



ODOT Negotiations Guide

Purpose: The purpose of this Negotiations Guide is to provide basic requirements and best practices information related to negotiation of contracts for Architectural & Engineering and Related Services and other professional services (or trade services). This guide was prepared based on research of FAR/CFR requirements, State rules, and procedure manuals from various Federal agencies and State DOTs across the county.

Policy/Directive: See the OPO [Negotiated Procurements Directive](#).

Advanced negotiation techniques: More in-depth information related to various elements of negotiation is available on-line from the U.S. Military at the following links:

1.  [Nonverbal Communication](#) (PDF)
2.  [Bargaining Techniques](#) (PDF)
3.  [Bargaining Tactics](#) (PDF)

Notes:

1. 1.To properly use hyperlinks within this document, select the Web Toolbar (from the “View/Toolbars menu) for access to back and forward buttons: 
After clicking on a hyper link to a different section in the document, click on the back arrow to return to the previous location.

The current version of this Negotiations Guide and related forms and checklists can be found on the OPO Intranet site in the [OPO Procurement Manual-Section N](#).

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1. Negotiation Overview and Outline of Process

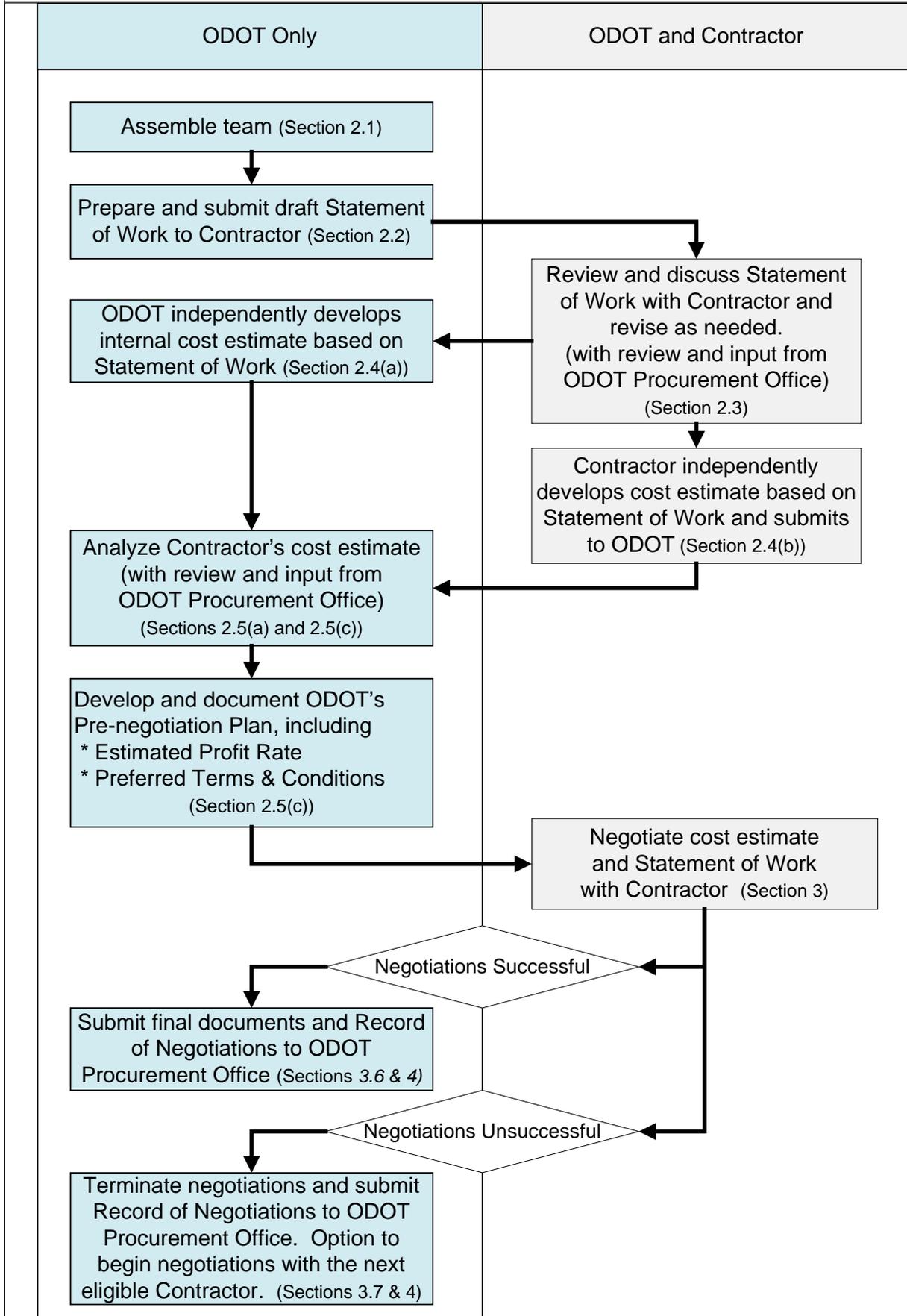
All contracts/WOCs (Contracts) awarded on the basis of anything other than low bid require [Cost Analysis](#) and negotiation to determine fair and reasonable prices as well as a Record of Negotiations (RON) to document each negotiation. The number one rule for negotiations is to be prepared. The primary objective in negotiation is to agree on a price, any terms reserved for negotiation in the solicitation, scope of services and schedule for delivery which meets the Agency's needs, is fair and reasonable to the Agency and gives the Contractor sufficient financial incentive to produce quality services and products on schedule. The Agency's effort and depth of analysis required for meetings, Agency's estimate/Pre-negotiation Plan and the negotiation of prices should be directly related to the dollar value, importance, and complexity of the Contract or Contract amendment. A Contractor's costs for preparing a Breakdown of Costs and attending negotiation conferences are normal costs of doing business and are included in their overhead rate.

