

# Chapter 31      *Using Consultants*

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Washington State Department of Transportation Local Programs administers Professional Service agreements under the statutory intent established by 23 CFR part 172 and Local Agencies.

## 31.1 Introduction

This chapter covers Professional Service (A&E, non-A&E, and Purchased services) on Federal Aid projects. The policies outlined in this chapter are mandatory for Local Agencies to be eligible for reimbursement of Federal Highway Administration (FHWA) funds for consultants. Local Agencies using state funds may use this chapter or they must comply with RCW Chapters 39.26 and RCW and 39.80.

Agreements for architects, landscape architects, land surveying, and engineering services are defined in 48 CFR 36.601-4, in the Brooks Act USC 1102, and outlined in RCW 39.80. The definitions of these four professions are described in RCW 18.08, 18.43, and 18.96.

## 31.2 Definitions

### *Architect & Engineer Professional Services*

For the purposes of federal regulation, architect-engineer services are defined in 48 CFR 36.601-4 as follows:

1. Professional (A&E) services of an architectural or engineering nature, as defined by applicable state law, which the state law requires to be performed or approved by a registered architect or engineer.
2. Professional (A&E) services of an architectural or engineering nature associated with design or construction of real property.
3. Other professional (A&E) services of an architectural or engineering nature or services incidental thereto, 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 that logically or justifiably require performance by registered architects or engineers or their employees.
4. Professional (A&E) surveying and mapping services of an architectural or engineering nature. Surveying is considered to be an architectural and engineering service and shall be procured pursuant to Section 36.601 from registered surveyors or architects and engineers. Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering service and is to be procured pursuant to Section 36.601. However, mapping services that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities, or have not in themselves traditionally been considered architectural and engineering services shall be procured pursuant to provisions in parts 13, 14, and 15.

In the Brooks Act, 40 USC 1102, “architectural and engineering services” is defined as:

1. Professional (A&E) 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.
2. Professional (A&E) 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
3. Other professional (A&E) services of an architectural or engineering nature, or incidental services of 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.

In RCW 39.80.020(5), “architectural and engineering services” is defined as:

1. “Architectural and engineering services” or “professional services” means professional services rendered by any person, other than as an employee of the agency, contracting to perform activities within the scope of the general definition of professional practice in chapters 18.08, 18.43, or 18.96 RCW.

### **Non-A&E Professional Services**

For this chapter the term Non-A&E Professional Services is used to describe Other Professional Services often rendered by consulting firms

Examples of non-A&E professional services typically include, but are not limited to:

- Material testing (consultant is delivering test results with project acceptance, performing an analysis and producing a discipline report).
- Financial and economic analyses
- Environmental planning (as opposed to environmental engineering)
- Public Outreach
- Media involvement
- Marketing services
- Research
- Scientific studies
- Real Estate activities including acquisition, relocation, appraisal, appraisal review, and property management when part of a professional services agreement

## **Purchased services**

For this chapter the term “Purchased Services” is defined as:

1. Purchased services means services provided by a vendor to accomplish routine, continuing, and necessary functions. This term may be applied only to an agreement when the service is procured by the local agency directly and fall into one of the categories below.

Examples of Purchased services includes, but are not limited to:

- Services for equipment maintenance and repair
- Operation of a physical plant; security
- Computer hardware and software maintenance
- Data entry
- Key punch services
- Computer time-sharing, contract programming, and analysis
- Real estate appraisal services not related to A&E or Non-A&E agreement.
- Legal services
- Expert witness services for litigation
- Material testing (performing and delivering test results only, not performing an analysis, producing a discipline report, or project acceptance).

### **31.3 Process Outline**

Throughout this chapter the term “project” means the work to be undertaken by the consultant.

The basic steps for entering into a consultant agreement are:

1. Determine the need for services.
2. Approval to advertise from the Local Programs Engineer.
3. Advertise the need for services.
4. Evaluate the applicants' qualifications.
5. Interview the top three candidates.
6. Select the single most qualified firm.
7. Negotiate with the most qualified firm.
8. Local Agency verifies that all firms have an active approved Indirect Cost Rate (ICR) or Safe Harbor Rate in place.
9. Disadvantaged Business Enterprise (DBE) concurrence (If a mandatory DBE is assigned)
10. Local Programs Engineer (LPE) review on all non-DBE agreements.
11. Execute the agreement.
12. Submit a copy of the executed agreement within 30 days to Region LPE.

## 31.4 A&E Services Consultants

A&E consultant services include the following:

1. Professional or technical expertise to accomplish a specific study, project, task, or other work statement.
2. Any phase of project development, as well as special studies or other assignments within any phase.
3. Periodic examination and consultation or full-time technical inspection during the construction phase.
4. Consultant design and preparation of plans, specifications, and estimates (PS&E) is common when an Agency's staff is small or when an Agency needs additional expertise.

Section 319 of Public Law 101-121 codified in 31 U.S.C. 1352 (Byrd Anti-Lobbying Amendment) prohibits federal funds from being expended by consultants or subconsultants, who receive a federal contract, grant, loan, or cooperative agreement to pay, to any person for influencing or attempting to influence a federal Agency or Congress in connection with awarding any of the above services.

**.41 Determine the Need for A&E Services** – Before an Agency advertises for A&E services, Agencies must have a clear definition of the work to be accomplished. This includes identification of:

1. The nature and scope of the effort required.
2. The technical requirements and qualifications of the consultant services needed.
3. The level of funding resources available.
4. The time frame for performing the work.
5. The expected results and products to be received (deliverables).
6. An independent agency cost estimate (see [Appendix 31.92](#)).
7. The establishment of a consultant contract DBE goal.

If assistance is needed in describing the desired scope of work, the Agency should contact their Region Local Programs Engineer (LPE) or other Local Agencies that have had similar projects.

Selection of the single most qualified consultant firm is based on evaluations; therefore, Agencies must develop clear selection guidelines (see Section 31.13). The selection criteria should enable the Agency to identify and select the consultant best qualified to meet the Agency's needs. Clear selection guidelines will ensure that the selected consultant will provide the required services to meet the Agency's needs in the most cost-effective manner.

The two agreement types are cost plus fixed fee and negotiated hourly rates. The Agency must determine the type of agreement to be utilized for this project and clearly state the type chosen in the RFQ. Consultant agreements are available from your Region Local Programs Engineer (LPE).

Consultant selection shall provide for maximum open and free competition and shall provide opportunities for small and disadvantaged business enterprises (DBE) to obtain an equitable share of the work, consistent with the project scope and the capabilities of available small and disadvantaged owned firms.

A&E consultants may be solicited for:

1. A specific project.
2. A specific stage of a project (i.e., Design Report).
3. Engineering services (i.e., supporting services of an Agency's staff in studies, design, etc.).
4. Multiple projects advertised in a single RFQ (i.e., several small bridge design projects). Each project must be named in the solicitation and individual projects must be executed with the single selected firm within one year of original RFQ advertisement date, unless an extension of one additional year is approved by the Assistant State Local Programs Engineer.
5. Multiple phases of a single project. Each phase to be executed with the consultant shall be named in the solicitation (Planning, Right-of-way, Design, Environmental, Construction Management, etc.). Multiple phases maybe included in the original agreement or additional phases may be supplemented into the original agreement if it has not expired or lapsed.

**.41a Multi-Phase Projects** – The original agreement for engineering shall state that the consultant may be considered for subsequent phases provided that the additional phases were identified in the advertised solicitation. The consultant's engagement to complete subsequent phases depends upon the consultant's satisfactory performance on prior work and upon negotiation of an agreement for the subsequent phases (Design, Right-of-way, Construction, etc.). The Agency is not obligated to use the same consultant firm for all phases. Separate consultant agreements may be considered for each phase that the funding is authorized. (e.g., one for preliminary engineering and another for construction engineering).

**.41b Environmental Assessment/Environmental Impact Statement/Environmental Classification Summary** – The first agreement would include preliminary engineering through final approval of the environmental documents. Preparation of the PS&E could be under a separate agreement with continuation of the original consultant at the option of the Agency, provided this was stated in the original advertisement and solicitation.

**.41c Engineering Management Consultants** – While an engineering management consultant may assist an Agency in fulfilling its responsibilities, the Agency cannot delegate these responsibilities to a consultant or to another Agency. A consultant serving in a management role for an Agency, and then managing consultant agreements with its own firm, is a conflict of interest. (Reference 23 CFR 172 and category VIII of FHWA's Q&A at: [Procurement, Management, and Administration of Engineering and Design Related Services - Questions and Answers \(dot.gov\)](https://www.fhwa.dot.gov/procurement/management-and-administration-of-engineering-and-design-related-services-questions-and-answers/)). On National Highway System (NHS) routes this requires FHWA written approval prior to advertisement, on non-NHS routes Region LPE approval is required.

