

PROCEDURES FOR PROCUREMENT, MANAGEMENT, AND ADMINISTRATION OF ENGINEERING AND DESIGN RELATED SERVICES

STATE OF HAWAII

DEPARTMENT OF TRANSPORTATION

HIGHWAYS DIVISION

September 9, 2016

I. PURPOSE and APPLICABILITY

To prescribe policies and procedures for the procurement, management, and administration of engineering and design related consultant services. This applies 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.

II. POLICY

It is the policy of the Hawaii Department of Transportation to use Hawaii Revised Statutes 103-D 302 to 307 as appropriate except as authorized by Hawaii Administrative Rules 3-122 for noncompetitive negotiation or emergency procurement.

AUTHORITY

- Title 23 United States Code (U.S.C.) Section 112 and as supplemented by the Uniform Administrative Requirements for Federal Awards rule;
- Title 2 Code of Federal Regulations (CFR) Part 200 – Uniform Administrative Requirements, cost Principles and Audit Requirements for Federal Awards rule
- Title 23 CFR Part 172 – Procurement, Management, and Administration of Engineering and Design Related Services;
- Brooks Act, Title 40 United States Code (U.S.C.) Chapter 11, Sections 1101-1104
- Federal Acquisition Regulation Cost Principles 48 CFR Part 31
- Hawaii Administrative Rules (HAR) 3-122
- Hawaii Revised Statutes (HRS) 103D-302 to 103D-307
- Hawaii Department of Transportation Department Staff Manual (DSM), Chapter 7

Any conflict between the HAR, the HRS and Federal Regulations, the more restrictive provision(s) shall govern.

III. SCOPE OF WORK

Per 23 CFR Section 172.5, HDOT Project Manager will prepare a project scope of work to be used as the Consultant scope of work when soliciting Consultant contracts. The Project Development Manual Section 1 may be used as a guide to prepare the scope of work.

IV. CONTRACT TYPE

Per 23 CFR 172.9, HDOT shall use the following types of contracts:

1. A Project-specific contract which is 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. A Multiphase contract which is 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. An on-call or indefinite delivery indefinite quantity (IDIQ) contract which is 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 (including extensions) not to exceed 5 years per 23 CFR 172.9(a)(3).

23 CFR 172 requires that both the solicitation and contract provision include the following for IDIQ contracts. 23 CFR 172.9 (a)(3) requirements are as follows:

- Specify a maximum total contract dollar amount that may be awarded under a contract;
- Include a statement of work requirements, specification, or other description to define the general scope, complexity, and professional nature of the services; and
- If multiple consultants are to be selected and multiple on-call or IDIQ contracts awarded through a single solicitation for specific services:
 - Identify the number of consultants that may be selected or contracts that may be awarded from the solicitation; and
 - 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 consultant on the basis of costs under on-call or IDIQ contracts for services procured with competitive procedures. Under competitive negotiation procurement, each specific task or work order shall be awarded to the selected qualified consultants:
 - Through an additional qualifications-based selection procedure, which may include, but does not require, a formal RFP in accordance with 23 CFR 172.5 (a) (1) (ii); or
 - 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.

The Project Manager will recommend for approval, the appropriate contract type, payment method, and terms and incorporating required contract provisions, assurances, and certifications in accordance with 23 CFR Section 172.9.

V. PAYMENT METHODS

Per 23 CFR 172.9 (b), 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.

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

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.

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 an approved contract modification.

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 agreed 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 degree of accuracy. This specific rate 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.

Withholding retainage for payment for services on federally funded contracts from the prime consultant is prohibited in accordance with 49 CFR 26.29, (b), (2).

VI. SMALL PURCHASES

Per 23 CFR 172.7(a)(2), small purchase procedures may be used when:

1. Procurement shall be made in accordance with small purchase procedures promulgated by the State of Hawaii Chief Procurement Officer per Hawaii Revised Statutes 103D-305 and Hawaii Administrative Rules Chapter 3-122, Subchapter 8.
2. Procurement amount does not exceed the Federal simplified acquisition threshold of \$150,000 per 48 CFR 2.101. The full amount of any contract modification or amendment that would cause the total contract amount to exceed the established Federal simplified acquisition threshold is ineligible for Federal-aid funding.
3. The scope of work, project phases, and contract requirements is not broken down into smaller components merely to permit the use of small purchase procedures.

