

Table of Contents

SECTION C	CERTIFIED AGENCY.....	2
Chapter 12	Consultant Selection.....	2
A. OVERVIEW.....		2
B. BECOMING CERTIFIED FOR CONSULTANT SELECTION		3
1. Applicable Federal Laws.....		3
a. Civil Rights Requirements.....		3
b. Federal Lobbying Restrictions		3
c. Conflicts.....		4
d. The Brooks Act (23 USC 112)		4
2. Applicable State Laws.....		4
3. Required Contract/Solicitation Clauses and Sample Language		4
C. DIFFERENCE BETWEEN A&E SERVICES AND NON-A&E PERSONAL SERVICES.....		4
D. A&E SERVICES CONTRACTS.....		4
1. Identify and Define Project		5
2. Determine Method of Procurement and Multi-Phase Projects.....		5
a. Formal Solicitation		5
b. Information Solicitation.....		6
c. Direct Appointment		6
d. Multi-Phase Projects.....		7
3. Appoint Contract Administrator and Retain Records		7
4. Create Scope / Determine Deliverables and Timelines		8
5. Prepare Cost Estimate.....		8
6. Formulate Selection Criteria.....		8
7. Identify Disadvantage Business Enterprises (DBE) Program and Goals		9
8. Advertise and Solicit Bids for the RFP		9
9. RFP Protest Procedures		11
10. Closing the Solicitation Process		11
11. Notice of Intent to Award.....		12
12. Consultant Selection Protest Procedures		12
13. Screening and Selection / Interviews		12
14. Consultant Selection and Negotiation		13
15. Award		14
16. Amendment to the Contract.....		14
E. NON-A&E PERSONAL SERVICES CONTRACTS.....		14
1. Identify and Define Project		15
2. Determine Method of Procurement and Project Phases		15
3. Appoint Contract Administrator and Retain Records		15
4. Create Scope / Determine Deliverables and Timelines		16
5. Prepare Cost Estimate.....		16
6. Formulate Selection Criteria.....		16
7. Identify Disadvantaged Business Enterprises (DBE) Program and Goals		16
8. Advertise and Solicit Bids for the RFP		17
9. RFP Protest Procedures		18

10. Closing the Solicitation Process	18
11. Notice of Intent to Award.....	18
12. Consultant Selection Protest Procedures	19
13. Screening and Selection / Interviews	19
14. Consultant Selection and Negotiation	19
15. Award	20
16. Amendments to the Contract.....	20
F. REQUIRED CONTRACT PROVISIONS.....	20
G. MANAGING THE CONSULTANT	21
H. NON-DELEGATED RESPONSIBILITIES	21
I. CONTRACT CLOSURE FOR A&E AND RELATED SERVICES AND NON-A&E PERSONAL SERVICES.....	21

SECTION C

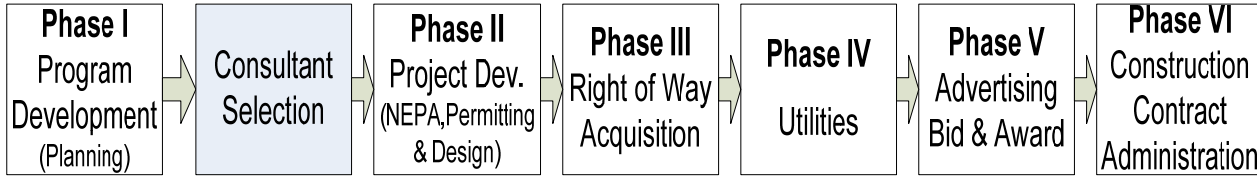
CERTIFIED AGENCY

Chapter 12

Consultant Selection

This chapter is used for all federal-aid projects on Non-NHS (National Highway System) routes by local agencies operating under agreement with ODOT as a certified local agency. On NHS routes, refer to [Section B, Chapter 12](#) “Consultant Selection” in this *LAG Manual*.

In the sequence of project development, consultant selection occurs prior to any stage when consultant services are needed.



A. OVERVIEW

Note, local agencies certified in consultant selection, must use the two-tier selection process on NHS routes and can use the two-tier selection process upon request to the [Regional Local Agency Liaison](#) on other routes.