A thorough statement of work (SOW) and mutual understanding of the objectives, requirements and pertinent technical criteria is the basis for negotiating a fair and reasonable price, successful performance, and fair and effective administration of the Contract. Discussion and agreement regarding the statement of work must be achieved prior to preparation of independent estimates and negotiation of costs and profit.

The negotiations should be conducted in good faith, recognizing that compromise may be required to achieve an equitable Contract. The Agency's negotiators must recognize the legitimate interest of Contractors in recovering their costs and making a reasonable profit when performing work. Conversely, Contractors must recognize the legitimate interest of the Agency in receiving quality work at a fair, competitive and reasonable cost, while maximizing the use of taxpayers' dollars. A Contract that is beneficial to both parties is the desired outcome of a successful negotiation. However, the Agency must also be willing to terminate negotiations and back away from agreements it believes are unreasonable.

Outline of Negotiation Process

(With references to corresponding sections in the ODOT Negotiations Guide)



2. Pre-negotiation and Planning Steps

The effort that goes into the planning, Pre-negotiation Plan preparation and cost analysis, internal estimate and Record of Negotiations should be directly related to the dollar value, importance, and complexity of the Contract or Contract amendment. Good planning includes building into the overall project schedule sufficient lead time for procurement and negotiations:

- The time required to complete negotiations can vary from a few minutes to several months.
- The number of negotiation sessions can vary from one to ten or more.
- The timeline programmed for procurement/negotiations must allow for negotiation with one or more alternate Proposers if agreement is not reached with the top ranked Proposer.

2.1 Assemble Team

The Agency's Project Manager (APM) is responsible for assembling the support team for a given project. The APM should employ judgment and (depending on the complexity and size of the project) seek input as needed for SOW development and review, internal estimate and Pre-negotiation Plan development, and participation in the negotiation itself. Small, discipline-specific projects may be reasonably scoped out and negotiated by the APM without much or any assistance (provided they have expertise in the discipline). However a full-service or multi-discipline Contract may require input from some or all of the following sources:

- appropriate technical staff for the various disciplines involved,
- Agency negotiation staff,
- local public agency (LPA) staff if applicable,
- Area Managers and other stakeholders,
- OPO staff,
- Agency's Risk Management Specialist,
- Contract/PA Administrator,
- Financial Services staff,
- DOJ staff (coordinated through procurement office). **Correspondence with contractors/consultants should not include emails received from DOJ or drafts of Contracts that include DOJ comments, unless DOJ approval is received.**

It is recommended that the staff who will later be involved with the negotiation also be involved during the scope/SOW development/refinement and internal estimate development. Early involvement of procurement staff is also recommended, including assistance with draft SOW development and review of Contractor's estimate (prior to negotiation of costs). The APM (and support team, when applicable) is responsible for:

- SOW discussion/negotiation and refinement with the Contractor,
- preparation of Agency's estimate and review of Contractor estimate ([Cost Analysis](#)),
- development of Agency's Pre-negotiation Plan (PNP), ([definition](#)), ([PNP form](#))
- price negotiation, and
- Record of Negotiations (RON),

2.2 Prepare Draft SOW

Prepare draft SOW and/or scope of services for RFP, mini-solicitation, or project-specific contract or WOC, as applicable. Review scoping documents, confirm project needs, and determine if any elements of the work will be (or have been) completed by Agency. Obtain input from technical and procurement staff as needed. Best practice is to include input in SOW development from all that may be involved in the negotiation later. SOW templates are being developed for A&E and Related Services, which should be used if available. Check at the following website for available templates: <http://www.oregon.gov/ODOT/CS/OPO/sow.shtml> . Otherwise prepare SOW in conformance with Agency's SOW Writing Guide.

Contingency Tasks are tasks that can be defined and negotiated, but it can't be determined if the tasks are necessary until after the Contractor work has begun. When appropriate, contingency tasks should be considered for use in the SOW as an effective and efficient Contract management tool. The dollar amount agreed to for each contingency task must include all labor and expenses and is separate from the amount authorized for the other Contract work. Potential candidates for contingency tasks include but are not limited to:

- Additional Meetings
- Additional modules for application development projects
- Additional borings
- Additional analysis, testing, exploration, or any other subtask that may be necessary depending on outcome of initial field explorations, testing, research, analysis, etc.
- Any task that can be quantified and fairly negotiated where flexibility is necessary.

The phased development approach allows for predetermined points during project development to negotiate costs for the next phase based on what is discovered in the preliminary tasks and/or analysis of alternatives. Each project phase is negotiated separately and added via amendment to the original Contract. For each amendment, Contractor must submit a complete breakdown of estimated man-hours and costs per task for staff, subcontractors and allowable direct non-labor expenses for negotiations. Phased development is used on large or complex projects or when there is too much uncertainty at the outset of the project to negotiate fair and reasonable costs to complete all of the work.

