Purchasing Manager or other District employee by any other reasonable means. When competitive quotes are obtained, the contract for the District Purchase shall be awarded to the lowest responsible quoter. In determining which quoter provided the lowest responsible quote, the Purchasing Manager or their designee shall be guided by the factors set forth in Section 6.G of this Policy.

**2. Purchases Where Quotes Not Practicable.** The determination whether obtaining competitive quotes is practicable may be made by (i) the Purchasing Manager, (ii) a Department Director, or (iii) a District employee, if he or she is authorized to approve the District Purchase in accordance with the Procurement Authorization List. It is generally not practicable to obtain competitive quotes for District Purchases (i) less than \$1,000.00 (ii) of Work Requiring Personal Confidence, (iii) of supplies, material, and work, readily available through cooperative purchasing, (iv) of supplies, material, and work, available only from one supplier, (v) necessary to abate an Emergency, (vi) if the delay caused by obtaining quotes would cause inefficient delay in the ongoing performance, maintenance, operation, or repair of existing District equipment, structures, property, or programs, or (vii) if the District has obtained, or is obtaining, competitive bids for the District Purchase.

**3. Approved Vendor List.** The Purchasing Manager shall, not less than annually, issue an “Approved Vendor List” identifying Approved Vendors and their agreed pricing for Open Market Purchases. Before approving an Open Market District Purchase, a District employee shall ascertain whether the District’s best interests will be served by making such Open Market District Purchase from an Approved Vendor.

**4. Accepting Single Quote Received.** When only one quote is received by the District, that fact alone shall not prevent the District from accepting that quote.

**B. Sole Source Purchases.** If the Purchasing Manager determines that, for a Large District Purchase, there is only one supplier of supplies, material, or work, the Purchasing Manager may negotiate and recommend to the appropriate Standing Committee(s) and to the Finance Committee a contract with such supplier to purchase the supplies, material, or work, at prices or on terms most advantageous to the District. In such a case, the Board shall make a written determination that such supplier is the sole source for such supplies, material, or work. If, for a Large District Purchase, there is a single manufacturer or producer of supplies, material, or work, but multiple authorized dealers or distributors of such supplies, material, or work, the contract for such Large District Purchase will be awarded to the lowest responsible bidder, as provided in Section 6.0.

**C. Cooperative Purchasing.** The District may approve Large District Purchases, without

the District obtaining separate competitive bids or proposals, pursuant to contracts with other government agencies for joint or cooperative intergovernmental purchasing that comply with applicable laws, including without limitation the Governmental Joint Purchasing Act, 30 ILCS 525/0.01 *et seq.*

**D. Emergency Purchases.** If the District President determines that an Emergency exists, the District President, without first seeking Standing Committee recommendation or Board approval, may approve a Large District Purchase, but only (i) to the extent necessary to abate the Emergency and (ii) if and to the extent the circumstances of the Emergency allow time for price comparison and consideration, at the lowest reasonably obtainable price. Not later than three business days following such a purchase, the District President shall send a written notice to the Board (i) stating that the District President approved the purchase and (ii) identifying the circumstances giving rise to the Emergency. When the District President approves a purchase necessary to abate an Emergency, such approval will be deemed to waive any otherwise conflicting provisions of this Policy. If the Executive Director (or, in their absence, the District's Chief Operations Officer; or, in their absence, the District's Director of Finance; or, in their absence, the Director of Administration) is unable to contact the District President concerning a potential Emergency within a time period that will reasonably allow the Emergency to be abated, then the authority and obligations under this Section devolve upon the District Vice-President and the Chair of the Board's Finance Committee, either of whom may exercise the District President's authority and obligations.

**E. Work Requiring Personal Confidence, Including Architectural, Engineering, and Surveying Services**

**1. General Requirement.** The District shall award each contract for Work Requiring Personal Confidence (i) to the person or entity whose proposal for such work is most advantageous to the District and (ii) for Architectural, Engineering, or Land Surveying Services (that are not Exempt Architectural, Engineering, or Land Surveying Services), at a price that the District determines, in writing, is fair and reasonable, taking into account the estimated value, scope, complexity and professional nature of the services to be rendered. The District is not required to award a contract for Work Requiring Personal Confidence to the low bidder or pursuant to a competitive bidding process.