- .42 Advertise the Need for A&E Consultant Services** – Federal regulations 23 CFR 172.7(a)(1)(i), requires that “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”. State law, RCW 39.80, requires that each Agency must publish in advance that Agency’s requirement(s) for architectural services, engineering services, or land surveying services. State laws RCW 35A.65 and RCW 65.16 outline the requirements of legal publication. An Agency can comply with these requirements by publishing an announcement on each occasion when A&E services are required by the Agency.

The need for A&E services must be advertised at least one day per week for two consecutive weeks in the area newspaper used for publication of legal notices, and a public announcement meeting the intent of the 23 CFR part 172.7(a)(1)(i), (such as widely distributed, websites, business publications, trade journals, or similar that can provide the required affidavit of publication). Consultant firms shall be allowed a three-week (21 days) minimum response time from the initial date of publication. If the publication meets the requirement of both RCW 39.80 and 23 CFR part 172.7(a)(1)(i) and an affidavit of publication can be provided, then only one advertisement will be required.

When DBE goals are assigned to the consultant agreement on a project, the agency should also advertise for consultants on the Washington State Office of Minority & Women’s Business Enterprises (OMWBE) – Bids & Contracting Opportunities webpage. The advertisement shall include the same information as required in Section 31.12a advertisement content.

The advertisement should also be supplemented by additional advertisements in special interest publications such as trade magazines, business publications, or websites utilized by disadvantaged business enterprises.

Agencies may also publish an announcement for emergent or emergency need contracts. There are four disciplines in which an agency may advertise for and award contracts to multiple firms to assist agencies if unexpected needs arise during construction. These disciplines include:

- **Geotechnical** – Investigations include the assessment of the risk to humans, property, and the environment from natural hazards such as earthquakes, landslides, sinkholes, soil liquefaction, debris flows and rockfalls.
- **Hydraulics** – These activities include roadways threatened by a river and/or the occurrence of scour.
- **Archeological** – Investigations include surveying the construction site and analyzing any findings if construction activities caused disturbance to potential cultural resources or human skeletal remains.
- **Environmental** – These activities involve contacting resource agencies, documenting all construction activities that may require mitigation and monitoring in-water work activities.

These agreements must be for a maximum of one-year and must include a “not to exceed” dollar amount. An agency may extend the agreement for one additional year provided the work is to complete agreements entered into within the first and the original agreement dollar amount was not exceeded.

**.42a Solicitation Content** – In accordance with 23 CFR 172.7(a)(1)(ii) and RCW 35.21.875, 36.100.180(2), the published legal notice (meeting the requirements listed in section 31.12 of this chapter) must contain the following information:

**Note:** A&E consultant procurements must be based upon the qualifications not on costs. The cost of procurement of an A&E firm is an eligible cost.

1. The project title of the federal aid project(s) including the estimated start and end date for each project listed under this Solicitation of qualification statements, referred to as Requests for Qualifications (RFQ) from consultants.
2. 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.
3. Solicitations of qualification statements, referred to as Requests for Qualifications (RFQ) from consultants, must incorporate a clear and accurate description of the technical requirements for the service to be procured, including any special conditions or certifications required. 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. (Example Submittal Information Forms to obtain consultant qualifications for Prime and Subconsultants are contained in [Form 140-565](#) and [Form 140-566](#), respectively.)
4. Solicitations must clearly specify the contract type and method of payment (Cost Plus Fixed Fee or Negotiated Hourly Rate) anticipated to contract for the solicited services in accordance with 23 CFR § 172.9.
5. Solicitations must clearly set forth the details of how applicant qualifications will be evaluated. The qualifications must include but are not limited to key personnel, firm experience, ability to meet schedule, past performance, in-house expertise, familiarity with WSDOT/FHWA standards, and DBE approach and commitment.
6. Identify any special provisions or contract requirements associated with the solicited services.
7. Provide an estimated schedule for the procurement process and establish a submittal deadline for responses to the RFQ 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 21 calendar days from the date of issuance of the RFQ.
8. Solicitations must state the DBE programs requirements assigned to the agreement.
9. Solicitations must state that the consultants will be held to ADA and Civil Rights language for the Local Agency.

10. Local Agencies must comply with the requirements of Title VI of the Civil Rights Act of 1964 and subsequent nondiscrimination laws. Therefore, when advertising for Consultant Services, the following Title VI language must be included in advertisement:

“The (Local Agency), in accordance with the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252,42 U.S.C. 2000d to 2000d-4) and the Regulations, hereby notifies all bidders that will affirmatively ensure that any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full and fair opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of race, color, or national origin in consideration for an award.”

**.42b Advertisement Content Supplemental** – The advertisement should contain the following information,

1. Non-engineering service applicants should be asked to provide estimates for the man-hours and classifications needed to complete the project.
2. If a project covers multiple phases, the Agency is not obligated to utilize the original consultant for subsequent phases. If the Agency desires this option, the advertisement must clearly state the possibility of a multi- phase agreement at the discretion of the contracting Agency (see Section 31.11a).
3. All prospective consultants must be advised that federally funded projects will be held to Federal Equal Employment Opportunity (EEO) requirements.
4. Response due date.
5. Publication dates.

**.43 A&E Consultant Evaluation and Selection Process** – The Local Agency must establish written guidelines for the technical evaluation of the qualifications received; this includes guidelines for the determination of finalists for the purpose of written and oral discussions, and the selection for the agreement award. Consultants will be evaluated and selected based upon the qualifications they present. For A&E services, fees for services cannot be considered during the selection process.

One of the following must be utilized as part of the consultant selection process:

1. **“Live” Interviews and Presentation of the RFQ by Consultant Individuals or Teams** – This provides interaction with the Agency and showcases the consultant’s presentation skills. This method provides the agency with a more personal interaction with the consultant. This method does increase travel time and costs to the applicant.
2. **Electronic Interviews** – Video conferencing such as TEAMS or ZOOM provide for many of the same benefits as live interviews, but eliminates the travel costs, while providing the agency with direct interaction with the consultant.
3. **Telephone Interviews** – This method provides for interaction but eliminates travel time and cost. This approach offers the least interaction with the consultant and is often reserved for smaller projects.



.43a Exceptions to the competitive process used for consultant selection are:

1. **Subsequent Phasing** – Selection of a consultant to perform subsequent project phases may only occur if this option was advertised originally (i.e., Phase 1 Preliminary Engineering, Phase 2 Right of Way, Phase 3 Construction Engineering). The agency should take into consideration the evaluation of the consultants for additional phases during the interview process.
  - a. **Agreement Supplement** – Supplements that do not alter the scope of work can be renegotiated with the existing consultant. However, this should not be used to avoid the responsibility of providing competition for consultant selection.
  - b. **Emergency** – To address a set of unforeseen circumstances beyond the Agency’s control which present a real, immediate threat to the proper performance of essential functions, or may result in the material loss or damage to property, bodily injury, or loss of life if immediate action is not taken<sup>1</sup>.

Exceptions to the competitive process used for consultant selection that require Local Programs approve prior to execution of the consultant agreement are:

- c. **Sole Source** – Sole source agreements may be requested from Local Programs when the consultant provides professional or technical expertise of such a unique nature that the consultant is clearly and justifiably the only practicable source to provide the service. The Local Agency must provide the Region Local Programs Engineer (LPE) written justification<sup>2</sup> for requesting this option based upon:
  - The unique nature of the services and/or the unique qualifications, abilities, or expertise of the consultant to meet the Agency’s needs (e.g., are they highly specialized or one-of-a-kind? What is their past performance, their cost effectiveness (learning curve), and/or the follow-up nature of the required services?).
  - Other special circumstances that may be relevant such as confidential investigations, copyright restrictions, or time constraints.
  - Availability of consultants in the location required.
  - The Local Agency shall include a copy of the original advertisement and affidavit of publication as part of the request package.
2. **Documentation of Selection** – Following consultant selection, the Local Agency shall retain the following documentation in the project file:
  - a. The names of a minimum of three consultants considered for the work (excluding exceptions detailed above). If the Local Agency receives less than three consultants from the advertisement for qualifications, they must receive written approval from Local Programs prior to moving forward with selection process. This is done through a written request (Sole Source) to the Region Local Programs Engineer (Region LPE) and the Region LPE will respond in writing with the approval if granted.

<sup>1</sup> LAG Chapter 33

<sup>2</sup> Form 140-567

- b. Consultant selected and reasons why this consultant was chosen over the others. The documentation must include a list of questions asked during the interview, the consultant's responses, and the individual reviewers' scoring for each question.
- c. Prior to executing an agreement, the agencies must verify consultant status with the *System for Award Management* (SAM) database to determine if the consultant has been excluded from bidding on a federal aid contract. SAM is the electronic version of the Lists of Parties Excluded from Federal Procurement and Non-procurement Programs (Lists), which identifies those parties that have been suspended, debarred, or otherwise excluded from bidding on federal procurement and non-procurement contracts. Consultant agreements awarded to firms listed on the Excluded Parties Listing will not be eligible for federal aid reimbursement.