A&E Project Phasing. A phased development approach is the industry standard for fully outsourced design projects. The typical exceptions, on a case-by-case basis, may include simple overlay jobs or small projects with no Right of Way (R/W) impacts, limited environmental issues, and no alternatives to consider. Typical phases for A&E services include, but are not limited to:

- Design Acceptance Package (DAP): The DAP consists of design criteria, list of exceptions to design standards, preliminary cost estimates, and concept plans development with sufficient detail to make a definitive determination of: 1) a preferred preliminary design for development of Final Design, and 2) final "R/W footprint".
- Final Design: After approval of the DAP; tasks, costs and schedule would be negotiated for an amendment to complete the agreed upon design.
- Construction Engineering & Inspection (CEI): At Agency's discretion, the CEI phase may or may not be assigned to the design consultant (and may or may not include construction contract administration). Notes: a) the method of payment for CEI work is Time and Materials (T&M) with not-to-exceed (NTE); b) an SOW template (available at: <http://www.oregon.gov/ODOT/CS/OPO/sow.shtml>) has been developed for CEI phase which should be used and modified with project-specific information as needed.

2.3 SOW Review Meeting and Revisions.

Following intent to award notice from the assigned Procurement Specialist (and prior to requesting Breakdown of Costs from Contractor), send Contractor draft SOW along with any available project documentation (for A&E this may include prospectus, scoping documents, design criteria, etc.).

a) SOW Meeting:

- Schedule SOW meeting to review and discuss the draft SOW tasks/deliverables (including expected number of plan sheets for A&E design work, when applicable), appropriate classifications, delivery schedule and other Contract requirements. Invite appropriate technical staff from Agency (this may be a one-on-one discussion in person or over the phone on smaller discipline-specific Contracts).

- Identify any items provided or tasks completed by Agency.
- For A&E projects that include design, discuss Agency’s construction budget for the project (enter budget in Contract)
- Document in the Record of Negotiation any items discussed/negotiated and names/titles of attendees.
- Click link for [Exhibit A - Best Practices for SOW/Contract review meeting](#).

b) SOW Revision and Reviews:

- **Revise SOW as necessary** based on discussion at the SOW meeting. Any expectations of the Contractor or items that were promised or agreed to by either party must be captured in the Contract (the State doesn’t recognize verbal agreements). This may entail several iterations back and forth via email between Agency and Contractor. On local agency projects, negotiation with the Contractor may be a collaborative process between Agency and LPA staff.
- **Send SOW to Procurement Specialist for review** when SOW discussions/revisions are complete. This preliminary review can be completed while each party prepares independent cost estimates.

2.4 Prepare Independent Estimates

Following the SOW discussion/review meeting, request a detailed Breakdown of Costs (BOC) from Contractor (without profit included) and prepare internal BOC. This can be done during Procurement Specialist review of SOW. The estimates should be based on the tasks/deliverables agreed to and documented in the SOW as well as the classifications discussed at the SOW/Contract review meeting. For ease of line by line comparison (on large and/or complex projects), Agency and Contractor should use [Agency’s BOC](#) form (under “Compensation Related”) and utilize similar task naming/numbering conventions. It is recommended that the Contractor and Agency estimates be submitted to the Procurement Office prior to price negotiations.

a) Agency’s Estimate

An internal estimate is required when Contract award is based on anything other than low bid; i.e., Qualification Based Selection such as A&E services, sole source Contracts, and Contract amendments. The estimate must be completed prior to receipt of Contractor’s estimate and is used as the basis for negotiation of project costs. The Agency’s estimate should be broken down by task/sub-task for valid comparison to Contractor’s estimate (ideally in same format). A detailed internal estimate is required regardless of the method of compensation used.

Agency (or local agency if applicable) must prepare an estimate of a reasonable level of effort (man hours) and expenses by task (and subtask) for the work proposed (aka Work Breakdown Structure) as if Agency was proposing to do the work. Obtain input as necessary from various discipline experts regarding estimated hours to complete each task (appropriate classifications should have been discussed and agreed to at SOW negotiation meeting). When available, historical, comparative prices ([Price Analysis](#)) should be factored into internal estimate. However, [Cost Analysis](#) must also be conducted. If Agency’s internal resources are unavailable for estimating significant projects (e.g., exceeding \$500,000), Agency may Contract with an independent third-party Contractor to develop Agency’s estimate.

Agency’s estimate shall remain confidential until execution of the Contract. Agency’s estimate and how it was calculated must be attached to the Record of Negotiations.

b) Contractor’s Estimate

Contractor shall prepare and submit a BOC based on the rates approved for the Contract/Price Agreement and the classifications discussed at the SOW discussion/negotiation meeting. Regardless of compensation method, the BOC must include a detailed breakdown of the costs for each element of the work. The BOC must identify (and should use Agency's standardized BOC form):

- the assigned staff (classifications and names of Key Personnel, and other staff if requested) and hours per task and sub-task;
- an itemization of rental equipment, flaggers, travel and other direct non-labor expenses (estimates with documentation from vendors shall be provided upon request);
- the estimate for services as provided by each subcontractor that shows the assigned staff (classifications and names) and hours per task and sub-task and itemized direct non-labor costs;
- **Contingency Tasks.** Amounts for any Contingency Tasks must be shown on the BOC as a separate line-item for each task. The amount for a Contingency Task must include all labor, overhead, profit, Facilities Capital Cost of Money (FCCM) and direct non-labor expenses for the task. Direct non-labor expenses for Contingency Tasks must not be included in an overall amount for direct non-labor expenses applied to the budget for the non-contingency tasks.

