



Section 6 – Consultant Contracts

GENERAL

If the local agency is not adequately staffed to provide the necessary engineering, architectural, land surveying and related services (including utility negotiations), they may engage a consultant to provide those professional services. Under the Brooks Act [40 USC 1102](#), professional services means:

- 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;
- 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
- 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.

Federal law also recently expanded professional services stating “engineering and design related services are defined in [23 USC§112 \(b\)\(2\)\(A\)](#) and [23 CFR §172.3](#) to include program management, construction management, feasibility studies, preliminary engineering, design engineering, surveying, mapping or other related services. These other services may include professional engineering related services, or incidental services that may be performed by a professional engineer, or individuals working under their direction, who may logically or justifiably perform these services.”

The cost of the above mentioned professional services is eligible for federal participation provided that prior approval of the contracts by MoDOT is received. Federal participation in the cost of construction engineering is limited to 15% of the net federal participating construction costs for all contracts statewide, whether performed by consultant, in-house, or both. Construction engineering can be greater than 15% if requested by the local agency on a case-by-case basis prior to the award of the contract. Construction inspection services may be included in the same agreement with design services. Preliminary engineering charges are permitted through the construction contract award stage. Charges after the award of the construction contract are considered to be construction engineering and cannot be charged against the design portion of the agreement. Right-of-way acquisition services shall be handled under a separate

right-of-way services agreement. This contract/agreement will be submitted at the same time the Request for Obligation of Right-of-Way Funds (A-Date Request) is submitted.

Right-of-way project cost estimates, title work, right-of-way plan development, and legal description writing may be included in the same agreement with design services and are reimbursable as preliminary engineering expenses. All other right-of-way acquisition activities eligible for reimbursement cannot be incurred or invoiced for reimbursement until the A-Date has been approved and the LPA has been notified.

On federal-aid projects, right-of-way costs and incidental expenses are only reimbursable after MoDOT district staff reviews and approves the LPA personnel or the right-of-way acquisition contractor that will perform the right-of-way acquisition activities.

After execution by the local agency and consultant, three (3) copies of the contract are submitted to MoDOT for review and approval. The standardized contract format developed by MoDOT in [Figure 6-1](#) is required.

In cases where the preliminary engineering or construction inspection costs in the contract exceed \$250,000, MoDOT's External Civil Rights Division may establish a Disadvantaged Business Enterprise (DBE) goal for the contract. The sponsor will need the established DBE goal before a Request for Proposal (RFP) is sent out to prospective engineering consultants. The RFP must include the DBE Contract Provisions for Engineering Services Contracts (ESCs). The sponsor must first submit an estimate of anticipated activities that will take place during the design or inspection process. Examples include but are not limited to surveying, plan sheet development, design, geological studies, and borings. Estimated hours and rates for each activity are not required. In order to obtain MoDOT approval of the contract in these cases, the consultant must acquire the required DBE participation or supply sufficient evidence as to why the DBE goal was not met.

The local agency should include a letter stating the necessity for utilizing a consultant for the work. If the local agency proposes to engage a consultant it has not previously utilized for the particular type of work involved, the local agency should submit a brochure or other information that outlines the qualifications of the firm's employees and recent past experience in similar work. It is **not** permissible for a consultant to contract with both the local agency and the contractor on the same project.

If a local agency engages a consultant to conduct an environmental study, the consultant is required to fill out a disclosure statement specifying the consultant has no financial or other interest in the outcome of the project. Additionally, the local agency cannot engage the same consultant for the environmental document and the final design during one contract negotiation process. The same consultant may be used but the local agency must utilize its selection process for the later stages.

All consultants receiving individual awards for \$100,000 or more and all sub recipients must certify that the organization and its principals are not suspended or debarred. Each local agency may, but is not required to, check the Nonprocurement List. Copies may be obtained by

purchasing a yearly subscription from the Superintendent of Documents, US Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Inquiry and Order Desk at (202) 783-3238. The electronic version can be accessed on the Internet at <http://www.arnet.gov/epl>. The user will be required to record their name and organization for purposes of the Computer Matching and Privacy Act of 1988.

All required independent assurance samples and tests will be performed by MoDOT, so this work should not be included in consultant contracts. However, required project tests are the local agency's responsibility. Should the local agency not have the required staff to administer these project tests, a consultant testing firm can be obtained and costs will be eligible for federal reimbursement.