Consultant selection is the responsibility of the certified local agency as identified in the Master Certification Agreement signed by the local agency and ODOT. ORS 279A grants local agencies contracting authority, however, the local agency must adopt A&E Model Rules or develop its own that meet federal requirements and are reviewed by ODOT. This chapter covers consultant selection for architectural, engineering, land surveying and related services. These three types of services (architectural, engineering, land surveying and related services) will be referred to as A&E Services. This chapter also covers consultant selection for non-A&E personal services needed to deliver federal-aid transportation projects and programs. This chapter contains a detailed description of which categories of work are considered A&E services or non-A&E personal services.

ROLES AND RESPONSIBILITIES

Certified Local Agencies	The certified local agency performs all activities related to consultant selection and administration of the consultant contract using the certified local agency’s procedures as approved by ODOT.
ODOT	Provides program training, oversight, process reviews and support to the certified local agency.

B. BECOMING CERTIFIED FOR CONSULTANT SELECTION

ODOT will work with local agencies interested in becoming certified in consultant selection by engaging in a collaborative review process to ensure that their consultant selection processes (e.g. local public contracting rules) are compliant with federal and state requirements. Once any necessary revisions are complete, ODOT will review and approve the local agency's documented processes, enter into a Master Certification Agreement, a Supplemental Project Agreement and any addition required agreements.

Additionally, ODOT will review and approve the following local agency the processes for retaining A&E consultants including:

- The local agency's contract administration structure, certifications, authorities, quality control and legal aspects of the work
- Development of project definition
- Determination of consultant need and project phases
- Preparation of scope of work
- Appointment of a Contract Administrator
- Preparation of cost estimate
- Development of selection criteria
- Advertisement and solicitation of bids
- Closure of the solicitation
- Consultant selection process and methods
- Negotiations process
- Documentation and documentation retention procedures
- Contract closure
- Consultant Liability for E&O Issues
- Preparing Consultant Evaluations

1. Applicable Federal Laws

The certified local agency shall follow all applicable federal laws, regulations and policies in the solicitation and award process of a project containing federal funds. The following contract provisions relating to federal requirements must be included in the consultant contracts.

a. Civil Rights Requirements

Federal law requires that consultant contracts comply with Disadvantaged Business Enterprise (DBE), Equal Employment Opportunity (EEO), On the Job Training (OJT) and Title VI Civil Rights requirements. Additional details are available at each appropriate Civil Rights chapter within this *LAG Manual*, see Section B [Chapter 7, Disadvantaged Business Enterprises](#) and [Chapter 8, Equal Employment Opportunity and Training in the Non-Certified Section of this LAG Manual](#) and Section A [Chapter 7, Title VI in Section A](#).

b. Federal Lobbying Restrictions

Federal law ([31 USC 1352](#)) prohibits recipients of federal funds from influencing or attempting to influence a federal agency or Congress.

c. Conflicts

Federal law shall prevail in case of conflict, unless as otherwise expressly provided in state statute. [[ORS 279A.030](#)]

d. The Brooks Act (23 USC 112)

The Brooks Act specifies the awarding of design related contracts by qualification and procurement procedures based on certain criteria established by the Act.

2. Applicable State Laws

- a. Oregon Public Contracting Code
- b. ORS 279A General Provisions
- c. ORS 279B – Public Procurement
- d. ORS 279C – Public Improvements and Related Services (including A&D personal services)

3. Required Contract/Solicitation Clauses and Sample Language

The “[Overview of Federal, State and ODOT Requirements for A&E Procurements by Local Agencies Guide](#)” (LPAAeRequirements) provides additional detail regarding federally funded A&E procurements including required contract and RFP clauses, procedural guidance and documentation requirements.

C. DIFFERENCE BETWEEN A&E SERVICES AND NON-A&E PERSONAL SERVICES

NOTE: Recent state legislation has proposed eliminating the A&E and Non-A&E distinction and to require qualified based selection for the procurement of all service types. The Certification Program is following these proposed changes closely and will update the LAG if new requirements materialize. Contact the Regional Local Agency Liaison for information on impacts to a particular project or program.

The basic difference in soliciting consultants for A&E services and non-A&E personal services is that consultant fees and other cost factors may be considered in selecting non-A&E personal services consultants, but cannot be considered in selecting A&E services consultants. A&E consultants are selected using qualification based selection (QBS) [ORS 279C 110](#). The cost and number of hours the consultant will work as needed for the A&E service(s) are negotiated after the consultant has been selected.