**2. Solicitation, Submission, and Evaluation of Proposals.**

**a. One or More Proposals Required:** If a Department Director or Purchasing Manager determines that a District Purchase is for Work Requiring Personal Confidence, then he or she (or their designee) shall solicit one or more Proposals for such work.

**b. Proposals for Architectural, Engineering, or Land Surveying Services:**

**i. Non-Exempt Services:** Proposals for Architectural, Engineering, or Land Surveying Services (that are not Exempt Architectural, Engineering, or Land Surveying Services), shall be solicited either (i) if required by 23 CFR 172, the Brooks Act, or other



applicable federal or state laws, in accordance with the qualification based procedures attached to this Policy or (ii) in accordance with the Local Government Professional Services Selection Act, 50 ILCS 510/0.01 et seq.

**ii. Exempt Services:** Proposals for Exempt Architectural, Engineering, or Land Surveying Services:

- (i) that are necessary to address an Emergency shall be solicited in accordance with Section 5.D of this Policy,
- (ii) that cost the same as or less than the Statutory Competitive Bidding Threshold, shall be solicited as Open Market Purchases in accordance with Section 5.A, and
- (iii) that cost more than the Statutory Competitive Bidding Threshold, shall be solicited in accordance with Section 5.E.2.c.

**c. Proposals for Other Work Requiring Personal Confidence:**

**i. Solicitation and Opening of Proposals:** Proposals for Work Requiring Personal Confidence (except Architectural, Engineering, or Land Surveying Services that are not Exempt Architectural, Engineering, or Land Surveying Services) shall be solicited in such manner as determined by the Purchasing Manager to be efficient for the submission and review of such proposals and for the selection of the proposal that is most advantageous to the District. The opening of proposals shall not be open to the public to avoid disclosure of confidential information to competing proposers.

**ii. Evaluation:** In determining which proposal is most advantageous to the District, the Department Director or Purchasing Manager shall consider (i) any evaluation factors that have been established for the proposals and (ii) the interested firms' qualifications, past record and experience, performance data on file, willingness to meet time requirements, workload, ability of their professional personnel, and (iii) any other factors that may be lawfully considered.

**3. Consultant Disclosure Requirements.**

**a. Required Disclosures:** Each Consultant that (i) submits a proposal to enter into a contract for a Large District Purchase or (ii) approves a Change Order to increase the price of or extend the time of the performance of a contract, if such original contract or the Change Order required, or requires, Board approval under this Policy, shall, with its proposal or prior to executing such Change Order, disclose for itself and for each of its Disclosure-Covered Owners and Disclosure-Covered Employees (i) each Campaign Contribution that it, he, or she has made within the two-year time period preceding the date upon which such proposal is submitted or such Change Order is executed and (ii) the identity and position of each Family Member that is either a District Commissioner or employed by the District as an Executive Director, Chief Operations Officer, Department Director, or Department Supervisor/Manager.

**b. Use of Disclosed Information:**

**i. Staff Review:** If a Consultant discloses that one of its Disclosure-Covered Owners or Disclosure-Covered Employees has a Family Member that is employed by the District as an Executive Director, Chief Operations Officer, Department Director, or Department Supervisor/Manager, then such Family Member shall recuse their self from any discussion, communication, review, recommendation, or award related to the contract for which the Consultant submitted its proposal.

**ii. Committee and Board Recommendation and Award:** If the agenda of a meeting of the Board or of a Standing Committee includes the award, or recommended award, of a contract to a Consultant for a Large District Purchase, the Purchasing Manager shall provide any responsive information disclosed by the Consultant to the Board Secretary, who shall include any such responsive information with the agenda information that is posted to the District's website and provided, pursuant to the Rules, to the Board or Standing Committee, as the case may be, and the media in advance of such meeting. Any Commissioner may consult with the Corporate Counsel concerning any disclosed information.

**iii. Disclosure Forms:** The disclosures required by this Section 5.E.3 will be made on one or more forms prepared by the Purchasing Manager.