## 31.5 Non-A&E Professional Services Consultants

Professions outside the fields described in [RCW 39.80](#) may provide such consulting services such as long-range planning and studies, economic analyses, and ROW activities. These consulting services are provided through professional services agreements [RCW 39.26](#). The basic difference between procuring professional services and A&E services consultants is the consultant fees may be considered in the evaluation and selection of professional services consultants but cannot be considered in selecting A&E services consultants.

ROW consulting activities include acquisition, relocation, appraisal, appraisal review and property management and can be contracted under a Non A&E professional services agreement under the authority of [RCW 39.26](#).

**.51 Determine the Need for Professional Services Consultants** – Before an Agency advertises for a professional services consultant, the agency must have a clear definition of the work to be accomplished. This includes identification of:

1. The nature and scope of the effort required.
2. The technical requirements and qualifications of the consultant services needed.
3. The level of funding resources available.
4. The time frame for performing the work.
5. The expected results and products to be received.
6. An independent agency cost estimate (see [Appendix 31.94](#)).
7. The establishment of consultant contract DBE goal.

If assistance is needed in describing the desired scope of work, the Agency should contact the Region Local Program Engineer (LPE).

The Agency shall develop selection guidelines as outlined in Section 31.13 of this chapter. The selection criteria must enable the Agency to identify and select the single best qualified consultant.

The Agency must determine the type of agreement to be used with the selected consultant as this must be stated in the advertisement. The two agreement types are cost plus fixed fee and negotiated hourly rates, (see Section 31.42).

Consultant advertisements and solicitations shall provide for maximum open and free competition while providing equal opportunities for small and disadvantaged business enterprises (DBE) to obtain an equitable share of the work (49 CFR part 26), consistent with the project scope, and the capabilities of available small and disadvantaged owned firms.

Professional Services consultants may be solicited for:

1. A specific study (i.e., Economic Study).
2. A specific project (i.e., Acquisition of Real Estate).
3. A specific scope (i.e., Real Estate negotiations).
4. Or a combination of the above.

- .52 Advertise the Need for Professional Services Consultants** –RCW 39.80, requires that each Agency must advertise in advance that Agency’s requirement(s) for professional services. State laws RCW 35A.65 and RCW 65.16 outline the requirements of legal publication. An Agency can comply with these requirements by publishing an announcement on each occasion when consultants are required by the Agency.

The need for consultant services must be advertised at least one weekday per week for two consecutive weeks in the area newspaper used for publication of legal notices. A three-week (21 days) minimum response time from the initial date of publication should be provided to consultants on small projects and four weeks (30 days) or more response time on large or complex projects. These advertisements may be supplemented by additional advertisements in widely distributed, special interest publications, websites, business publications, trade journals, or similar publications utilized by disadvantaged business enterprises.

- .52a Advertisement Content** – The advertisement must contain the same information listed in Section 31.12a.

- .53 Professional Services Consultant Evaluation and Selection Process** – The Local Agency must establish written guidelines for technical evaluation of the qualifications received; this includes guidelines for the determination of finalists for the purpose of written, oral discussions, and the selection for the agreement award. Consultants will be selected based upon the qualifications they present. Fees may be considered as an evaluation factor in the professional services selection process, but it is not a “low-bid” consultant selection where the low bidder wins the contract automatically.

One of the following is required as part of the consultant selection process:

1. **“Live” Interviews and Presentation of the RFQ by Consultant Individuals or Teams** – Provides for interaction with the Agency and showcases the consultant’s presentation skills. This method provides the agency with a more personal interaction with the consultant. This method does increase travel time and costs to the applicant.
2. **Electronic Interviews** – This method provides for many of the same benefits as live interviews, but eliminates the travel costs, while providing the agency with direct interaction with the consultant.
3. **Telephone Interviews** – This method provides for interaction but eliminates travel time and cost. This approach offers the least interaction with the consultant and is often reserved for smaller projects.

**.53a** Exceptions to the competitive process used for consultant selection are:

1. **Subsequent Phasing** – Selection of a consultant to perform subsequent project phases may only occur if this option was advertised originally (i.e., Phase 1 Preliminary Engineering, Phase 2 Right of Way, Phase 3 Construction Engineering)
2. **Agreement Supplement** – Supplements that do not alter the scope of work can be renegotiated with the existing consultant. However, this should not be used to avoid the responsibility of providing competition for consultant selection.
3. **Emergency** – To address a set of unforeseen circumstances beyond the Agency’s control which present a real, immediate threat to the proper performance of essential functions or may result in the material loss or damage to property, bodily injury, or loss of life, if immediate action is not taken.

Exceptions to the competitive process used for consultant selection that require Local Programs approve prior to execution of the consultant agreement are:

1. **Sole Source** – Sole source agreements may be requested from Local Programs when the consultant provides professional or technical expertise of such a unique nature that the consultant is clearly and justifiably the only practicable source to provide the service. The Local Agency must provide the Region Local Programs Engineer written justification<sup>3</sup> for requesting this option based upon:
  - a. The unique nature of the services and/or the unique qualifications, abilities, or expertise of the consultant to meet the Agency’s needs (e.g., are they highly specialized or one-of-a-kind? what is their past performance, their cost effectiveness (learning curve), and/or the follow-up nature of the required services?).
  - b. Other special circumstances that may be relevant such as confidential investigations, copyright restrictions, or time constraints.
  - c. Availability of consultants in the location required.
  - d. The Local Agency shall include a copy of the original advertisement and affidavit of publication as part of the request package.

**.54 Document Selection** – Following consultant selection, the Local Agency shall retain the following documentation in the project file:

1. The names of a minimum of three consultants considered for the work (excluding exceptions detailed above). If the Local Agency receives less than three consultants from the advertisement for qualifications, they must receive written approval from Local Programs prior to moving forward with selection process. This is done through a written request (Sole Source) to the Region Local Programs Engineer (Region LPE) and the Region LPE will respond in writing with the approval if granted.
2. Consultant selected and reasons why this consultant was chosen over the others. The documentation must include a list of questions asked during the interview, the consultant’s responses, and the individual reviewers’ scoring for each question.
3. Prior to executing an agreement, the agencies must verify consultant status with the System for Award Management (SAM) database to determine if the consultant has been excluded from bidding on a federal aid contract. SAM is the electronic version of the Lists of Parties Excluded from Federal Procurement and Non-procurement

<sup>3</sup> LAG Chapter 33

Programs (Lists), which identifies those parties that have been suspended, debarred, or otherwise excluded from bidding on federal procurement and non-procurement contracts. Consultant agreements awarded to firms listed on the Excluded Parties Listing will not be eligible for federal aid reimbursement.

## 31.6 Establishment of Consultant Roster

Local Agencies with full CA status without restrictions (such as Probationary, Corrective, or Training plans) maybe approved to obtain consultant services through the process of an agency developed and maintained consultant “Roster(s).” Agencies that establish and maintain a consultant “Roster” must allow for a continuously open “Roster” to which interested and qualified firms may apply. Firms within the “Roster” may submit updated information annually.

Each agency must submit the “Roster” selection procedures to the Region Local Programs Engineer (LPE) annually for **review, Region LPE will forward the “Roster” requests to the Headquarters Assistant State Local Programs Engineer for approval.** Any changes to the approved “Roster” process shall be submitted for approval. Approved consultant “Rosters” are reviewed periodically as a part of Project Management Reviews. The “Roster” selection procedures must address the following:

1. Process of invitation to be included on the “Roster.”
2. Process of encouraging interested firms to submit or update qualifications to a “Roster” and performance data.
3. Guidelines for technical evaluation and ranking of firms to establish the “Roster.”
4. Follow the formal process for Second Tier competition on projects and agreements with a total of \$10,000 or more as outlined in Section 31.31.
5. Nondiscrimination/equal opportunity for DBE consultants (Agreements that use federal funding must be evaluated for DBE participation per the limits set in Section 31.51).

When using the “Roster,” the federal aid project must be identified prior to the consultant selection process. Rosters must consist of a minimum number of active consultant firms for each discipline to be utilized on a federal project.

- \$0 - \$99,999 Roster should consist of no less than three active firms.
- \$100,000 - \$250,000 Roster must consist of no less than five active firms.
- \$250,000 and more Roster cannot be used on federal funded projects.

\*\*Dollar amounts shown above represent the TOTAL agreement value.

No “Roster” consultant may be awarded more than one federal aid contract from any “Roster” at one time for each phase of the project. When active contracts are complete, the consultant’s name will be returned to “available” status. (The “Roster” process cannot be used if the consultant’s agreement has expired or completed within the same phase.)