SUBCONSULTANTS

Subconsultant cost exceeding \$25,000

If the consultant is using a subconsultant with a cost exceeding \$25,000, then the subconsultant shall include a detailed estimate of cost as shown on Fig. 6-1-11 and an overhead rate breakdown.

Subconsultant cost NOT exceeding \$25,000

If the consultant is using a subconsultant with a cost that does not exceed \$25,000, then a letter from the subconsultant shall be included that quotes the subconsultant's cost shown in Attachment A of the contract.

SOLICITATION AND SELECTION PROCEDURES

Local agencies must use a Qualification Based Selection (QBS) process for the procurement of engineering services, design-related services or other professional services on every project involving federal-aid highway funds. The Brooks Act and 23 CFR 172.3 must be followed if the local agency is seeking federal reimbursement for these services. The QBS process must include a public announcement, advertisement or other acceptable method that assures qualified in-state and out-of-state consultants are given a fair opportunity for consideration, which allows for a minimum two-week response time. It is recommended the local agency use the MoDOT Consultant Resources website to post the public announcement or advertisement (Figure 6-7, sample solicitation form). The solicitation form should be submitted to the appropriate MoDOT district representative. If the LPA wishes to use an alternative procedure to advertise and solicit qualifications for the RFQ, they must submit a written request with an advertising plan attached that complies with state and federal requirements. The advertisement plan must include advertisement of the availability in a major newspaper of general circulation. The RFQ notice must be advertised at least one time allowing a minimum 14 calendar days prior to the due date. The notice may be advertised multiple times if desired. The advertisement plan should also identify and send the solicitation to organizations qualified to do specified work as well as professional societies and recognized DBE organizations. The request must be approved by MoDOT and FHWA prior to advertisement.

Local agencies must submit to MoDOT a description of procedures they use to evaluate and select consultants. Figure 6-2 lists criteria that should be considered when selecting a consultant. To avoid conflict of interest, the local agency may not use a consultant-engineering firm on retainer unless it satisfactorily documents the engineer or the firm was not involved in the solicitation and selection of the firm. These criteria must meet minimum federal requirements and be in compliance with Sections 8.285 to 8.291, RSMo (Figure 6-3).

The local agency may use the criteria specified in federal and state regulations or may develop its own written procedures provided a qualification-based selection procedure commensurate with state policy is used. Local agencies must prepare a written description of the scope of the proposed services. According to state law, the agency must list three highly qualified firms and then select the firm best qualified to perform the desired services. The agency may evaluate current statements of qualifications and performance data of firms on file or solicit statements from other firms interested in the project. It is not necessary for the agency to interview all the firms. Price shall not be used as a factor in the analysis and selection of a firm. Price quotations shall not be requested for consideration prior to selecting a firm. If a local agency cannot negotiate a reasonable price with the consultant selected, it can cease negotiations and select a different firm. The local agency must provide written documentation of the selection procedures used and the names of the three or more firms considered when a contract is submitted for approval. If the local agency chooses to cite the state statute, then the following wording can be used:

“We have considered the following three firms under procedures outlined in Missouri Law (RSMo Sections 8.285 to 8.291).”

Failure to follow the state and federal provisions outlined above could jeopardize federal funding.

SCOPE OF SERVICES

The local agency should determine the scope of services when issuing an invitation for consultants to submit proposals. The scope of services should be detailed and project specific. In addition to the customary information contained in a scope of services, it is suggested that the following items be included:

1. The proposed design parameters to be used on the project (MoDOT design guidelines are required for projects on MoDOT right of way);
2. When applicable, an investigation of Federal Emergency Management Agency’s requirements;
3. Provision for 404 Permits, archaeological investigations, and other environmental matters as judged necessary; and
4. Degree of construction inspection services to be included in the engineering service contract, if any.

BASIS OF PAYMENT

The following methods may be used as the basis of payment in a contract:

1. Actual cost plus fixed fee and
2. Specific rates of pay (for emergency situations only).

The most common basis of payment is actual cost plus fixed fee. Federal regulations prohibit the use of cost plus a percentage of cost and percentage of construction cost methods of compensation.

It is often necessary for a consultant to subcontract work, such as surveying, core drilling, materials testing, cultural resource documentation, and environmental documentation. Subcontractors should be shown in the contract and costs passed through to the local agency at actual cost. Prompt payment of subcontractors is required and any retainage cannot be passed through to the subcontractors.