**iv. Exceptions:** The requirements of this Section 5.E.3 do not apply to (i) a Consultant whose common stock is traded on a nationally recognized securities market or (ii) a Disclosure-Covered Owner whose ownership interest, that would otherwise require compliance with this Section 5.E.3, is in a Consultant whose common stock is traded on a nationally recognized securities market. However, the requirements of this Section 5.E.3 do apply to a Disclosure-Covered Employee of a Consultant whose common stock is traded on a nationally recognized securities market.

## **6.0 District Purchases That Require Competitive Bidding - Large District Purchases**

**A. General Requirement.** Each contract for a Large District Purchase shall be awarded to the lowest responsible bidder according to the procedures provided in this Section, except for Large District Purchases (i) of Work Requiring Personal Confidence, as set forth in Section 5.E of this Policy, (ii) to abate an Emergency, as set forth in Section 5.D of this Policy, (iii) available from only one source, as set forth in Section 5.B of this Policy, (iv) pursuant to statutorily authorized cooperative purchasing, as set forth in Section 5.C of this Policy, or (v) that are otherwise exempt from such competitive bidding requirements and procedures under state or federal law.

**B. No Bid-Splitting.** No Commissioner or employee shall split, divide, or arrange one or more District Purchases with the intent to avoid the competitive bidding requirements of this Policy. Such division or arrangement may constitute a violation of the Illinois Criminal Code and be punishable thereunder as a Class 3 felony.

### **C. Competitive Bidding Requirements.**

**1. Public Notice Required:** For a Large District Purchase contract, the Purchasing

Division shall cause to be published a public notice that (i) invites sealed competitive bids for the contract, (ii) is published at least once in at least one newspaper of general circulation within the District, and (iii) is published not less than ten business days prior to the last date upon which bids for such contract may be submitted to the District. In addition (but not in lieu of such published invitation) the Purchasing Manager (or their designee) may also solicit sealed competitive bids by sending a notice directly to prospective bidders that ordinarily provide the supplies, material, or work being purchased.

**2. Public Notice Contents:** The public notice of the invitation to bid shall include, at a minimum, the following;

- (i) a general description of the supplies, material, or work to be purchased,
- (ii) the location of the work site, if applicable,
- (iii) the place where specific bid documents may be found and reviewed,
- (iv) the place at which bids must be submitted,
- (v) the time and place for the opening of bids,
- (vi) the requirements for Bid Security, Performance Bond, and Payment Bond, and
- (vii) prevailing wage requirements, if applicable.

**3. Additional Information:** The District reserves the right to require, from any Competitive Bidder, prior to award of a contract, additional information to ascertain whether the Competitive Bidder is a responsible bidder, including, but not limited to: information regarding the Competitive Bidder's business and technical organizations; the Competitive Bidder's plant, equipment, and personnel available to perform the contract; the Competitive Bidder's financial resources; the experience of the Competitive Bidder's personnel; the Competitive Bidder's experience in providing the types of supplies, material, or work that will be provided pursuant to the contract to be awarded; a history of the Competitive Bidder's contract defaults and litigation; and a list of the Competitive Bidder's pending construction or other projects and outstanding bids and proposals.

**D. Bid Security and Performance and Payment Bonds.**

**1. Bid Security:** Each Competitive Bidder, for a competitive bid in excess of the Statutory Competitive Bidding Threshold, must submit Bid Security to the District with such competitive bid, except to the extent waived or reduced by the Purchasing Manager. If the District accepts a competitive bid and awards a contract to the Competitive Bidder that submitted such competitive bid, but the Competitive Bidder fails to timely enter into a binding contract with the District as provided in the invitation to bid, then the Competitive Bidder forfeits its Bid Security.

**2. Performance Security and Payment Security:** Each Competitive Bidder to

which a Public Works Contract is awarded shall deliver to the District, upon the execution of the Public Works Contract, the Performance Security and Payment Security for such Public Works Contract that is required under the Illinois Public Construction Bond Act, 30 ILCS 550/0.01 et seq., if any. In addition, if he or she determines it is in the District's best interests to do so, the Purchasing Manager may require any other person or entity to whom or to which the District has awarded a contract for a District Purchase to deliver to the District Performance Security or Payment Security for such contract.