Notes:

- Contractor submits the BOC initially without profit included (profit will be negotiated following agreement on the SOW, labor costs and expenses)
- No mark-up is permitted on subcontractors or direct non-labor costs.

2.5 Cost Analysis, Profit Analysis, and Pre-negotiation Plan

a) Review Contractor's Estimate

Following receipt of Contractor's BOC:

- Conduct [Cost Analysis](#) and compare Contractor and Agency estimates - note discrepancies in Pre-negotiation Plan as points for discussion/negotiation. Obtain reviews of Contractor's BOC as necessary from Agency staff for level of effort realism.
- See [Exhibit B](#) for additional information regarding review of Contractor estimate.

b) Conduct Profit-Fee Analysis

Use Agency's [Profit Worksheet](#) to calculate Agency's profit fee objective and enter objective in Pre-negotiation Plan. Profit/fee analysis and Profit Worksheet must be completed by Agency (or local agency) staff and is an element of Cost Analysis. The Contractor may use the Profit Worksheet for their negotiation position as well, however, Agency must have an independently prepared worksheet for Agency's profit position. Cost Analysis is required for A&E Contracts, sole source Contracts, and any other Contracts awarded on a basis other than low bid. Profit or fee is the total dollar amount paid to a Contractor for performance over and above allowable costs. The negotiation of profit as a fixed fee (i.e., Cost Plus Fixed Fee Contract) or if included in a fixed-price Contract provides incentives to the Contractor for efficient Contract performance.

Profit/fee analysis provides a means of ascertaining what a reasonable and adequate profit/fee should be, and it also provides a framework for discussing profit during negotiations. Profit/fee analysis does not necessarily produce the "right" profit/fee. Rather, the appropriate profit/fee is that amount which is agreeable to both sides as the product of negotiation and within any statutory limitations.

c) Prepare Pre-negotiation Plan (PNP)

Prior to entering negotiations, prepare and document a [Pre-negotiation Plan](#) . Per the OPO [Negotiated Procurements Directive](#), a PNP should be prepared prior to any negotiations but, at minimum, must be prepared for negotiation of contracts/amendments exceeding \$100,000. The PNP

is prepared following cost analysis of the consultant's estimate, but prior to negotiations. At a minimum, the Pre-negotiation Plan should identify the following:

- Maximum duration allowed for negotiations. This should be conveyed to Contractor at (or prior to) initial negotiation meeting;
- Turnaround time allowed for items requested from Contractor (such as revised estimates, detailed breakdown from subcontractors, SOW reviews, etc.)
- Maximum \$ amount (Agency's estimate plus some reasonable percentage for variance);
- Predetermined walk-away points., Determine the maximum acceptable spread between Agency and Contractor positions (see sections 3.6 and 3.7 regarding termination of negotiations);
- Tasks or expenses that are more than 5% to 10% higher than Agency's estimate (noted during Cost Analysis review of Contractor's estimate);
- Tasks or expenses that appear to be unrealistically low on hours/cost.
- Tasks or portions of the project that Agency may be able to do internally;
- Maximum duration allowed for completion of project;
- Method of compensation appropriate for the project (see [Exhibit C](#));
- Profit/fee objective based on Agency's [Profit Worksheet](#).

3. The Negotiation

3.1 Conduct of Negotiations.

Negotiations should normally be conducted within Agency's (or LPA's) facilities rather than at the Contractor's offices. Negotiations should be conducted in good faith and in an atmosphere of professionalism. Based on the complexity and dollar amount of the project, the APM will assign appropriate responsibilities to the team members according to their expertise and maintain overall positive control of the negotiations. The negotiation team must be fully prepared and know what flexibility there is in the Agency's position. The negotiators must focus on the pertinent issues and be willing to adjust the Agency's position when appropriate.

3.2 Statement of Work.

a) General.

The Agency and Contractor should have a common understanding of the SOW (per the SOW meeting – see section 2.3 and [Exhibit A](#), SOW/Contract Meeting Best Practices) before discussing level of effort and price. The negotiators must ensure that the Contractor is proposing to use personnel and procedures appropriate for the required work (as discussed at SOW meeting). The negotiators must know if there is any flexibility in the SOW requirements, including the performance schedule. It might be possible to reach agreement if one or more items in the SOW are modified or deleted, or provided by the Agency.

b) Appropriate Classifications.

The appropriate classifications for the various elements of the work should have been discussed and agreed to during the SOW review/discussion meeting. These should be further negotiated if Contractor's BOC includes classifications other than previously agreed to, or if Agency determines changes are appropriate.

c) Construction Cost (For A&E Contracts involving design).

The Agency's construction budget must be entered in the SOW/Contract if it includes design preparation. Agreement must be reached on the estimated construction cost of the project because it

impacts the ¹six percent limitation (for federal agencies) on cost of designs, plans and estimate and the Design Within Funding Limitation clause of the A&E Contract or Price Agreement.