D. A&E SERVICES CONTRACTS

Under the Brooks Act [40 USC 1102](#) and ORS 279C, Architectural and Engineering (A&E) services means:

- Professional services of an architectural or engineering nature, as defined by state law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide the services described in this paragraph.
- Professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration or repair of real property.

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

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

Under Oregon state law, the definition of Architectural and Engineering Services adds land surveying to the matters covered under the federal definition. [ORS 279C.100\(1\)](#) to [ORS 279C.100\(4\)](#). Some specific examples of A&E services are listed in the Appendix to this chapter. It is important to note that the list of examples is for information only. If a local agency questions whether a particular service would be considered an A&E or non-A&E personal service, then the local agency should contact their [Regional Local Agency Liaison](#).

1. Identify and Define Project

The certified local agency selects and initiates a federal-aid highway project that is in the Statewide Transportation Improvement Plan (STIP). See Chapter 3, Federal Funding Programs in Section A of this *LAG Manual*, for more information regarding the STIP, funding programs and related required planning processes. Contact the [Regional Local Agency Liaison](#) with any additional questions.

Requirement: The selected project must be included within the STIP.

2. Determine Method of Procurement and Multi-Phase Projects

In the event a local agency chooses to hire a qualified private consultant to perform the required work, there are three methods a certified local agency could use to select an A&E consultant depending on the contract price.

a. Formal Solicitation

Local agencies must use a formal solicitation process for A&E and related services on federally funded projects with a project cost of \$100,000 or greater. These contracts shall use QBS selection procedures. The formal solicitation process requires a type of announcement, such as public announcement or advertising, that assures that qualified in-state and out-of-state consultants are given fair opportunity to be considered for award of the contract. Price cannot be used as in the analysis or selection phase. Refer to [23 CFR 172\(5\)\(a\)\(1\)](#).

Local agencies may either solicit through their own approved qualification based consultant selection process or request to use ODOT's two-tiered contracting process as outlined within [ODOT's Quick Reference Guide](#). For more information on the two tier process refer to the "Tier 2_Quick Reference" at ODOT's Local Government Section website.

b. Information Solicitation

Informal solicitations for small procurements up to \$100,000 or lower as provided for by the local agency administrative rules may be conducted in conformance with the rules and procedures adopted by the local agency and approved by ODOT. Informal solicitations do not require public advertising. However local agency should request proposals by some minimum number of firms as provided by local agency rules, usually no fewer than 3 or 5 qualified firms to perform the needed services.

c. Direct Appointment

Local agencies may use direct appoint procurement method for contracts up to the dollar threshold in the local agency's administrative rules, but may not exceed the federal amount of \$100,000. Additionally, local agencies must have a written procedure approved by ODOT for its direct appointment process that include how the local agency will ensure the following:

- Compliance with local, state and federal contract provisions requirements for total amount of contract.
- Scope and statement of work preparation
- Civil Rights contract provisions
- DBE goal requirements
- Use of prequalified consultants
- Communications with consultants
- Internal estimate preparation
- Cost analysis
- Consultant negotiations
- Ensuring appropriate Federal contract provisions are included in consultant and subcontractor contracts.
- Documentation of process

For direct appointment, the local agency must also comply with listed items 1-8 of this chapter (including identifying and defining project, method of procurement, project phases, appoint of contract administrator and retaining records creating scope and timelines, cost estimates, selection criteria, and DBE goal submittals). For more detailed information regarding developing the written procedures and reviewing direct

appointment opportunities, refer to the [Overview of Federal, State and ODOT Requirements for A&E Procurements by Local Public Agencies Guide](#) for contract requirements.

Additional details are available at [OAR 137-048-0200 Direct Appointment Procedures](#), [OAR 137-048-0210 Informal Selection Procedures](#) and [OAR 137-048-0220 Formal Selection Procedures](#).

Refer to the “[Overview of Federal, State and ODOT Requirements for A&E Procurements by Local Public Agencies Guide](#)” (LPA A&E Requirements Guide), for guidance/requirements applicable to all three methods of procurement, including the following

- Required Contract/Solicitation provisions
- Internal estimates
- Cost analysis
- Negotiation
- Statement of Work
- Documentation details
- Contract Administration

d. Multi-Phase Projects

When projects cover two or more distinct phases and the cost for the second phase depends on decisions reached during the first phase, the contract should cover only the first phase, but provide for amendment to add the second phase. The agreement for preliminary engineering should state that the consultant may be considered for subsequent phases, provided this option was 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 phase(s). Separate contract consultants may be considered for preliminary engineering and construction engineering.