**E. Submission of Bids.** Competitive Bidders shall submit competitive bids (i) in a sealed envelope bearing the legend "Sealed Bid for [Name of Work]" or (ii) if the District institutes an online, digital, or web-based competitive bidding system, on forms approved by the Purchasing Manager for use in such system, at the place and before the time for the opening of competitive bids specified in the invitation to bid. If the District receives a competitive bid after the time specified for the opening of competitive bids, the Purchasing Division shall return such competitive bid unopened to the Competitive Bidder that submitted it.

**F. Opening and Evaluation of Bids.** All competitive bids shall be opened in public with no less than two witnesses, which may include members of the District's staff, present at the place and time specified for the opening of such competitive bids. The Purchasing Division shall tabulate all competitive bids and refer them to the appropriate District Department for evaluation and recommendation.

**G. Factors to Determine Lowest Responsible Bidder.** In determining which Competitive Bidder is the lowest responsible bidder, the District shall consider the following factors in addition to price, as applicable:

- (i) the compliance of the bid, including proposed plans and specifications, with bidding and contract requirements,
- (ii) the ability, capacity, and skill of the Competitive Bidder to perform the contract,
- (iii) whether the Competitive Bidder has the requisite facilities, plant, capital, financial resources, organization, and staffing to enable the Competitive Bidder to perform the contract successfully and promptly, within the time specified, without delay or interference,
- (iv) the character, integrity, reputation, judgment, experience, and efficiency of the Competitive Bidder,
- (v) the quality of the Competitive Bidder's performance of previous contracts or services,
- (vi) the previous and existing compliance by the Competitive Bidder with other contracts and the laws or ordinances relating to said contracts,

- (vii) where required by the contract, the ability of the Competitive Bidder to provide future maintenance and service,
- (viii) the conditions placed on the bid by the Competitive Bidder, and
- (ix) any other factor that the District may legally consider in determining which Competitive Bid is in the District's best interest.

**H. Negotiation of Price on Lowest Bid.** After all Competitive Bids for a Large District Purchase have been opened, the Purchasing Manager, or their designee, may negotiate with the lowest Competitive Bidder for a price lower than the lowest Competitive Bidder's bid, if the Purchasing Manager and the Department Director collectively determine that (i) the Lowest Competitive Bidder's bid would cause the price of the Large District Purchase to exceed the amount budgeted for the Large District Purchase in the Budget or (ii) it is otherwise in the District's best interests to do so. If multiple Competitive Bidders submit a lowest responsible bid, then the Purchasing Manager, or their designee, shall (i) solicit from each such Competitive Bidder a best and final bid and (ii) recommend that the contract for the District Purchase be awarded to (a) the Competitive Bidder who submitted the lowest best and final bid or (b) if there are multiple lowest best and final bids, recommend award of a contract for the District Purchase to (1) each of the low Competitive Bidders or (2) if it is not practical to award multiple contracts for the District Purchase, to a Competitive Bidder that is randomly selected among all the Competitive Bidders that submitted the lowest best and final bids. During negotiations with the Competitive Bidders, the Purchasing Manager and their designees may not negotiate to change the contract specifications or requirements for the Large District Purchase.

**I. Accepting Single Bid Received.** When only one Competitive Bid is submitted, that fact alone shall not prevent the District from accepting that Competitive Bid.

**J. Bid Protests and Appeals.**

**1. Authority:** The Purchasing Manager shall decide all Bid Protests. The Bid Appeal Panel shall decide all appeals of Bid Protests. The process set forth in this Policy to decide Bid Protests and appeals from such decisions is intended to provide a prompt and efficient adjudication of a Bid Protest. However, nothing in this Section 6.J, including the authority granted to the Purchasing Manager and the Bid Appeal Panel, limits the authority of any Standing Committee to make recommendations or the authority of the Board to (i) approve Large District Purchases or (ii) determine the lowest responsible bidder for a Large District Purchase. Without limiting the preceding sentence, this Section does not prevent a Standing Committee from making a recommendation on, or the Board from taking final action on, a contract that is the subject of a pending Bid Protest or Bid Protest appeal.