**Note: Sole Source request cannot be used on consultants selected from the Roster.**

- .61 Secondary Selection Process using the Roster** – The Local Agency shall determine the need for consultant services including creating a draft scope of work before beginning the formal secondary selection process. Local Agencies should identify the following, at a minimum:
- The nature and scope of efforts required.
  - The technical requirements and qualifications of the consultant services needed.
  - The level of funding resources available.
  - Create an independent cost estimate.
  - Request DBE goal.
  - The time frame for performing the work.
  - The expected results, products, and deliverables.
1. The Local Agency in conjunction with the Region Local Programs Engineer (LPE) shall develop a selection criterion and scoring system for each “Roster” based upon the scope of work the Roster was developed for.
  2. The Local Agency will issue requests for additional information (RFAI) via email to all consultants on the Roster. (The request must include Title VI Language.) The RFAI must include the scope of work, timeframe, qualifications required, DBE goal requirements, and the deadline for responses.
  3. The Local Agency in conjunction with the Region LPE will review and score each consultant response to the RFAI. The Local Agency will verify each consultant’s status in federal System for Award Management (SAM) prior to scoring. (Scoring, reviews comments, and SAM status must be documented in the project file.)
  4. The Local Agency will verify that each consultant has not already been selected off the “Roster” or is currently under another federal funded agreement. Select the highest ranked consultant based upon the RFAI responses received and inform the Region LPE of the two highest ranked consultants. (If the highest ranked consultant is not selected the agency must document in writing their discussions and reasons.)
  5. The Local Agency negotiates with the highest ranked consultant as required per LAG Section 31.95. “Roster” consultants must have a current Indirect Cost Rate (ICR) established prior to execution of the agreement. (If the agreement is assigned a mandatory DBE goal, HQ LP concurrence is required prior to execution of the agreement.)

**Note:** All “Roster” selections over \$100,000 require the use of one of the Local Agency Consultant Agreement forms.

## 31.7 Negotiation With Selected Firm, A&E, and Non-A&E Professional Services

The Local Agency will notify the consultant of their selection in writing; the Agency will meet with the consultant to reach a complete and mutual understanding of the scope of the services; and the Local Agency will begin negotiations on the terms of the agreement.

In this meeting with the selected consultant, the Local Agency should include key people with appropriate technical expertise within the Agency to ensure that their concerns are addressed. The following items are typically discussed while developing an agreed upon scope of services:

1. A list of meetings the consultant is expected to attend, the expected location of the meetings, and key personnel.
2. The anticipated design schedule. The Local Agency shall designate the basic premises and list criteria to be used in design development.
3. Any special services required.
4. Complexity of the design.
5. Safety and operational considerations.
6. Environmental considerations.
7. Survey and geotechnical testing requirements.
8. Inspection services during construction.
9. Quality control during construction.
10. Preparation of forms, letters, and documents.
11. Property map preparation.

### .71 Agency Preparation for Negotiations – Following the receipt of the consultant's proposal, Agency responsibilities include:

Compare the consultant's proposal with the Agency's own estimate, examining the scope of work, work hours, and estimate of cost. (See [Appendix 31.94](#), Independent Estimate for Consulting Services.) The Agency is to prepare its independent cost estimate using:

1. The salary rates by position from the consultant's Payroll Register.
2. Multiplying these by the Agency's estimates of staff hours by position for work elements.
3. Apply the consultant's overhead rate and profit/fixed fee (see below) to develop the total project staff cost estimate.

The Agency will use this independent estimate, along with estimates of non-salary costs, to negotiate the agreement with the consultant.

1. Ensure the consultant has divided the project into work units and related time units in such a manner that the estimate can be readily reviewed for work hours, rates of pay, overhead, profit, and itemized direct non-salary costs.
2. Request records to confirm the consultant's rates (i.e., their Payroll Register, giving payroll rates by name and position of staff working on the project).

3. Request the consulting firm's indirect cost rate from the WSDOT Consulting Services Office (see Section 31.6 for indirect cost rate details).
4. The consultant's profit/fixed fee amount can be calculated using the procedure described in [Appendix 31.92](#). The fee is determined through evaluation of the following:
  - a. Degree of risk.
  - b. Relative difficulty of work.
  - c. Size of job.
  - d. Period of performance.
  - e. Assistance of agency.
  - f. Sub-consulting.
  - g. Fixed fee/profit rates:
    - When the fixed fee/profit is calculated on direct labor costs plus indirect cost, an acceptable profit for a federally funded project shall not exceed 15 percent.
    - When the fixed fee/profit percentage direct (raw) labor costs only, the agency shall calculate the fair and reasonable fixed fee/profit rate using [Appendix 31.92](#).

**Note:** Fixed fee/profit percentage of (20 to 30 percent) require the approval of the Region LPE. Mark-ups are not allowed on direct "non-salary" costs.
  - h. A Management Reserve Fund (MRF) may be established to be used for:
    - Overruns of direct salary and overhead costs that might occur under the existing scope of work, or
    - The consultant to perform additional work that is outside the agreement or supplement's scope of work (but within the scope of the advertised project).

The maximum MRF set up at the beginning of the agreement is \$100,000 or 10 percent of the agreement, whichever is less. If the original MRF is less than \$100,000, the MRF may be increased by preparing a supplement to a total accumulative amount that cannot exceed \$100,000, (or exceed the cumulative 10 percent). The Agency cannot authorize, and the consultant cannot utilize, the MRF until a supplement is processed. The Agency and consultant must negotiate the scope, schedule, and budget for the increase in direct salary and overhead costs, or the increase in additional work to use all or a portion of the MRF.
5. Record and retain an explanation of differences in work hours or costs between the Agency's independent estimate and the negotiated consultant fee.



**.72 Agreement Types/Payment Options** – The following are the types of agreements that contain acceptable methods of payment for FHWA funded projects. Consultant agreements are available at Consultant agreements & indirect cost rate information. All agreements must include a direct labor rate list for Cost Plus a Fixed Fee agreements and an Actuals Not to Exceed (ANTE) rate table for Negotiated Hourly agreements. WSDOT ANTE templates available at <https://wsdot.wa.gov/business-wsdot/contracts/contract-services/rate-review-process>.

1. **Actual Costs Plus a Fixed Fee (CPFF)** – This type of agreement is used when the extent, scope, complexity, character, or duration of the work cannot be reasonably determined in advance. The advantage to this type of agreement is that it offers an incentive through the fixed fee to the consultant to complete the work efficiently and timely. It can be used effectively for projects with multiple phases. Negotiations are expected to occur in some form whenever the project phase, deliverables, or other elements change. This type of agreement provides the agency with flexibility for managing large, multi-phase, or multi-year design projects with several significant elements of work at reasonable costs.

The following elements should be considerations when using the CPFF method:

#### **Consultant**

- **Benefits** – The labor costs (including Indirect Cost Rate) are covered at actual rates, even if there are fluctuations in the original anticipated effort required to complete the deliverables, increased efficiencies may reduce the overall consultant effort, and the profit ratio is tied to the consultant's performance. More efficient work and schedule management can increase the profit to labor ratios.
- **Disadvantage** – A “blown estimate,” which requires a larger labor effort without additional profit, since the fee portion is fixed for the work scoped and additional labor for the existing work will not increase the fee portion. The CPFF method is an incentive for the consultant to accomplish the work as described efficiently and to manage scope creep.

#### **Agency**

- The benefit to the agency is the ability to develop the project in stages and move the project forward, especially if time is a major issue. Profit is fixed for the scope negotiated, and, if the work requires less labor than anticipated for that scope, the state benefits in lower direct labor and indirect costs. If the work requires more labor than anticipated, the additional labor costs less because no additional profit is involved.

Cost-plus fixed fee agreement are flexible agreements which allows the costs to be adjusted to actual costs annually.

- Labor rates for are invoiced at actual cost, and the Indirect Cost Rate for Cost-Plus Fixed Fee agreements is adjusted on an annual basis for the contract.
- Indirect Cost Rate is audited and approved by CSO annually based upon the previous year's indirect charges based on the labor charges invoiced.
- The Indirect Cost Rate can move up or down during a given agreement's life span. These adjustments should be part of the discussion during negotiations, including how these adjustments will be accommodated.

- The requirement for actual costs for Indirect Cost Rate will also require that the contract remain open a little longer than usual for a project to allow for a final Indirect Cost Rate adjustment. It is mainly for this reason that this type of agreement often has a Management Reserve option.

#### Negotiations of CPFF

The agency should consider the timeframe of the entire project and take the possible increases in indirect costs and direct labor over multiple years, when developing the estimate for a given scope to accommodate changes. When estimating these adjustments, the agency should consider which elements of work will need multiple years to complete, and when elements of work are expected to be completed on multi-year projects. These adjustments are typically expressed in percentage of total direct labor cost and accounting for projected inflation.

Additional fixed fee (profit) should be considered when supplements add new elements of work to the agreement. Consideration may be given to additional project management element hours when adding time to the agreement, however; there are no requirements that additional project management fee be allowed. If the agency allows adjustments, they are subject to further discussion and negotiations.

Existing work elements that require additional hours to complete above the original negotiated hours, termed a scope and magnitude increase for those elements, shall not include added fee, only direct labor, and indirect costs. Existing work elements that are modified by a supplement may include subtracting already approved fee on work that is changed in such a way that the actual work is reduced. In this case, the percent used to estimate the original fee is used to develop the subtractive amount of fee. It is recommended that the LPE and/or CSO be involved in any additions, changes, or subtractions of work to ensure the financial portion of the contract is changed appropriately.