VII. NONCOMPETITIVE SOLICITATION

Per 23CFR172.7 (a) (3) (iii)C and 23CFR172.7(a)(1)(iv)(D) contract may be awarded without competition when:

1. The service is available only from a single source per Hawaii Revised Statutes 103D-306, Hawaii Administrative Rules 3-122 Subchapter 9;
2. This type of procurement will follow Hawaii Revised Statutes 103D-307 and HAR Chapters 3-122 Subchapter 10, in an emergency where there is a threat to public health, welfare, or safety under emergency conditions which will not permit the time necessary to conduct competitive negotiations; or
3. After solicitation of a number of sources, competition is determined to be inadequate.

When the service is available only from a single source, the HDOT Director shall make a determination in writing, submit justification to, and receive concurrence from FHWA and the State Procurement Office before using this form of contracting.

When there is an emergency, HDOT shall prepare a written determination describing the basis for the emergency, the extent of competition obtained, and the basis for selection of a particular contractor shall be prepared, reviewed and approved by HDOT before contract award. The determination shall be included in the contract file.

VIII. COMPETITIVE SOLICITATION

HDOT shall use the competitive negotiation method for the procurement of engineering and design related services when federal-aid highway funds are involved in the contract per 23CFR 172.7 and Hawaii Revised Statutes 103D-304.

The solicitation process will follow the Consultant Selection Guidelines State of Hawaii Department of Transportation Highways Division dated 5/19/2016 (See Appendix A).

1. Local preference shall not be used as a factor in the evaluation, ranking, and selection phase per 23 CFR 172.7(a)(1)(iii)(C).
2. As a minimum qualification, consultants for engineering and design related services shall have a current and valid professional engineering /surveying license from the State of Hawaii, as applicable to the scope of services being procured per Hawaii Revised Statutes 103D-304.
3. Local presence may be used as a nominal evaluation factor where a need has been established for a local presence, a local presence will add value to the quality and efficiency of the project, and application of this criterion leaves an appropriate number of qualified consultants, given the nature and size of the project. This criterion shall not exceed a nominal value of 10 percent of the total evaluation criteria to maintain the integrity of a qualifications-based selection per 23 CFR 172.7(a)(iii)(D)(1).

Check <https://www.sam.gov> to ensure the most highly qualified consultant and their subconsultants are not excluded (suspended or debarred) from entering into a contract funded with federal-aid highway fund per 23 CFR 172.11, 2 CFR part 1200 and 2 CFR part 180.

4. The HDOT shall retain supporting documentation of the solicitation, proposal evaluation, and selection of the consultant for a period not less than three years from the date of submission of the final voucher to FHWA per 2 CFR 200.333.
5. Per 23 CFR 172.7(a)(1)(iv)(C), HDOT 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 HDOT written policies and procedures. 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.
6. Per 23CFR172.7(b)(5), the scope of services currently included in the Construction Management Services (CMS) contracts meet the definition of "Consultant Services in management support roles" and therefore requires FHWA approval before utilizing a consultant in a CMS role for each individual project or on a program level. This does not apply to Construction Support Service contracts.

Per Hawaii Revised Statutes 103D-304 and Hawaii Administrative Rules Chapter 3-122, Subchapter 7, the HDOT shall review the qualifications of at least three consultants. In instances where less than three qualified consultants respond to the solicitation, the HDOT will determine if reprocurement is necessary and make a recommendation for approval.

Based on the review of Request for Proposals received, the HDOT shall contract the most qualified firm and attempt to negotiate a contract for the required services at a fair and reasonable price.

Allowability of costs shall be determined per Federal Acquisition Regulation Cost Principals 48 CFR Part 31.

IX. NEGOTIATIONS

Per 23CFR 172.7(a)(1)(v)(A-E), in determining fair and reasonable compensation, the HDOT shall consider the scope, complexity, professional nature, and estimated value of the services to be rendered.

Per 23CFR172.7(a)(1)(v)(B), the HDOT shall develop a detailed independent estimate showing tasks, hours and cost prior to receipt or review of the most highly qualified consultant's cost proposal.

1. The detailed independent estimate shall include 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.
2. The HDOT 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 allowable costs per 2CFR Section 200.333.
3. HDOT shall require Consultant Cost Certification of its own indirect cost rate per 23CFR172.11(c)(3).

HDOT shall negotiate a contract for architectural and engineering services at compensation for which HDOT determines is fair and reasonable.