3.3 Price/Hours.

Bottom-line agreement on scope, schedule and budget is the primary negotiation objective. The negotiators should not be overly preoccupied with any single cost item since agreement on every item is not required to reach overall price agreement (FAR 15.405(a) and (b)). Conversely, final agreement does not indicate agreement on all elements of the proposal. Significant items affecting price agreement (such as more than 10% above Agency's estimate on a particular task) should have been identified during Cost Analysis and documented in Agency's Pre-negotiation Plan – these items must be discussed/negotiated. The negotiators should not place themselves in a position where they are defending the Agency's position. Rather, a Contractor should be requested to explain and support its proposal and to offer appropriate revisions.

Agency projects have approved budgets that cannot be exceeded without considerable justification and/or documentation of unforeseen circumstances. Negotiations for each phase of a project must leave enough of the total project budget to complete the entire project (including construction for public improvement projects).

3.4 Labor Rates and Overhead Costs.

a) For WOCs, the labor and overhead rates are typically pre-approved in the parent Price Agreement.

b) For project-specific Contracts, check with the assigned Procurement Specialist to determine whether approved labor and overhead rates are on file. If not, the rate data submitted will be reviewed for reasonableness by procurement staff and may include review by audit staff. High rates may be questioned/negotiated, particularly if the labor and overhead rates are so high as to make the overall price estimate unreasonable.

3.5 Method of Compensation and Profit/fee.

Most Contracts typically include several options for the method of compensation to use. Though the method of compensation can be a matter of negotiation, the determination of which compensation method or combination of methods to use is at Agency's discretion and must be appropriate for the project. The selection of Contract type is a very important decision that Agency will make in the acquisition process. Per FAR Sub Part 4.8 & 16.103(d), the reasons/justification for selecting a particular method must be documented on the RON. A properly selected Contract type will work in the interests of the Agency to provide services or goods which meets The Agency's needs at a reasonable price without undue risks to the Contractor or the Agency. [Exhibit C](#) includes guidance for determining appropriate method of compensation.

Profit should not be negotiated until all costs have been agreed to. The Agency's profit percentage objective should have been calculated using the Profit Worksheet, entered in the Pre-negotiation Plan, and may be negotiated within the limitations indicated in the instructions attached to the Profit Worksheet.

¹ For Federal agencies, the portion of an A-E services Contract price for the preparation of designs, plans, drawings and specifications may not exceed 6 percent of the project's construction budget (FAR 15.404-4(c)(4)(i)(B) and 36.606(a), and DFARS 236.606-70). This limitation should be used as a benchmark for ODOT contracting. A firm must submit evidence of any perceived deficiencies in the Agency's construction cost estimate before the Agency agrees to any adjustment.

3.6 Acceptance or Termination of Negotiations.

a) If agreement is reached, the Proposer will be advised not to begin work until Contract is executed and notice-to-proceed is sent by APM. The Contractor should submit a revised BOC reflecting any adjustments agreed to during negotiations. The SOW and schedule must also be finalized to reflect any clarifications or changes resulting from the negotiation meeting(s).

b) If agreement cannot be reached, the Proposer will be requested to submit its best and final offer in writing (FAR 36.606(f)) within a reasonable time. If the Proposer does not submit a final offer in the stated time, its last written proposal will be used as the final offer. No further discussions will be held with a Proposer if its final offer is not completely acceptable. Following concurrence from the responsible manager and discussion with the Procurement Specialist, the Proposer will be sent a brief letter stating that negotiations are terminated. A Record of Negotiations must be prepared documenting the unsuccessful negotiations and then approved by the responsible manager (typically the Area Manager). Negotiations may then begin with the next ranked Proposer. To preclude complaint or protest by the unsuccessful Proposer, no significant changes should be made in the scope/SOW during negotiations with the next Proposer.

3.7 Early Termination of Negotiations

If the spread is too large (i.e., Contractor is more than 50% over internal estimate), consider not entering negotiations or only allowing one meeting to get within an acceptable range where negotiations could go forward and have some likelihood of a successful outcome. For example, internal estimate is a range of \$500k to \$700k and Contractor's estimate is \$1.3 Million. Hold a meeting to discuss project scope, tasks and level of effort. If Contractor can't come down at least close to the upper end of Agency's range, and Contractor can't point out areas or elements of the project where Agency clearly missed on its estimate, then negotiations should be terminated per the process described in 3.6.b above. The spread is too large to expect that a series of meetings (over perhaps months) will result in a win-win successful negotiation. Reasonable parties can disagree and both can come back to the table another day on another project.

Note: There are special rules for Public Contracts for construction services contacts per OAR 137-049-0430(6). Negotiations may be undertaken only with the lowest responsive, responsible bidder pursuant to ORS 279C.340 (if the low bid is above Agency's budget). That statute does not provide authority to further negotiate with Bidders next in line for Contract Award.