The consultant are reimbursed for all eligible direct and indirect costs within defined limits, plus a predetermined amount as a fixed fee.

The costs are determined by:

1. Salaries of employees with time directly chargeable to the project and salaries of principals for the time they are productively engaged in work necessary to fulfill the terms of the agreement. Actual rates of pay for employees and principals actively involved in the project will be included in each agreement.
2. Direct non-salary costs incurred in fulfilling the terms of the agreement. Travel costs, (excluding air, train, and rental car costs), shall be in accordance with the Agency's travel rules and procedures. Air, train and rental car costs shall be reimbursed in accordance with 48 CFR Part 31.205-46 "Travel Costs."
3. The consultant's overhead schedule must be prepared in compliance with 48 CFR Part 31. The indirect costs must be allowable, allocable, and properly segregated. "Indirect cost rates shall be updated on an annual basis in accordance with the consultant's annual accounting period and in compliance with the Federal cost principles" (23 CFR 172.11(b)(1)).

4. Management reserve funds are an Agency option and are to address overruns of direct salary and overhead costs that might occur under the existing scope of work or a need for additional work beyond the existing agreement scope of work, but within the advertised project scope of work.
5. Fixed fee percentage is derived by considering the degree of risk, relative difficulty of work, size of job, period of performance, assistance by the Agency, and sub-consulting assumed by the consultant at the time of the negotiations. The fixed fee payments are based on percent agreement completion multiplied against the total approved dollar amount of the fee less fee already paid.

Note that the fixed fee payment to the consultant with each month has no relationship to the amount of labor billed for that month, nor to the percent of direct labor used to develop the fee amount. To obtain the full fixed fee amount, the agreement must be complete. If an agreement or certain elements of work are stopped prior to finalization of the deliverables, negotiations must be held to determine the actual percent complete for final payment of the project or elements for all firms on the agreement. The percentage is applied to the maximum payable agreement amount and converted to a fixed dollar amount.

Shown as exhibits to the agreement are the consultant's estimate of work, direct labor rates, indirect cost rate and fixed fee.

- .73 Negotiated Hourly Rate (NHR)**– This type of agreement allows some flexibility for changes during the progress of the work or where work is assigned as the budget is approved, is the Negotiated Hourly Rate payment type. This payment method is commonly used for situations such as design support services during AD and construction or other circumstances where a Cost-Plus Fixed Fee agreement is not appropriate.

Negotiated Hourly Rate is an all-inclusive hourly Actual Not to Exceed billing rate (based on maximum direct labor) is determined for each classification within a firm. The billing rate is made up of direct salary, fringe plus Indirect Cost Rate, and profit (fixed fee) and is updated on an annual basis for all firms on the agreement. (See [Section 31.41](#) for guidance in developing the independent estimates of these costs for use in negotiations with the consultant firm.)

The following elements should be considerations when using the NHR method:

**Agency,**

- **Disadvantage** – There is no incentive for consultants to keep costs down, the agency must be diligent to ensure efficient delivery by estimating for the reasonable number of staff hours for the work, carefully negotiating the hours for completion of the work, managing the work schedule by overseeing the work progress, and not automatically approving time extensions or additional labor hour costs to the project or work effort without negotiations.
- **Advantage** – Allows more flexibility for changes during the progress of the work or where the budget is staged or not approved for complete project.

The following items also apply to negotiated hourly rate agreements:

1. Direct non-salary costs incurred in fulfilling the terms of the agreement. Travel costs, (excluding air, train, and rental car costs), shall be in accordance with the Agency's travel rules and procedures. Air, train, and rental car costs shall be reimbursed in accordance with 48 CFR Part 31.205-46 "Travel Costs." The consultant's overhead schedule must be prepared in compliance with 48 CFR Part 31. The indirect costs must be allowable, allocable, and properly segregated.
2. Profit/fee is derived by considering the degree of risk, relative difficulty of work, size of job, period of performance, assistance by the Agency, and sub-consulting assumed by the consultant at the time of the negotiations (see Section 31.41).

Prime consultants cannot markup subconsultants' contracts, however the fee (profit) should be negotiated to reflect a percentage of subcontracting relative to the percentage of work by the prime consultant. Subcontracting is then one of several considerations when determining a reasonable profit. Justification for the profit should be included in the record of contract negotiations.

**.74 Agency/Consultant Negotiations** - Negotiate an agreement with the selected consultant and retain a record of these negotiations (see [Appendix 31.95](#)). Negotiations may include the following:

1. The Agency negotiator and the consultant meet in person or by telephone and go over any significant areas of discrepancy between the Agency estimate and the consultant proposal. Either the consultant satisfactorily explains differences or agrees to address concerns in a revised proposal.
2. The Agency reviews revised proposals and revises their detailed cost analysis accordingly. Steps 1 and 2 are repeated, if required.
3. The consultant submits a final fee proposal.
  - a. Provide a final offer in writing.
    - The final agreement must specify the maximum amount payable.
    - The basis for establishing the maximum amount should be documented.
    - Procedures for adjustments to the maximum amount to accommodate changes in the work distribution or workload shall be explained.
  - b. When unresolved differences exist between the consultant and the Local Agency, the Agency shall notify the Region Local Programs Engineer (LPE). The Local Programs Engineer will review and confirm that the Agency has followed all the required procedures and will notify the Agency of the finding. The Agency will then notify the consultant in writing that negotiations are terminated and proceed to the next highest ranked consultant to begin the negotiation process again. Negotiation steps and records shall be repeated with the alternate consultant selected.

## 31.8 Consultant Agreements, Exhibits, and Supplements to Agreements, A&E, and Non-A&E Professional Services

When the **total cost** of consulting services (including supplements) is \$100,000 or more, Local Agencies must use the Local Agency Standard Consultant Agreements. (Consultant Agreement forms are available online at <https://wsdot.wa.gov/business-wsdot/support-local-programs/delivering-your-project/consultant-agreements-indirect-cost-rate-information>.) The agreement completion date establishes the last possible date the consultant may work, and be paid for that work, utilizing federal funds. **Any work performed after the completion date of the agreement will be considered non-federally participating.** It is of the utmost importance that the Agency monitors the project's completion date and extends the completion date by supplemental agreement, if appropriate, **prior** to the completion date.

**Note:** Local agencies choosing to use nonstandard forms for agreements under \$100,000 must follow all federal requirements during the hiring process and include the federal required assurances/statements in the agreement to be eligible for reimbursement.

The time for completion of the agreement is dependent upon the complexity of the project's scope of work. The duration may vary from two years for a relatively simple project, to six or more years for a complex project having multiple phases of work. These are also important considerations when negotiating a consultant agreement end date. Any expenditures that take place beyond an agreement end date are ineligible for reimbursement.

- .81 **DBE Evaluation** – Consultant agreements with the total direct labor cost of \$100,000 or more must be evaluated for the inclusion of DBE firms. The evaluation must include all possible phases to be accomplished by consultants. (Agency will need to submit an overall estimate of all potential phases on the project. RW, PE, Environmental, construction, etc.). Agreements may be assigned a mandatory DBE participation goal in the form of an overall agreement percentage. The DBE goal will apply to all phases, and supplements to the original agreement.
- .82 **Supplements to the Agreements** – An agreement shall be supplemented in writing when work that falls outside the scope of the original agreement is requested, when supplemental language to the consultant agreement is desired, or when there is a need for a time extension or wage adjustment. This may be done by a supplemental agreement only when the agreement completion date has not expired. (Supplemental Agreement forms are available online at [www.wsdot.wa.gov/business-wsdot/support-local-programs/delivering-your-project/consultant-agreements-indirect-cost-rate-information](http://www.wsdot.wa.gov/business-wsdot/support-local-programs/delivering-your-project/consultant-agreements-indirect-cost-rate-information).) The work in the supplement must have been included in the advertisement for consultant services regarding the original agreement.

The supplemental agreement should include:

1. A statement that the original agreement will be supplemented to add/change/amend conditions.
2. A scope of work described in sufficient detail to clearly outline what additional work the consultant is to do or what changes are authorized to the existing scope.
3. The method of payment, i.e., cost-plus-fixed-fee, specified hourly rate, daily rate, and any indirect cost. (**Note:** Always include a maximum amount payable.) Section V of the original agreement should be reviewed prior to negotiating any supplements.