**2. Submission of Bid Protest:** Any actual or prospective bidder or proposer may submit a Bid Protest to the Purchasing Manager within three business days after the bidder or proposer has actual or constructive notice of any adverse action or event that allegedly gave rise to the Bid Protest, including without limitation (i) the bidder's or proposer's receipt of a Department Director's recommendation to award a contract to a different bidder or proposer or

(ii) the District's posting of a Standing Committee agenda that includes a recommendation to award a contract to a different bidder or proposer. Any Bid Protest not submitted within such time period is waived.

**3. Decision on Bid Protest:** The Purchasing Manager shall promptly (i) issue a written decision on the Bid Protest, stating the reasons for the decision and informing the protesting party of its appeal rights under this Policy and (ii) send the written decision to the protesting party and any other interested parties. The Purchasing Manager's decision on a Bid Protest is final, unless the decision is appealed to the Bid Appeal Panel, as provided in Section 6.J.4; however, as stated above, nothing in this Section 6.J limits the authority of the Board to (i) approve Large District Purchases or (ii) determine the lowest responsible bidder for a Large District Purchase.

**4. Bid Protest Appeal Process:**

**a. Appeal of Purchasing Manager's Decision on Bid Protest:** Any protesting party whose Bid Protest was denied by a decision of the Purchasing Manager, and any bidder or proposer affected by a decision of the Purchasing Manager on a Bid Protest, may appeal such decision to the Bid Appeal Panel, by filing a written appeal with the Executive Director so it is received by the Executive Director within three (3) business days after the appealing party receives the decision of the Purchasing Manager. Any Bid Protest appeal not submitted within such time period is waived. If the Bid Appeal Panel has not made a decision on a Bid Protest appeal prior to the meeting of a Standing Committee or the Board at which the District Purchase that is the subject of the appeal is to be considered, the Standing Committee or Board may vote to postpone such consideration pending resolution of the Bid Protest appeal.

**b. Bid Appeal Panel Meeting:** If the Executive Director receives an appeal of the Purchasing Manager's decision on a Bid Protest, the Bid Appeal Panel will hold a public meeting to decide the appeal within twenty (20) business days after the date the appeal is received by the Executive Director. The Bid Appeal Panel shall notify all interested parties of the date, time, and location of the public meeting at which the Bid Protest appeal will be considered and at such meeting, shall give a reasonable opportunity to all interested parties to state their positions.

**c. Bid Appeal Panel's Decision.** If two or more of the three members of the Bid Appeal Panel vote to overturn the decision of the Purchasing Manager, then the decision shall be overturned. In all other cases, the decision shall be deemed upheld. The Bid Appeal Panel shall notify all interested parties of its decision in writing. The Bid Appeal Panel's decision on an appeal of a Bid Protest is final; however, as stated above, nothing in this Section 7.J limits the authority of the Board to (i) approve Large District Purchases or (ii) determine the lowest responsible bidder for a Large District Purchase.

**7.0 Change Orders**

**A. Department Director's Authority:**



**1. Contract with Current Price That Exceeds Statutory Competitive Bidding Threshold:** In addition to their authority in Section 7.A.2 below, but subject to the limits of Section 2.D above, the Department Director responsible for supervision of a contract is authorized to approve a Change Order to such contract if (i) the then-current contract price of the contract (as it may have been increased or decreased by prior Change Orders) exceeds the Statutory Competitive Bidding Threshold and (ii) the Change Order, when added to all other Change Orders to such contract, will not increase the original contract price by more than the lesser of (a) 25% of the original contract price and (b) \$25,000.00.

**2. Contract with Current Price Equal to or Less than Statutory Competitive Bidding Threshold:** In addition to their authority in Section 7.A.1 above, but subject to the limits of Section 2.D above, the Department Director responsible for supervision of a contract is authorized to approve a Change Order to such contract if (i) the then-current contract price of the contract (as it may have been increased or decreased by prior Change Orders) is equal to or less than the Statutory Competitive Bidding Threshold and (ii) the Change Order will not increase the then-current contract price of the contract to an amount greater than the Statutory Competitive Bidding Threshold.