4. Documenting the Negotiations

Each negotiated Contract (and amendments, except time-only) must have a [Record of Negotiations \(RON\)](#) prepared and submitted to the Procurement Specialist for the Contract file. Best practice is to begin preparing the RON from the beginning and throughout the negotiation process rather than waiting until end of process and trying to recall what happened. The RON is submitted following completion of all negotiations but prior to Contract execution. The RON must identify how reasonableness of cost was determined. This includes documentation such as:

- Minutes/summary of SOW discussion meeting(s)
- Agency's Estimate (prior to receiving the Proposer's estimate)
- Proposer's initial and revised final estimate
- Agency's Profit Worksheet
- Agency's Pre-negotiation Plan
- Minutes/summary of negotiation meeting(s)
- Copies of relevant correspondence

5. Negotiations for Amendments

Negotiations for amendments are the same as for the original Contract and will follow the same process as outlined above, depending on the importance and dollar amount of the amendment. **A RON must be prepared if there are changes to the SOW, compensation, or profit fee.**

Profit. If an amendment is for substantially the same work as the original Contract (just making revisions or adding more of the same) and the risk profile remains the same under the Contract, then renegotiating profit rate isn't necessary. However, when doing an amendment that adds a new phase of work or that increases or decreases the risk profile of the services done under the Contract, then renegotiating profit is required.

Revising SOW. Amendments that include revisions to previously contracted work (other than just adding the next phase of the project), such as deleting or adding a few tasks or subtasks must include the following in the cost basis for the amendment:

- **Credit for Deleted Tasks:** If tasks are being deleted, a credit must be shown as a separate line item for each deleted task. The credit should be based on the amount included in the Contractor’s original estimate submitted for the work. If a subtask without a clear dollar amount established is deleted, APM should negotiate a reasonable credit based on the percentage of the level of effort that sub-task represents, when compared to the overall task effort and cost.
- **Cost for Additional Task(s):** Contractor must submit a spreadsheet with breakdown of cost estimate for additional work. Final cost is negotiated as usual based on agreement of reasonable estimates for level of effort required, times applicable billing rates.
- **Additional Funds -** Generally, funds cannot be added unless additional work is being added that is above and beyond the original, agreed-to statement of work.

Amount Payable. The amount payable under a Contract may be adjusted by Agency or renegotiated to:

- Reduce the NTE, Fixed-Price or Fixed-Fee amount associated with Tasks/Deliverables that were not authorized by Agency or not performed by Consultant;
- Reduce the NTE, Fixed-Price or Fixed-Fee amount commensurate with deductive amendments to reduce the risk associated with the project or to reduce the scope of work required under the Contract;
- Increase the NTE, Fixed-Price or Fixed-Fee amount for additional Tasks/Deliverables added to the statement of work via amendment to the Contract.

6. Definitions

For this Negotiations Guide the following definitions apply:

- Agency/ODOT.....Oregon Department of Transportation
- APM.....Agency’s Project Manager – Individual responsible for oversight of the contracted work {synonymous with Work Order Project Manager (WPM) or Consultant Project Manager (CPM)}
- ATA.....Agreement to Agree
- BOC.....Breakdown of Costs
- Contract.....Means project-specific contract or Work Order Contract (WOC).
- ContractorMeans individual, corporation, Consultant as defined in OAR 137-048-0110, or any other legal or commercial entity that has entered (or proposer that potentially could enter) a Contract with the Agency.

- Cost Analysis.....The analysis of the separate cost elements of a service or good and the application of judgment to determine what it should cost to complete or produce (rather than comparing to previous prices, i.e., Price Analysis), assuming reasonable economy and efficiency. Cost Analysis is used in developing Agency’s estimate, and in the review of costs and profit in a Contractor’s proposal to determine reasonableness. A detailed internal estimate for comparison purposes is required. Price Analysis (comparisons with previous prices) may be included, provided Cost Analysis was performed on the previous prices, reasonableness was determined and the previous contracted work is substantially the same.
- FCCM..... “Facilities capital cost of money” means “cost of money as an element of the cost of facilities capital” as used at 48 CFR 9904.414--Cost Accounting Standard.
- LPA.....Local Public Agency
- OAR.....Oregon Administrative Rules
- OPO.....The ODOT Procurement Office. OPO is the procurement and contracting authority for the Oregon Department of Transportation (ODOT).
- ORS.....Oregon Revised Statute
- PA.....Price Agreement (currently synonymous with ATA)
- Pre-negotiation Plan.. The Pre-negotiation Plan (PNP) is prepared following development of Agency’s internal estimate and subsequent receipt of Contractor’s estimate. The PNP documents the Agency’s negotiation position on costs and profit, and identifies areas of concern regarding the Contractor’s estimate (determined from the required Cost Analysis). It lists items the Agency intends to discuss/negotiate and potential concession items. Agency has developed a standard Pre-negotiation Plan template.
- Price Analysis.....The process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit. Price Analysis is used in low bid solicitations to confirm reasonableness of price, especially if only one bid is received or if there is wide disparity in bid pricing. The validity of the comparison and the reasonableness of the previous price(s) used for comparison must be established. Generally, adequate price competition establishes reasonable pricing.
- Procurement Office....Any office of ODOT that has received written delegated authority to conduct procurements and is responsible to retain the associated procurement documents.
- Proposer..... A legally operating business entity submitting a Proposal in response to a Procurement.
- R/W..... Right-of-Way
- RON.....Record of Negotiations
- SOW.....Statement of Work