4. A specific time for beginning/continuing work under the supplement and completing the project in calendar days or day and month of the year.
  5. A summary of the estimated costs of the original agreement plus those of the supplement(s).
  6. Provisions that give both parties of the agreement the authority to act.
  7. Specific rates of pay shall be established for the supplemental agreement in the same manner as described in Section 31.42, Agreement Types/Payment Options, Sub-Part 2.a, Specific Rates of Pay.
- .83 Patent or Royalty Rights** – Agreements that involve research, developmental, experimental, or demonstration work may include patent or royalty rights. In this case, the Consultant Agreement should be supplemented by adding the appropriate language to account for this. The Region Local Programs Engineer (LPE) must be contacted for assistance in developing these supplemental agreements.
- .83a Risk Management and Added Insurance Requirements** – The Agency may change Section XII of the Consultant Agreement to reduce the requirement for the Consultant Professional Liability from one million dollars to the amount of the Agreement; whichever is the lesser of the two. This should be done for work that involves minimal risk, such as studies. For many consultant firms, covering the one-million-dollar liability would be an added cost to their overhead or directly to the project.

In the event the Agency determines that added liabilities or an insurance policy are warranted beyond the amount allowed in the consultant agreement, they should negotiate this with the Consultant after the selection process is complete. This ensures that engineering qualifications, rather than the ability to obtain insurance, is the criteria for selection.

The Agency will determine the sufficiency of insurance normally provided within the consultant's overhead costs, and will identify the costs beyond that amount on Exhibit H. This exhibit is not needed if the consultant agreement provisions are used.

These costs will be considered direct project costs and will not be billed to an FHWA funded project. If Exhibit H is warranted, it should be sent with the risk analysis to the Region Local Programs Engineer (LPE) for approval, who will forward it to the Assistant State Local Programs Engineer for concurrence, prior to the agreement's execution by the Agency and the consultant.

The Agency's risk analysis should show that the work warrants this added cost, and that consideration has been given to less costly solutions, including assuming the risk; ensuring the risk outside of the agreement as an Agency cost; or adding a third tier of engineering overview to check the work.

To calculate the risk requires an ability to judge the likely amount of a jury's award if liability is determined. A suggested method is to determine the number of comparative cases presently existing within this state and to develop the probabilities based upon historic awards.

## 31.9 Indirect Cost Rates

The Agency shall utilize a consultant's Indirect Cost Rate (ICR) that is compliant with 48 CFR Part 31 of the Federal Acquisition Regulation (FAR), or an approved Safe Harbor Indirect Cost Rate for all A&E and non-A&E Federal Aid projects. The exception to this is when the agency is procuring a Purchased Service as defined in this chapter and meeting the requirements. Purchased Service agreements do not need to have an active ICR or Safe Harbor rate. They do however need to meet the accounting requirements and comply with 48 CFR Part 31 of the Federal Acquisition Regulation (FAR).

"Indirect cost rates shall be updated on an annual basis in accordance with the consultant's annual accounting period and in compliance with the Federal cost principles" (23 CFR 172.11(b)(1)).

Once the ICR is established, "A consultant's accepted indirect cost rate for its year applicable accounting period shall be applied to contracts; however, once an indirect cost rate is established for a contract, it may be extended beyond the one-year applicable period, through the duration of the specific contract, provided all concerned parties agree. Agreement to the extension of the one-year applicable period shall not be a condition or qualification to be considered for the work or contract award" (23 CFR 172.11(b)(3)(vi)).

If a consultant does not have a FAR compliant ICR, they may consider reviewing the eligibility requirements of the Safe Harbor program (<https://wsdot.wa.gov/business-wsdot/audit/safe-harbor-indirect-cost-rate>).

Consulting firms that use the Safe Harbor Rate will still be required to have an accounting system capable of accumulating and tracking direct labor and other direct costs by contract, segregating indirect costs, and removing unallowable costs. These basic accounting system functions are essential for accurate billing of costs under a cost-reimbursement contract. Additionally, the expectation will be for the firm to establish a cost history for the eventual development of a FAR compliant indirect cost rate for the firm, based on actual cost data.

Consultants who do not qualify or choose not to enroll in the Safe Harbor program, will be subject to a review by the WSDOT Contract Services Office (CSO). CSO will utilize a risk assessment process to provide WSDOT the necessary assurance that the consultant's accounting practices are FAR compliant. There are multiple tools that consultants may submit to assist CSO review such as the following:

- An audit conducted by another governmental agency that conforms to 48 CFR Part 31;
- An audit conducted by an independent CPA that conforms to 48 CFR Part 31
- A WSDOT approved ICR provided by the Internal Audit Office (IAO)

The CSO will notify the consultant of their findings and determination. The consultant will decide whether this determination is fair and reasonable, prior to notifying the CSO whether they agree or disagree with the determination.

It is expected that the consultant will develop an ICR that conforms to the requirements outlined in 48 CFR Part 31. Each firm has the option of providing an Indirect Cost Rate or qualifying for the Safe Harbor program. Please choose one of the options listed below and provide the documentation listed with your request for a rate. Incomplete submission of documents for review will not be evaluated.

**.91 For the Safe Harbor Program**

Documents needed include:

- Labor Checklist
- Examples of timesheets
  - For smaller firms – one for each person

Information on Safe Harbor: <https://wsdot.wa.gov/business-wsdot/audit/safe-harbor-indirect-cost-rate>

**.92 CSO review of an Indirect Cost Rate**

Documents needed include:

- Indirect Cost Rate Schedule (ICR)
- FHWA Certification Document
- Consultant Information Worksheet
- Timesheet & Labor System Checklist

All requests for the Safe Harbor Program or for an Indirect Cost Rate review must be sent to [ConsultantRates@wsdot.wa.gov](mailto:ConsultantRates@wsdot.wa.gov), include the words “Local Programs” in the subject line of your email. The following information must also be included:

- Number of active local agency contracts, including the contract amount.
- Number of local agency contracts, including the contract amount for the previous fiscal year.

The documents listed above are available at [wsdot.wa.gov/business-wsdot/support-local-programs](https://wsdot.wa.gov/business-wsdot/support-local-programs).

**31.10 Submittal of Consultant Agreement Data**

If a DBE goal has been assigned to a consultant agreement, Concurrence to Execute is required prior to the execution of the consultant agreement by submitting the draft consultant agreement to the Region Local Programs Engineer (LPE) for review. After the execution of the consultant agreement, the local agency must submit the following information to the Region Local Program Engineer (LPE) within 30 days of execution:

- A signed copy of the Local Agency Consultant Agreement
- Exhibit B – DBE Participation
- Exhibit D – Prime Consultant Cost Computations
- Exhibit E – Sub-consultant Cost Computations
- Diversity Management & Compliance System (DMCS) contact information as follows,

<b>Agency</b>	<b>Consultant</b>
Name:	Name:
Title:	Title:
Phone:	Phone:
Email:	Email:

Failure to submit the above listed information, before work begins, may result in delay of reimbursement of the billed cost, until the information is received.



### 31.11 Oversight of the Agreement and Project Closure

The Local Agency shall assign one of its fulltime personnel as project administrator to work with the consultant. The project administrator's responsibilities are to:

1. Prepare supplements to existing agreements for services beyond the scope of the original agreement and include the Agency's independent estimate of the costs for the work involved.
2. Ensure that no work is done, or costs incurred until the agreements and supplements are approved by the approving authority and executed by the proper parties.
3. Conduct regular meetings with the consultant to track progress, evaluate the consultant's progress in achieving its commitments as identified in its DBE Participation Plan, and identify potential concerns.
4. Act as a liaison between the Agency and the consultant to assure compliance with the terms of the agreement, including OECR provisions and the use of mandatory forms.
5. Monitor the consultant's progress reports to ensure that problem areas are reported, and corrective action taken.
6. Make sure that all work is within the agreement's scope of work.
7. Establish controls to monitor the time for completion of the agreement to ensure that the specified time limitations are not exceeded.
8. Ensure the accuracy of bills presented by the consultant and their consistency with the work performed.
9. Maintain cumulative cost records to assure that costs are allowable, allocable, and reasonable. Track bills to ensure compliance with the agreement and fixed fees.
10. Review bills to ensure that the appropriate Indirect Cost Rate is being applied.
11. Establish controls to prevent overpayment of the agreement.
12. Ensure the prime consultant enters monthly payments received from the Local Agency and payments made to all firms into the WSDOT Diversity Management and Compliance System – DMCS ([wsdot.diversitycompliance.com](https://wsdot.diversitycompliance.com)).
13. Monitor the DBE's for the duration of the agreement (i.e., conduct DBE on-site reviews). The Local Agency must comply with the requirements as described in [Chapter 26](#). Termination or substitution of DBE's shall be submitted to the Region Local Program Engineer (LPE) for written concurrence prior to executing the contract supplement.
14. Ensure that all terms and conditions of the agreement have been met prior to the final release of the consultant.
15. Monitor the agreement and supplement if necessary, PRIOR to the end date recognizing that it may have to get council/commissioner approval.

**.111 Invoicing** – The invoice will include the following:

1. All employees who worked on the project during the billing period;
2. The classification of each employee, the hours worked, the actual hourly payroll rate, and the amount billed; and
3. Direct non-salary costs. Non-salary costs should be supported for auditing purposes by copies of the invoice or billing instruments the consultant received for payment. Either the consultant or the Agency may retain these copies.