**B. Standing Committee Authority:** Subject to the limits of Section 2.D above, each Standing Committee is authorized to approve any Change Order to a contract that, when added to all other Change Orders to the contract, would increase the original contract price by less than 50%.

**C. Board's Authority:** The Board is authorized to approve any Change Order.

**D. Modification of Authority:** Notwithstanding the foregoing, the Board shall have the authority to modify the Change Order approval authority established by this Section 7 as part of its approval of any specific contract.

**E. Necessary Finding:** A Department Director, a Standing Committee, and the Board shall not approve a Change Order that, when added to all other Change Orders to a contract, authorizes or necessitates an increase or decrease in (i) the original cost of the contract by a total of \$10,000.00 or more, or (ii) the time of completion of the contract by a total of 30 days or more, unless it makes a written determination that:

- (i) the circumstances said to necessitate the change were not reasonably foreseeable at the time the contract was signed,
- (ii) the change is germane to the original contract as signed, or
- (iii) the change order is in the best interest of the District.

**F. Re-Bid Required:** Any Change Order to a Public Works Contract that, when added to all other Change Orders to the Public Works Contract, increases the original price of the Public Works Contract or any subcontract to the Public Works Contract by 50% or more, may be approved only if the supplies, material, or work covered by the Change Order are first resubmitted to the Large District Purchase or Open Market Purchase process required for the

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original Public Works Contract, in accordance with the Public Works Contract Change Order Act, 50 ILCS 525/1 *et seq.*

## **8.0 Contract Solicitations and Awards in Violation of Law; Suspension**

### **A. District's Remedies for Solicitations or Awards in Violation of Law.**

**1. Prior to Bid Opening or Closing Date for Receipt of Proposals:** If, prior to the opening of competitive bids, sealed proposals, or quotes for a District Purchase, the Purchasing Manager, after consultation with the Corporate Counsel, determines that the District's solicitation or other request for such bids, proposals, or quotes is in violation of applicable law, including this Policy, then the solicitation or request shall be cancelled or (if practical) revised to comply with applicable law.

**2. Prior to Award:** If, after the opening of competitive bids, sealed proposals, or quotes for a District Purchase, but before award of a contract, the Purchasing Manager, after consultation with the Corporate Counsel, determines that a solicitation or other request, or a proposed award of a contract for such District Purchase, is in violation of applicable law, including this Policy, then the District shall cancel such solicitation, request, or proposed award and reject all bids, proposals, or quotes for such District Purchase.

**3. After Award:** If, after the District's approval of a District Purchase, the Board (if it approved the District Purchase) or the Executive Director, Purchasing Manager, or Director of Finance (if the Board did not approve the District Purchase) determines that a solicitation or other request for, or an award of a contract for, the District Purchase violated any applicable law, then the Board, Executive Director, Purchasing Manager, or Director of Finance (as the case may be) may, after obtaining the positive recommendation of the Finance Committee (if the Board approved the District Purchase) and after consultation with the Corporate Counsel:

- (i) if the person or entity awarded the contract for the District Purchase has not acted fraudulently or in bad faith:
  - (a) to the extent permitted by law and if the District employee or entity determines that doing so is in the best interests of the District, ratify and affirm the contract for the District Purchase, or
  - (b) nullify and terminate the contract for the District Purchase and direct that the person or entity awarded the contract be compensated for their actual costs reasonably incurred under the contract prior to notification, or
- (ii) if the person or entity awarded the contract for the District Purchase has acted fraudulently or in bad faith, to the extent permitted by law, declare the contract to be null and void.

### **B. Suspension.**

- 1. Finance Committee Decision:** The Finance Committee, after (i) consulting with



the Purchasing Manager, the Executive Director, and the Corporate Counsel, (ii) reasonable notice to the person or entity considered for suspension, and (iii) a reasonable opportunity for that person or entity to be heard, may suspend a person or entity, for cause, from consideration for award of contracts for District Purchases for a period of not more than two years, unless a different period of time is required by applicable law. If it suspends a person or entity, the Finance Committee shall issue a written decision to suspend stating the reasons for the action taken and shall promptly deliver a written notice to the suspended person or entity that includes (i) a copy of such written decision and (ii) a description of the suspended person's or entity's appeal rights under this Policy.