In addition, when the project involves similar or related tasks, segmenting the consultant work appropriately increases efficiency and cost effectiveness. For example, combining preliminary engineering tasks with the preparation of the required environmental analysis is often desirable. Further details regarding environmental processes are available in the Non-Certified Environmental Chapter and the Certified Environmental Chapter within this manual.

3. Appoint Contract Administrator and Retain Records

The certified local agency assigns a Contract Administrator who is responsible for the quality of consultant products and services through the duration of the contract.

The Contract Administrator is responsible for ensuring the work pursued is complete, accurate and consistent with the terms, conditions and specifications of the contract. Local agencies must retain accepted bids for a minimum of 10 years (as indicated in [OAR 166-200-0050\(8\)](#)) after substantial completion (as defined by ORS [12.135\(3\)](#)). Other accepted bids must be retained for a minimum of six years, and rejected bids and bid exemptions must be retained for a minimum of two years.

Specific details regarding record retention for local agencies is available on the [Secretary of State's website](#), under "General Record Retention Schedule."

4. Create Scope / Determine Deliverables and Timelines

The certified local agency is responsible for developing a contract including a scope of work -- a detailed description listing the products or services the consultant will provide, and a schedule of when they must be delivered.

5. Prepare Cost Estimate

The certified local agency prepares an independent, confidential cost estimate so the certified local agency can ensure that consultant services will be obtained at a fair and reasonable price. A good cost estimate can be prepared only if the scope of work is defined clearly.

The development of an estimate involves:

- Past experience from similar work.
- Percentage of cost of services compared to total project cost, for similar types of projects.
- A detailed cost estimate including:
 - Direct labor costs
 - Indirect costs
 - General and administrative costs
 - Other direct costs
 - Sub-consultant costs
 - Net fee

Additional information regarding cost estimates is available from ODOT's [Audit Guide](#).

6. Formulate Selection Criteria

The local agency must determine the quality needed for a particular project from which the proposals will be evaluated and the method to measure the the qualifications of each proposal. **If Contracting Agency does not indicate the applicable number of points, weights or other classifications, then each criterion is of equal value.** Evaluation criteria may include, but are not limited to, the following:

- Availability and capacity to perform work Proposers' availability and capability to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP.
- Experience of key staff
- Amount and type of resources and experienced staff available
- Recent, current and projected workloads of staff and resources
- Amount of time required

- History of ability to complete project successfully similar projects on time within budget and with satisfactory outcomes
- References and recommendations from past clients
- Performance history in meeting deadlines, submitting accurate estimates, producing high quality work and meeting financial obligations
- Status and quality of required licenses or certifications
- Knowledge and understanding of the project
- Results of interviews if applicable
- Design philosophy and approach
- Pricing policies and proposals if the contracting agency is a local agency selecting consultant and conditions of ORS 279C.110(2) do not exist
- Any other criteria that seems relevant to the project
- Conditions or limitations that may constrain or prohibit the selected consultant's ability to provide additional services related to the project.

Lastly, the local agency must develop a process that applies the project against the additional optional items listed in the [Screening and Selection Criteria](#) section below.

7. Identify Disadvantage Business Enterprises (DBE) Program and Goals

The certified local agency, when participating in programs funded in whole or in part with funds made available by ODOT, shall comply with ODOT's [DBE Program Document](#). Through the DBE program, the certified local agency will practice nondiscrimination on the basis of race, color, sex and/or national origin in the award and administration of U.S. Department of Transportation (USDOT) assisted contracts. At 90% PS&E the certified local agency will submit a Request for Goals Form, with a construction schedule and cost estimates to ODOT's Office of Civil Rights REQUESTFORGOALS@odot.state.or.us. OCR will review the project the cost estimate and the construction schedule and develop DBE and OJT goals as applicable and return the DBE goals to the certified local agency to include in the solicitation documents or contract (as applicable).

For additional details, refer to Chapter 7, Civil Rights and Disadvantaged Business Enterprises.

NOTE: Items 8-13 do not apply to the Direct Appointment process, but do apply to both formal and informal procurement processes.