The Local Agency may disallow claimed cost(s), which are not adequately supported by documentation.

**.112 Documentation** – Original documents may include but are not limited to signed time sheets, invoices, payroll records, rental slips, and gasoline tickets that support the costs billed to WSDOT. In compliance with 48 CFR part 31, the consultant is responsible for maintaining records, including supporting documentation that costs claimed have been incurred and are allocable to the agreement. Time sheets should document hours worked, the billing rate of pay, and must be signed by the supervisor or his designee and the employee. Records will be retained for a period of three years after receipt of final payment.

**.113 Closure** – Upon completion of the work under the consultant agreement, the Agency will ensure that all terms and conditions of the agreement have been complied with and that all services to be performed under the agreement have been completed prior to the final release of the consultant. The Local Agency should evaluate the consultant's performance and retain this in their records.<sup>4</sup>

**.114 Alleged Consultant Design Error** – There may be times during a construction contract that a potential error or omission in the design is discovered. Other times an error or omission is discovered after the work is completed. [Appendix 31.94](#) establishes the procedures to follow if this occurs.

**.115 Consultant Claim Procedures** – Most contract claims are based on requests for additional payment beyond was agreed to when the consultant agreement was executed. There are two circumstances that usually lead to this request:

- The first is when the consultant's understanding of the consultant agreement expectations is different than that of the local agency.
- The second is when the consultant has been asked, or believes they have been asked, to perform work outside the original scope of work.

[Appendix 31.95](#) outlines the procedures to be followed by both the consultant and the agency to consider a potential claim.

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<sup>4</sup> Form 272-019

## 31.12 Appendices

- [31.91](#) Consultant Fee Calculation Worksheet
- [31.92](#) Independent Estimate for Consulting Services
- [31.93](#) Record of Negotiations – Example
- [31.94](#) Alleged Consultant Design Error Procedures
- [31.95](#) Consultant Claim Procedures
- [31.96](#) Consultant Draft scope and Independent Cost Estimate example

## 31.13 Forms

- [140-564](#) Advertisement – Example
- [140-565](#) Submittal Information Form (Prime)
- [140-566](#) Submittal Information Form (Subconsultant)
- [140-567](#) Request for Sole Source Consultant Services
- [272-019](#) Performance Evaluation Consultant Services

## Appendix 31.91 Consultant Fee Calculation Worksheet

### A. Consultant Fee Calculation Worksheet

This technique will ensure consideration of the relative value of the appropriate factor in the establishment of a fee objective in the conduct of negotiating and provide a basis of documentation of the fee objective.

In negotiating a fee as an element of price, a reasonable fee shall be negotiated or determined for each agreement by using the following procedure as a guide:

Weighted Guidelines			
Factor	Rate	Weight	Value
Degree of Risk	25		
Relative Difficulty of Work	20		
Size of Job	15		
Period of Performance	15		
Assistance by the Agency	15		
Sub-consulting	10		
Total			

Based on the circumstances of each agreement and/or supplement, each of the above factors shall be weighted from .15 to .30 as indicated below. The value shall be obtained by multiplying the rate by the weight. The value column, when totaled, indicates the fair and reasonable fixed fee and/or profit percentage of direct (raw) labor costs for the agreement and/or supplement.

### B. Description of Calculation of Fee Factors

**Degree of Risk:** Where the design involves no risk, or the degree of risk is very small, the weighting should be .15; as the degree of risk increases, the weighting should be increased up to a maximum of .30. Agreements with options will have, generally, a higher weighted value than agreements without options for which quantities are provided. Other things to consider: nature of the design, responsibility for design, reasonableness of negotiated costs, amount and type of labor included in costs, amount of executive management/principal time required.

**Relative Difficulty of Design:** If the design is most difficult and complex, the weighting should be .30 and should be proportionally reduced to .15 on the simplest of jobs. This factor is tied in, to some extent, with the degree of risk. Some things to consider: the nature of the design; what is the time schedule; etc., and whether it is rehabilitation or new work.

**Size of Job:** All agreement (estimated) total costs less than \$250,000 shall be weighted at .30. The fixed fee percentage should be proportionately weighted for those projects between \$250,000 and \$999,999 from .29 to .25. Agreements from \$1,000,000 to \$5,000,000 may be proportionately weighted from .24 to .20. Agreements from \$5,000,000 to \$10,000,000 may be proportionately weighted from .19 to .15 and work more than \$10,000,000 at .15.

**Period of Performance:** Agreements and/or supplements that are 24 months or longer are to be weighted at .30. Agreements and/or supplements of lesser duration are to be proportionately weighted to a minimum of .15 for work less than 2 months.

**Assistance by the Agency:** To be weighted from .30 in those situations where few items are provided by the agency to .15 in those situations where the agency provides many items. Things to consider: existing or provided design or plans, mapping, quantities, surveys, geotechnical information, etc.

**Sub-Consulting:** To be weighted in proportion to the amount of sub-consulting. Where 50% (50 percent) or more of the design is to be done by subconsultants, the weighting is to be .30. The weighting is proportionally decreased to .15 where all the design is performed by the consultant's own forces.

# Appendix 31.92 Independent Estimate for Consulting Services

Independent Estimate For Consultant Services Worksheet

Agency:	Federal Project No.:
Project Name:	
Prepared By:	Date:

Type of Services	Estimated Cost	Comments
Planning		
Surveying		
Project Management		
Geotechnical Engineering		
Geometrics / Hydraulics Engineering		
Structural Engineering		
Traffic Engineering		
Environmental & permitting		
Public Involvement		
Real Estates Services		
Architectural Services		
Mechanical / Electrical Engineering		
Construction Management		
Total	\$0.00	

Indirect Cost Rate Cost (in percent) \_\_\_\_\_ \$0.00  
 Fix Fee (in percent) \_\_\_\_\_ \$0.00

**Reimbursable**

- A. Travel and Per Diem \_\_\_\_\_
- B. Reproduction Expenses \_\_\_\_\_
- C. Computer Expense \_\_\_\_\_
- D. Communication \_\_\_\_\_
- E. Sampling and Testing \_\_\_\_\_
- F. Outside Consultants \_\_\_\_\_
- G. Other \_\_\_\_\_

Total: \$0.00

Sub-Total \_\_\_\_\_ \$0.00

\*Contingencies \_\_\_\_\_ \*Contingencies \_\_\_\_\_ \$0.00

\* Use only on Cost plus Fix Fee agreement **Grand Total** \_\_\_\_\_ **\$0.00**

## Appendix 31.93 Record of Negotiations – Example

Name and Job Title: John Doe, PW Contracts Manager

----- (signature)

Action	Date
1. Consulting firm of Acme Consulting selected.	2/15/99
2. Independent cost estimate of \$953,000.00 prepared by agency to address the following*: Develop design for Timermann Rd. Realignment from MP 53 to MP 57; including pre-engineering services of biological assessment, & NEPA/SEPA documentation.	2/25/99
3. Meeting held with consultant to ensure thorough understanding of the scope of work.	2/20/99
4. Consultant provided scope of work; request for proposal solicited.	2/15/99
5. Consultant submitted proposal in the amount of \$1,203,000.00.	2/27/99
6. Agency compared proposal with independent estimate and negotiation objectives were established	3/3/99
7. Agency negotiator contacted/met with the consultant and identified the following as items which needed revision (i.e., excessive or insufficient principal/ management involvement, high overhead, unallowable costs). **Mark-ups on two subconsultants for environmental work not allowable; overhead rate of 35 percent too high based on nature of the work and degree of risk; consultant management and principal attendance redundant at meetings; subconsultant time excessive*	3/5/99
8. Agency revised detailed cost estimate based on negotiations.**	3/15/99
9. Consultant submitted revised proposal with following changes: ** Removed \$53,000 in subconsultant mark-ups; overhead rate reduced to 26 percent; reduced management attendance with principal to two meetings.*	3/20/99
10. Agency accepted final fee proposal of \$1,000,000.00 to address the following: Develop design for Timermann Rd. Realignment from MP 53 to MP 57; including pre-engineering services of biological assessment, and NEPA/SEPA documentation to be completed by Ace Engineering Services as subconsultant.*	3/23/99
11. (or alternately) Agency could not agree to final proposal and notified the consultant in writing of this fact.	3/23/99

The negotiations were conducted in good faith to ensure the fees were fair and reasonable. The procedures outlined in this manual were followed.

\*Additional detail should be expanded upon with documentation.

\*\*These steps should be repeated as often as necessary, with documentation.

*This example has been simplified and does not include the level of detail typically found in a complete record of negotiations.*

## **Appendix 31.94      Alleged Consultant Design Error Procedures**

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The purpose of this appendix is to establish a procedure to determine if a consultant's alleged design error is of a nature that exceeds the accepted standard of care. In addition, it will establish a uniform method for the resolution and/or cost recovery procedures in those instances where the agency believes it has suffered some material damage due to the alleged error by the consultant.