EVALUATIONS

Before a contract can be approved, it will be necessary to perform and document a technical evaluation to determine that the estimated man-hours are reasonable. In addition, an audit evaluation will need to be performed for some contracts to determine that cost aspects are reasonable and, in particular, that the cost estimate and overhead rates contain only items allowable under federal guidelines. Only those contracts that fall within the guidelines established for pre-negotiation audits by Audit and Investigations, MoDOT, will need to have such an audit evaluation.

CONTRACT SUBMITTAL

The contract format illustrated in [Figure 6-1](#) is required. Following is a checklist of items that should be included in or submitted with the contract:

1. Local agency's statement regarding the necessity for utilizing a consultant for the work;
2. Procedures used to evaluate and select consultants and a listing of firms considered;
3. Qualifications and experience résumé for consultant, if consultant has not been previously utilized by the local agency,
4. A method for modifying the contract (extra work or modified work or any change in the contract fee requires the approval of a supplemental agreement by MoDOT and FHWA prior to performing the work or incurring the added cost) ([Article II](#));
5. A statement that a local agency employee will be responsible for and in direct control of the construction contract even though a consultant may perform inspection work ([Article III-E](#));

6. A time reference after which all work under the contract will be considered complete ([Article IV](#));
7. A statement that specifies the basis for allowability of costs will be 23 CFR, Part 172 and 48 CFR, Part 31 ([Article VI-F](#));
8. Give residual credit for specialized equipment purchased for the contract ([Article VI-H](#));
9. The following covenant against contingent fees in the contract ([Article VII](#)):

“The consultant warrants that he has not employed or retained any company or person, other than a bona fide employee working for the consultant, to solicit or secure this contract, and that he has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of this contract. For breach or violation of this warranty, the local agency shall have the right to annul this contract without liability, or, in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such fee, commission, percentage, brokerage fee, gift, or contingent fee plus reasonable attorney’s fees.”
10. An agreement for the retention of records for a period of three years after the consultant receives payment of their final invoice from the local agency ([Article X](#));
11. An agreement to allow MoDOT and FHWA and other authorized federal agencies to examine records pertaining to the project and costs ([Article X](#));
12. Ownership of engineering documents by local agency ([Article XI](#));
13. Procedure for settling disputes arising under the contract ([Article XIII](#));
14. A nondiscrimination provision ([Article XVII](#));
15. A cost breakdown as follows ([Attachment A](#)):
 - a. man-hours by pay grade and general work function,
 - b. basic rates of pay,
 - c. Overhead rates, projected for the period of performance,
 - d. Other direct costs (travel, subsistence, etc.),
 - e. fixed fee (actual cost),
 - f. subcontracts,

- g. contract ceiling;
- 16. A breakdown of the consultant's overhead rates ([Attachment B](#)) (See [Figure 6-6](#) for a listing of common unallowable items);
- 17. Debarment certifications as an attachment to the contract (samples are attached in the standardized contract) ([Attachment C & D](#));
- 18. If desired, a stipulation by the local agency that a certain percentage, usually 5%, will be held as a retainage until the final invoice has been received;
- 19. When the project is on MoDOT right-of-way, the ESC shall indicate that the design must meet the requirements specified in MoDOT's Project Development manuals.

This checklist will help to insure that all necessary documentation related to the project is completed in a timely manner.

SUPPLEMENTAL AGREEMENTS

Changes to a contract should be made through a supplemental agreement. **No work is to be initiated until MoDOT has notified the local agency to proceed with the activities contained in the supplemental agreement.** If a fee is to be changed, approval is needed before the original ceiling is exceeded. The format may be by letter agreement, signed by both parties. It is desirable to include the original fee in the supplement as well as the revised fee. If the reasons in the supplement are not self-explanatory, additional justification should be included when submitting for approval. No changes in the fixed fee portion of a cost plus fixed fee contract will be approved in a supplemental agreement unless it is determined that the scope of work has changed significantly. [Figure 6-4](#) contains a sample copy of a supplemental agreement.

1. Supplemental agreements to original engineering services contracts may need to be submitted to the External Civil Rights Unit to review for an appropriate DBE goal if the combined total of the original agreement and the supplemental(s) exceeds \$250,000.00. If a DBE goal has already been set on the original contract, the supplemental agreement must still be reviewed to determine if the original DBE goal will apply, or if a new DBE goal should be established for the supplemental agreement.

CONSULTANT PERFORMANCE APPRAISAL

Local agencies with the assistance of MoDOT and the contractor are requested to complete the Consultant Performance Appraisal ([Figure 6-5](#)) after project completion. If any questions arise concerning the Consultant Performance Appraisal, the local agency should contact the MoDOT district representative for assistance.