The HDOT will attempt to negotiate a contract, with the most highly qualified firm selected by ranking (i.e. highest ranked). If the HDOT is unable to negotiate a satisfactory contract with the highest ranked firm, the HDOT shall formally terminate negotiations and then undertake negotiations with the second highest ranked firm until an agreement is reached. If the HDOT is unable to negotiate a satisfactory contract with the second highest ranked firm, the HDOT shall formally terminate negotiations and then undertake negotiations third highest ranked firm until an agreement is reach. If the HDOT is unable to negotiate with the third highest ranked firm, reprocurement may be recommended.

The HDOT shall retain documentation of negotiation activities and resources used in the analysis of costs to establish elements of the contract for a period not less than three years from the date of submission of the final voucher to FHWA. 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 2CFR200.333.

The Project Manager will negotiate a contract with the selected consultant based upon the Scope of Work, Payment and Compensation, and Time of Performance. All selection records shall be kept in confidential project files until three years after the FHWA final voucher per 2CFR200.333. Records may be disposed by shredding per the HDOT records retention policy.

X. CONTRACT PROVISIONS

Per 23 CFR 172.9 (c), all contracts and subcontracts will have the General Conditions (Form AG-008), in addition to Scope of Work - Attachment S1 (Form AG-011), Payment and Compensation - Attachment S2 (Form AG-012) and Time of Performance - Attachment S3 (Form AG-013), Special Conditions – Attachment S5 (Form AG-015), Equal Opportunity Exhibit A and Requirements for Participation by Disadvantaged Business Enterprises Exhibit B.

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:

- 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.
- HDOT requirements pertaining to consultant errors and omissions. A sample errors and omissions clause is included in Special Conditions (Form AG-015).
- 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 20. A sample *Certification Regarding Lobbying – Certification for Contracts, Grants, Loans, and Cooperative Agreements* (Figure IVE) is included in Appendix A.

Per 23 CFR 172.11 (c) 3. Consultant Cost Certification, certification requirement shall apply to all indirect cost rate proposals submitted by consultants and subconsultants for acceptance. Each consultant or subconsultant is responsible for certification of its own indirect cost rate and may not certify the rate of another firm. A sample of the *Certificate of Final Indirect Costs* (Figure IVD) is included in Appendix A.

Per 23 CFR 172.11 (c) 4. Sanctions and Penalties, contracting agency written policies, procedures, and contract documents shall address the range of administrative, contractual, or legal remedies that may be assessed in accordance with Federal and State laws and regulations where consultants violate or breach contract terms and conditions. Where consultants knowingly charge unallowable costs to FAHP funded contract

- HDOT shall pursue administrative, contractual, or legal remedies and provide for such sanctions and penalties as may be appropriate, and
- Consultants are subject to suspension and debarment actions as specified in 2 CFR part 1200 and 2 CFR part 189, potential cause of action under the False Claims Act as specified in 32 U.S.C. 3729-3733, and the prosecution for making a false statement as specified in 18 U.S.C. 1020.

XI. CONFLICT OF INTEREST

Per 23 CFR 172.7 (b)(4), no employee, officer, or agent of the contracting agency shall participate in procurement, 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:

- The employee, officer, or agent;
- Any member of his or her immediate family;
- His or her partner; or
- An organization that employs or is about to employ any of the above;

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 sub agreements. A contracting agency may establish dollar threshold where the financial interest is not substantial or the gift is an unsolicited item of nominal value.

XII. CONTRACT MODIFICATIONS

Per 23 CFR 172.9(e), contract modifications are required for any amendment 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.

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.

The HDOT shall negotiate contract modifications following the procedures outlined in Section IX, NEGOTIATIONS of this document.

The HDOT 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. 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:

1. Procure the services under a new solicitation;
2. Perform the work itself using contracting agency staff; or
3. Use a different, existing contract under which the services would be within the scope of work.

Any disputes will follow the terms stated in the General Conditions (AG-008) of the Consultant Contract.

XIII. ALLOWABLE COSTS AND OVERSIGHT

Per 23 CFR 172.11, consultants shall be responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with Federal cost principles.

HDOT shall accept a consultant's or subconsultant's indirect cost rate(s) established for a one-year applicable accounting period by a cognizant 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 and issued an audit report of the consultant’s indirect cost rate(s); or
- Conducted a review of an audit report and related workpapers prepared by a certified public accountant and issued a letter of concurrence with the related audited indirect cost rate(s).