**2. Cause for Suspension:** Cause for suspension includes, but is not limited to:

- (i) conviction for commission of a criminal offense incident to obtaining or attempting to obtain a contract or subcontract or in the performance of a contract or subcontract,
- (ii) conviction for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of integrity or honesty in the conduct of business or the performance of contracts,
- (iii) conviction under federal or state antitrust statutes arising out of the submission of bids or proposals,
- (iv) violation of contract provisions that show a lack of integrity or honesty in the conduct of business or the performance of contracts, or are of a character regarded by the Finance Committee to be so serious as to justify suspension,
- (v) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract,
- (vi) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; except that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor may not be considered a basis for suspension,
- (vii) delinquency in any debt or other obligation owed to the District,
- (viii) suspension or debarment by any other governmental entity for any cause listed in this Policy, or
- (ix) any other cause the Finance Committee may legally consider in suspending a person or entity from consideration for award of a District contract and that the Finance Committee determines to be so serious and compelling as to affect responsibility as a District contractor.

**3. Appeal Rights:** A decision of the Finance Committee to suspend is final and conclusive, unless the suspended person or entity, within ten calendar days after receipt of the decision of suspension, files a written appeal to the Board, in which case, the Board shall render



a final decision regarding such suspension.

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**Exhibit A**

**Brooks Act Procedures**

**40 U.S.C. §1101. Policy.**

The policy of the Federal Government is to publicly announce all requirements for architectural and engineering services and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

**40 U.S.C. §1102. Definitions.**

In this chapter, the following definitions apply:

(1) Agency head.--The term “agency head” means the head of a department, agency, or bureau of the Federal Government.

(2) Architectural and engineering services.--The term “architectural and engineering services” means--

(A) professional services of an architectural or engineering nature, as defined by state law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide the services described in this paragraph;

(B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

(C) other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

(3) Firm.--The term “firm” means an individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the profession of architecture or engineering.

**40 U.S.C. §1103. Selection Procedure.**

(a) In general.--These procedures apply to the procurement of architectural and engineering services by an agency head.

(b) Annual statements.--The agency head shall encourage firms to submit annually a statement of qualifications and performance data.

(c) Evaluation.--For each proposed project, the agency head shall evaluate current statements of qualifications and performance data on file with the agency, together with statements submitted by other firms regarding the proposed project. The agency head shall conduct discussions with at least 3 firms to consider anticipated concepts and compare alternative methods for furnishing services.

(d) Selection.--From the firms with which discussions have been conducted, the agency head shall select, in order of preference, at least 3 firms that the agency head considers most highly qualified to provide the services required. Selection shall be based on criteria established and published by the agency head.

#### **40 U.S.C. §1104. Negotiation of Contract.**

(a) In general.--The agency head shall negotiate a contract for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Federal Government. In determining fair and reasonable compensation, the agency head shall consider the scope, complexity, professional nature, and estimated value of the services to be rendered.

(b) Order of negotiation.--The agency head shall attempt to negotiate a contract, as provided in subsection (a), with the most highly qualified firm selected under section 1103 of this title. If the agency head is unable to negotiate a satisfactory contract with the firm, the agency head shall formally terminate negotiations and then undertake negotiations with the next most qualified of the selected firms, continuing the process until an agreement is reached. If the agency head is unable to negotiate a satisfactory contract with any of the selected firms, the agency head shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached.

#### **23 C.F.R. §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

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Requirements For Federal Awards rule and procedures applicable to such activities.

### **23 C.F.R. §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:

(1) 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

(2) 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.

### **23 C.F.R. §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.

### **23 C.F.R. §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

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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 subconsultants 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 subconsultants 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.

### **23 C.F.R. §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 provides for reimbursement on the basis of direct labor hours at specified fixed hourly rates, including direct labor costs, indirect costs, and fee or profit, plus any other direct expenses or costs, 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 subcontracts 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 subcontracts 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.