EXHIBIT A - SOW/Contract Meeting Best Practices

a. General. Normally a scope/Contract meeting should be held between the Contractor and appropriate Agency representatives to discuss and resolve questions concerning the SOW and Contract requirements. The project site may also be inspected if appropriate. The objective of the meeting(s) is to ensure a mutual understanding of the project/Contract requirements before each party prepares cost estimates. This will assist in negotiating fair and reasonable pricing and increase the likelihood of a successful project outcome.

b. Attendees. The Agency's and Contractor's project managers must attend this meeting. Depending on the complexity and magnitude of the project, attendees may include but are not limited to (this may be a one-on-one over the phone on smaller discipline-specific Contracts):

- Agency's Project Manager
- Agency's Appropriate Discipline Specialists (Hydraulics, Bridge, Surveying, etc.)
- Agency's Contract administrator or procurement staff (if needed/requested)
- Contractor's Project Manager
- Contractor's Appropriate Discipline Specialists and subcontractors

c. SOW and Contract Requirements. The following items are considered important in a well thought out project and should be reviewed/discussed at the meeting and documented in the Record of Negotiations -

1. Project/SOW information (**ensure these items are documented in SOW**):

- Basic information - project overview, problem statement, objectives and expectations;
- Items provided (and tasks completed, if any) by Agency;
- Design criteria (for projects that include design work);
- Applicable standards and process/timeline for design exception requests;
- Applicable/regional preferences for drainage design, traffic control, project sequencing, work zone speed limit changes, etc.;
- Contractor tasks, deliverables and format requirements (both electronic and hard copy). The Agency and Contractor should go over each item to ensure mutual understanding of the task requirements. If differences in the interpretation of task/deliverable requirements are discovered, the task language should be clarified until there is mutual assent.
- Role of proposed subcontractors (if any) – prime is ultimately responsible;
- When applicable for architectural & engineering projects, review what constitutes the Design Acceptance Phase (DAP), 60%, and 90% submittal;
- Appropriate job classifications for the work, and Key Personnel if applicable;
- Project meetings (quantity and who should attend; set up contingency tasks for additional meetings);
- Tasks that should be included as contingency (see [ODOT SOW Writing Guide](#));
- Length of time Agency will need for reviews of the various deliverables and the participants that will be involved;
- Delivery schedule and milestone dates, and programmed bid let date (when applicable).

2. Contract Administration and Other Requirements:

- Responsibility for costs resulting from design errors or deficiencies;
- Design within funding limitations, when applicable;
- Project communication plan, protocols, and change management procedures;
- Performance evaluation criteria and process;
- Invoicing and status report requirements (see Agency's [Invoice Requirements Guide](#));
- Time lines for invoice reviews and turnaround time with regard to payment.

EXHIBIT B - Review of Contractor Estimate

A thorough review of Contractor's estimate (cost analysis) and comparison to Agency's estimate must be completed by Agency. Review and input should be obtained from appropriate technical staff regarding level of effort for the various tasks disciplines included in the statement of work. Discrepancies between Agency and Contractor estimates or any other concerns regarding hours, classifications, expenses should be noted in Agency's Pre-negotiation Plan and discussed/negotiated with Contractor. When appropriate, a reduction should be requested.

Billing Rates/Classifications - document the following in the Pre-negotiation Plan:

- Billing rates and/or classifications in the Breakdown of Costs (BOC) for staff and subcontractors not in conformance with the rates approved in the Contract or PA/ATA.
- Job classifications assigned to tasks in the BOC that do not reflect those agreed to during SOW review/discussion meeting.
- Direct expenses that are not based on rates included in the PA/ATA (or not at cost if rates for items are not specified in PA/ATA).

Billing Rate Errors. The labor costs must be based on current rates approved for the Contract or PA/ATA. If higher rates were used in the estimate, they must be corrected without adjusting the number of hours or number of units of direct expense items (for travel, etc.).

Example:

- Estimate listed 100 hours for Survey Technician 2 (ST2) at \$90/hr = \$9,000;
- PA/ATA listed ST2 at a maximum rate of \$80/hr = \$8,000;
- Estimate must be reduced by \$1,000 {the hours cannot be adjusted up (for this task or elsewhere in the estimate) to offset the difference}.

Contractor may use rates lower than range from PA/ATA as long as they note that this is their intention. Instead of listing a range, the preference for rates in the PA/ATA is to list a maximum rate (and may also include average rates) for each classification.

Level of Effort - document the following in the Pre-negotiation Plan:

- At minimum, any tasks where the Contractor's (or subcontractor) estimate includes labor-hours that exceed the Agency's estimate by more than 5-10% should be noted in Agency's Pre-negotiation Plan for review and discussion with Contractor and, if appropriate, a reduction requested.
- Likewise, tasks that appear to be unrealistically understaffed should be questioned to confirm Contractor and Agency have a mutual understanding of the work required.

Management Costs & Expenses - document the following in the Pre-negotiation Plan:

- Project Management costs should be questioned/negotiated when they exceed 5-8% of total estimate costs (depending on complexity and coordination efforts required for the project) of the phase of work being negotiated.
- Travel and per diem expenses should be reviewed for reasonableness and questioned/negotiated as necessary.
- Any unexplained or miscellaneous costs/expenses should be questioned. Request details from Contractor to break down, identify and substantiate estimated costs.
- No markup on subcontractors or direct non-labor expenses is allowed.
- Any unexplained costs or expenses that do not have supporting documentation or breakdown should be questioned and justified with supporting documentation.