When an indirect cost rate has not been established by a cognizant agency, HDOT shall perform an evaluation of a consultant’s or subconsultant’s indirect cost rate prior to acceptance and application of the rate to contracts administered by the recipient. The evaluation performed by HDOT to establish or accept an indirect cost rate shall provide assurance of compliance with the Federal cost principles and may consist of one or more of the following:

- Performing an audit in accordance with generally accepted government auditing standards and issuing an audit report;
- Reviewing and accepting an audit report and related workpapers prepared by a certified public accountant;
- Establishing a provisional indirect cost rate for the specific contract and adjusting contract costs based upon an audited final rate at the completion of the contract; or
- Conducting other evaluations in accordance with risk-based oversight process as specified in 23 CFR 172.11(c)(2) and within the agency’s approved written policies and procedures.

Audit information may be shared provided that the consultant is given notice of each use and transfer. Audit information shall not be provided to other consultants or any other government agency not sharing the cost of the data, or to any firm or government agency for purposes other than complying with the acceptance of the consultant’s indirect cost rates without the written permission of the affected consultants.

XIV. FHWA APPROVAL

Coordinate with FHWA as per the Stewardship and Oversight Agreement on Project Assumption and Program Oversight dated April 30, 2015 (see Appendix A, Figure III.7.2A).

XV. DEBRIEFING UNSUCCESSFUL INTERVIEW FIRMS

Per Hawaii Revised Statutes 103D-304 and Hawaii Administrative Rules Chapter 3-122, Subchapter 7, Consultants may request a debriefing from HDOT if they have not been successful in getting a contract award. Refer to Appendix D – Procedures for Debriefing.

XVI. CONTRACT ADMINISTRATION

Per 23 CFR 172.9, the Project Manager will ensure that the work delivered under contract is complete, accurate, and consistent with the terms, conditions, and specifications of the contract. At a minimum, the Project Manager will be responsible for the following:

1. 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. Refer to Appendix B for IDIQ contracts and Appendix C for Projects managed by others;
2. Being familiar with the contract requirements, scope of services to be performed, and products to be produced by the consultant;
3. Being familiar with the qualifications and responsibilities of the consultant's staff and evaluating any requested changes in key personnel;
4. 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;
5. 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;
6. Evaluating and participating in decisions for contract modifications; and
7. Per 2 CFR 200.333, document contract monitoring activities and maintain supporting contract records for a period of three years from the date of submission of the final voucher to FHWA.

XVII. PERFORMANCE EVALUATION

Per 23 CFR 172.9(d)(2), the Project Manager 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 and delivered.

The HDOT shall provide the consultant a copy of the performance evaluation and an opportunity to provide written comments to be attached to the evaluation. The HDOT 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 for use in the future evaluation of the consultant to provide similar services.

XVIII. CLOSE OUT

Per 23 CFR 172.9(d)(1), the Project Manager shall send a letter to the Consultant requesting a final billing after all the contract terms have been successfully completed. After final billing is paid, HDOT's Highways Division Staff Services will then initiate closing out the authorization.

Per 2 CFR 200.333, the Project Manager will retain supporting programmatic and contract records for a period not less than three years from the date of submission of final voucher to FHWA.

XIX. PROFESSIONAL REGISTRATION

Consultants shall have a current and valid professional engineering / surveying license from the State of Hawaii as applicable for the scope of services being procured per Hawaii Revised Statutes 103D-304.

XX. ESTIMATED TIME FRAME FOR PROCUREMENT

Per 23 CFR 172.7(a)(1)(iv)(C), the Project Manager shall include an estimated timeframe for procurement in the Request for Proposal documents which will state what method will be used for discussions with the Consultant after the Request for Proposal is submitted. The Project Manager may use the Consultant Procurement flowchart as a guide to establish the procurement timeframe as shown in Appendix E.

XXI. LIST OF APPENDICIES AND REFERENCES

Appendix A - Consultant Selection Guidelines State of Hawaii Department of Transportation Highways Division dated 5/27/16, revised 9/9/2016

Appendix B - Administration of Open Ended Engineering Support Contracts State of Hawaii Department of Transportation Highways Division dated 4/14/08

Appendix C - Consultant Contract Administration and Billing Procedures Consultant Contract Procured by Technical Design Services Office and the PS&E Managed by Another Section, Branch or District dated 12/28/15

Appendix D - Procedures for Debriefing dated 10/10

Appendix E - Consultant Procurement Flow Chart dated 5/19/2016, revised 9/9/2016

References:

Hawaii Administrative Rules 3-122

Hawaii Revised Statutes 103D-302 to 103D-307

Project Development Manual Chapters 1-10

General Conditions (AG-008) and Special Conditions (AG-015)

Department Staff Manual Chapter 7