### **Step 1 Potential Consultant Design Error(s) is Identified by Agency's Project Manager**

At the first indication of potential consultant design error(s), the first step in the process is for the Agency's project manager to notify the Director of Public Works or Agency Engineer regarding the potential design error(s). For federally funded projects, the Region Local Programs Engineer should be informed and involved in these procedures. (**Note:** The Director of Public Works or Agency Engineer may appoint an agency staff person other than the project manager, who has not been as directly involved in the project, to be responsible for the remaining steps in these procedures.)

### **Step 2 Project Manager Documents the Alleged Consultant Design Error(s)**

After discussion of the alleged design error(s) and the magnitude of the alleged error(s), and with the Director of Public Works or Agency Engineer's concurrence, the project manager obtains more detailed documentation than is normally required on the project. Examples include: all decisions and descriptions of work; photographs, records of labor, materials and equipment.

### **Step 3 Contact the Consultant Regarding the Alleged Design Error(s)**

If it is determined that there is a need to proceed further, the next step in the process is for the project manager to contact the consultant regarding the alleged design error(s) and the magnitude of the alleged error(s). The project manager and other appropriate agency staff should represent the agency and the consultant should be represented by their project manager and any personnel (including sub-consultants) deemed appropriate for the alleged design error(s) issue.



#### Step 4 Attempt to Resolve Alleged Design Error with Consultant

After the meeting(s) with the consultant have been completed regarding the consultant's alleged design error(s), there are three possible scenarios:

- It is determined via mutual agreement that there is not a consultant design error(s). If this is the case, then the process will not proceed beyond this point.
- It is determined via mutual agreement that a consultant design error(s) occurred. If this is the case, then the Director of Public Works or Agency Engineer, or their representatives, negotiate a settlement with the consultant. The settlement would be paid to the agency or the amount would be reduced from the consultant's agreement with the agency for the services on the project in which the design error took place. The agency is to provide LP, through the Region Local Programs Engineer, a summary of the settlement for review and to make adjustments, if any, as to how the settlement affects federal reimbursements. No further action is required.
- There is not a mutual agreement regarding the alleged consultant design error(s). The consultant may request that the alleged design error(s) issue be forwarded to the Director of Public Works or Agency Engineer for review. If the Director of Public Works or Agency Engineer, after review with their legal counsel, is not able to reach mutual agreement with the consultant, proceed to Step 5.

#### Step 5 Forward Documents to Local Programs

For federally funded projects all available information, including costs, should be forwarded through the Region Local Programs Engineer to LP for their review and consultation with the FHWA. LP will meet with representatives of the agency and the consultant to review the alleged design error(s), and attempt to find a resolution to the issue. If necessary, LP will request assistance from the Attorney General's Office for legal interpretation. LP will also identify how the alleged error(s) affects eligibility of project costs for federal reimbursement.

- If mutual agreement is reached, the agency and consultant adjust the scope of work and costs to reflect the agreed upon resolution. LP, in consultation with FHWA, will identify the amount of federal participation in the agreed upon resolution of the issue.
- If mutual agreement is not reached, the agency and consultant may seek settlement by arbitration or by litigation.

## **Appendix 31.95      Consultant Claim Procedures**

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The purpose of this appendix is to describe a procedure regarding claim(s) on a consultant agreement. The following procedures should only be utilized on consultant claims greater than \$1,000. If the consultant's claim(s) are a total of \$1,000 or less, it would not be cost effective to proceed through the outlined steps. It is suggested that the Director of Public Works or Agency Engineer negotiate a fair and reasonable price for the consultant's claim(s) that total \$1,000 or less.

This appendix will outline the procedures to be followed by the consultant and the agency to consider a potential claim by the consultant.

### **Step 1 Consultant Files a Claim with the Agency Project Manager**

If the consultant determines that they were requested to perform additional services that were outside of the agreement's scope of work, they may be entitled to a claim. The first step that must be completed is the request for consideration of the claim to the Agency's project manager.

The consultant's claim must outline the following:

- Summation of hours by classification for each firm that is included in the claim;
- Any correspondence that directed the consultant to perform the additional work;
- Timeframe of the additional work that was outside of the project scope;
- Summary of direct labor dollars, overhead costs, profit and reimbursable costs associated with the additional work; and
- Explanation as to why the consultant believes the additional work was outside of the agreement scope of work.

### **Step 2 Review by Agency Personnel Regarding the Consultant's Claim for Additional Compensation**

After the consultant has completed step 1, the next step in the process is to forward the request to the Agency's project manager. The project manager will review the consultant's claim and will meet with the Director of Public Works or Agency Engineer to determine if the Agency agrees with the claim. If the FHWA is participating in the project's funding, forward a copy of the consultant's claim and the Agency's recommendation for federal participation in the claim to the WSDOT Local Programs through the Region Local Programs Engineer. If the claim is not eligible for federal participation, payment will need to be from agency funds.

If the Agency project manager, Director of Public Works or Agency Engineer, WSDOT Local Programs (if applicable), and FHWA (if applicable) agree with the consultant's claim, send a request memo, including backup documentation to the consultant to either supplement the agreement, or create a new agreement for the claim. After the request has been approved, the Agency shall write the supplement and/or new agreement and pay the consultant the amount of the claim. Inform the consultant that the final payment for the agreement is subject to audit. No further action is needed regarding the claim procedures.

If the Agency does not agree with the consultant's claim, proceed to step 3 of the procedures.

**Step 3 Preparation of Support Documentation Regarding Consultant's Claim(s)**

If the Agency does not agree with the consultant's claim, the project manager shall prepare a summary for the Director of Public Works or Agency Engineer that included the following:

- Copy of information supplied by the consultant regarding the claim;
- Agency's summation of hours by classification for each firm that should be included in the claim;
- Any correspondence that directed the consultant to perform the additional work;
- Agency's summary of direct labor dollars, overhead costs, profit and reimbursable costs associated with the additional work;
- Explanation regarding those areas in which the Agency does/does not agree with the consultant's claim(s);
- Explanation to describe what has been instituted to preclude future consultant claim(s); and
- Recommendations to resolve the claim.

**Step 4 Director of Public Works or Agency Engineer Reviews Consultant Claim and Agency Documentation**

The Director of Public Works or Agency Engineer shall review and administratively approve or disapprove the claim, or portions thereof, which may include getting Agency Council or Commission approval (as appropriate to agency dispute resolution procedures). If the project involves federal participation, obtain concurrence from WSDOT Local Programs and FHWA regarding final settlement of the claim. If the claim is not eligible for federal participation, payment will need to be from agency funds.

**Step 5 Informing Consultant of Decision Regarding the Claim**

The Director of Public Works or Agency Engineer shall notify (in writing) the consultant of their final decision regarding the consultant's claim(s). Include the final dollar amount of the accepted claim(s) and rationale utilized for the decision.

**Step 6 Preparation of Supplement or New Agreement for the Consultant's Claim(s)**

The agency shall write the supplement and/or new agreement and pay the consultant the amount of the claim. Inform the consultant that the final payment for the agreement is subject to audit.

# Appendix 31.96 Consultant Draft Scope and Independent Cost Estimate Example

Independent Estimate For Consultant Services Worksheet

Agency:	Example	Federal Project No.:	xxxx(xxx)
Project Name:	Main Street Safety Improvements		
Prepared By:	Project Engineer	Date:	10/31/16

Draft Project Scope:

- Approximately 1.74 miles of widening for two additional lanes on Main Street
- Improving intersection radii to meet design standards and ADA
- Environmental documentation and preparation of permits
- Structural design for retaining walls
- Construction administration

Type of Services	Estimated Cost	Comments
Planning		
Surveying	\$3,600.00	2-person crew / one week
Project Management	\$15,740.00	10% of project
Geotechnical Engineering		
Geometrics / Hydraulics Engineering	\$90,000.00	3-person team / 15 weeks
Structural Engineering	\$9,600.00	Walls / 1-person 4 weeks
Traffic Engineering	\$2,200.00	WZTC - 1 person 1 week
Environmental & permitting	\$10,000.00	NEPA/Section 106/Permits
Public Involvement		
Real Estates Services		
Architectural Services		
Mechanical / Electrical Engineering		
Construction Management	\$42,000.00	1.75-person team / 60 days
<b>Total</b>	<b>\$173,140.00</b>	

Indirect Cost Rate Cost (in percent)	170.00%	\$294,338.00
Fix Fee (in percent)	30.00%	\$51,942.00

**Reimbursable**

A. Travel and Per Diem	<u>\$2,000.00</u>	
B. Reproduction Expenses	<u>\$3,000.00</u>	
C. Computer Expense	_____	
D. Communication	_____	
E. Sampling and Testing	_____	
F. Outside Consultants	_____	
G. Other _____	_____	
	Total: \$5,000.00	
	Sub-Total	<u>\$524,420.00</u>

*Management Reserve	<u>\$10,000.00</u>	*Management Reserve	<u>\$10,000.00</u>
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\* Use only on Cost plus Fix Fee agreement **Grand Total** \$534,420.00