EXHIBIT C - Selecting Method of Compensation (Contract Type)

Below are the methods of compensation available in most ATAs/PAs (post 2004) along with some guidelines. For questions regarding the appropriate method of compensation for a particular project, contact the OPO Procurement Specialist or OPO Team Lead worker for your Region or Section. For A&E work, Cost Plus Fixed-Fee (CPFF) is the most commonly used method to complete the preliminary engineering phase. Fixed-Price (aka Lump Sum) or CPFF are commonly used for final design phase (depending on what is prudent for a given project based on the factors listed below). Time and Materials is the industry standard for the construction engineering and inspection phase. The rationale for the method of compensation selected must be documented in the Record of Negotiations.

Cost Plus Fixed-Fee (CPFF) with Not-To-Exceed

This cost-reimbursement method is one that provides for payment of allowable incurred costs (actual costs), up to a not-to-exceed amount established in the Contract, and includes a negotiated fixed fee amount. These Contracts establish a total cost for the purpose of obligating funds and establishing a ceiling on expenditures that the Contractor may not exceed without acceptable justification, such as a revision (added work) in the statement of work, and approval of the Agency. The fee does not vary regardless of the cost experience of the Contractor. The fee is subject to adjustment only if the Contract is modified to provide for an increase or decrease in the SOW tasks/deliverables specified in the Contract. CPFF Contracts are suitable for use when the uncertainties of the project do not permit costs to be estimated with sufficient accuracy to use a fixed-price Contract. This method is preferable to T&M Contracts as the profit/fee is not tied to the number of hours worked. This method provides Contractor some incentive for efficient completion of the project because the profit/fee is fixed - fewer hours results in a higher profit per hour.

- CPFF is the industry norm for preliminary engineering services (prior to final design phase).
- CPFF should be used instead of time and materials, except when:
 - the requirements listed below for time and materials are met,
 - the requirements listed below for fixed-price are met.

Time & Materials (T&M) with Not-To-Exceed

Before using T&M compensation method, 49 CFR 18.36 requires a determination/justification that no other compensation method is suitable. The reason why this type of Contract is the least preferable of all allowable types is that it creates a disincentive for the contractor to complete the Contract in a timely manner. Since each labor hour expended carries with it a profit and a predetermined overhead charge built into the fixed hourly rate, there is no incentive to complete the Contract quickly. Therefore, almost constant monitoring of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used. A T&M Contract must include a ceiling price (Not-to-Exceed amount) that the contractor exceeds at its own risk.

Examples of when no other Contract type would be suitable include:

- A Contract for an expert witness. For this type of service we cannot estimate the hours or know for sure if the expert witness will even be called to testify.
- Contracts with firms that don't calculate O/H. In this case the firm uses fully loaded billing rates that already include profit.

- T&M is the industry norm for construction engineering, inspection and construction Contract administration, though CPFF or Fixed-Price may be appropriate for these services on small, low complexity projects.
- A T&M Contract may be used only when it is not possible at the time of placing the Contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.

To comply with Federal requirements a determination and finding must be prepared documenting why no other Contract type is suitable. A customer requesting a T&M Contract will be required to submit a determination and finding which may be revised by the Procurement Specialist or challenged if not justified. The determination and finding shall be (i) signed by the Procurement Specialist prior to the execution of the base period or any option periods of the Contracts; and (ii) Approved by the Chief Procurement Officer prior to the execution of the base period when the base period plus any option periods exceeds three years.

Fixed-Price

Fixed Price should be considered for use when:

- Complexity of the project is moderate to low,
- The scope of work is clearly defined,
- Level of effort required to complete the work can be determined with a fair amount of confidence, and
- For no-bid Contracts (such as A&E), Agency has developed a solid internal estimate and completed Cost Analysis to establish that the Contract amount is reasonable.
- A Contract is awarded based on low bid (such as goods and trade services). Normally effective price competition results in reasonable and fair pricing.

High risk or complex projects/performance situations will result in Contractors building significant costs into their prices for risks or worst case scenarios which may never occur, resulting in higher than necessary prices and excessive profits on that Contract.

Fixed Price should not be used for project phases when:

- Agency has not completed detailed scoping and requirements of the project,
- Agency has not completed a detailed internal or independent estimate and has insufficient historical cost data to reasonably negotiate a fixed price amount,
- The level of effort necessary cannot be reasonably anticipated for the project or elements of the project (for any reason),
- Projects are high risk or require analysis of alternatives,
- Projects include unknown environmental or HazMat (or other) issues,
- There are project uncertainties that the Contractor will have to base their cost estimates on worst case scenarios, even though the worst case may never come to pass.
- Contract is for construction engineering and inspection work.
- Contractor's estimate is higher than Agency's, not to the point of terminating negotiations, but to the point Agency believes the cost will be lower with a CPFF or T&M type Contract.

Fixed Price is easier to administer for both parties, should be used when it is appropriate, and should result in a few percent lower cost estimate from Contractor. However, Fixed Price should only be used when it is prudent to do so, when it fits within the guidelines for using Fixed Price, and not solely because it is easier to administer.