8. Advertise and Solicit Bids for the RFP

In order for the Office of Civil Rights to track certified projects being advertised, a certified agency is required to submit two additional forms; "[Certified Agency Notice of intent to Advertise](#)" and "[Certified Agency Notice of Intent to Award](#)". These two forms must be submitted to the Regional Local Agency Liaison, who will forward them to OCR prior to advertisement and award. Refer to the [OCR Forms Matrix on the OCR website](#).

The following activities represent ODOT's recommended practices for advertising A&E RFP's:

- Advertise the availability of the Solicitation in a major newspaper of general circulation or technical publication of widespread circulation (e.g. Daily Journal of Commerce) for a period not less than 14 calendar days.
- Identify and send the solicitation to organizations qualified to do specified work as well as professional societies and recognized DBE organizations.

The advertisement should contain the following information:

- A project title, estimated project cost and estimated start and end dates.
- The general scope and nature of the project or work for which services are required and the address of a representative of the local agency who can provide further details.
- Solicitations must clearly set forth sufficient detail on how applicant qualifications will be evaluated (these may include but are not limited to key personnel, firm experience, ability to meet schedule, past performance, in-house expertise, familiarity with ODOT/FHWA standards and DBE approach and commitment as listed above in [Selection Criteria](#) and below in [Screening](#)).
- Non-qualified based selection solicitations service applicants should provide cost estimates to complete the project.
- In the event that a project covers multiple phases, the local agency is not obligated to utilize the original consultant for subsequent phases (if the local agency desires this option, the advertisement must state the possibility of a multi-phase agreement at the discretion of the contracting local agency).
- All prospective consultants must be advised that federally funded projects will be held to federal EEO requirements.
- Consultants will also be held to [Americans with Disabilities Act](#) (ADA) and civil rights language for the employing local agency.
- The Minimum Qualifications for PE's.
- The anticipated method of compensation and cost information.
- Required Certifications and Conflicts of Interest Disclosures.
- The possibility of interviews.
- The right to seek clarification and protest procedures.
- Any Phase-development language.
- Response due date.

- The right to negotiate in the best interest of the agency.
- The right to reject some or all bids.
- The possibility of a pre-bid conference.
- The ability of contracting agency to request additional information.
- Publication dates.

Pursuant to federal and state law, specific costs estimates shall not be requested until a consultant has been selected.

In addition, during the time the solicitation is open, potential respondents can write or email the certified local agency member identified in the solicitation with their questions, and the following items apply:

- Answers shall only be supplied in writing.
- Answers to substantive questions (those that materially impact the Statement of Proposal) should be advertised as an addendum to the solicitation/RFP.
- Unless otherwise specified, the period for questions ends seven days before the proposal due date.

Requirement: The certified local agency must meet or exceed the minimum legal requirements for advertising the RFP as adopted by the local agency and approved by ODOT through the certification process. For additional details, see [OAR 137-048](#) as it applies to all public contracting agencies pursuant to [ORS 279A.065](#).

9. RFP Protest Procedures

Local agencies must provide consultants an opportunity to submit a written protest regarding the terms of an RFP or request a change to the RFP. Such protests will not be accepted later than seven days prior to the proposal due date.

Requirement: As outlined in [OAR 137-048-0240\(1\)](#), within seven calendar days prior to the date proposals are due, unless another date is specified in the RFP, consultants may submit a written protest or request a change to any provision, specification or contract term contained in the RFP. Each protest request for change must include the reasons for the protest or request, and any proposed changes to the RFP provisions, specifications or contract terms.

10. Closing the Solicitation Process

After the due date for submission, the certified local agency evaluates the Statements of Proposal on the Pass/Fail criteria listed in the solicitation/RFP. The proposals that pass are forwarded to an evaluation panel chosen by the Contract Administrator.

11. Notice of Intent to Award

Upon selection of the consultant(s), the local agency shall provide written notice of intent to award and submit the “Certified Agency Notice of Intent to Award Form to the Regional Local Agency Liaison and the Office of Civil Rights.

Requirement: Local agencies shall provide written notice of intent to award to all bidders and proposers pursuant to [ORS 279B.135](#) at least seven days before the award of a contract.

Local agencies may choose to follow the procedures outlined in [OAR 137-047-0610](#).

12. Consultant Selection Protest Procedures

In the event of a single award, or an award to more than one proposer, adversely affected or aggrieved proposers may submit a written protest of the selection no later than seven days after the consultant(s) selection.

Requirement:

As outlined in OAR 137-047-0740, no later than seven days after the selection of a consultant, the local agency shall provide to all proposers, a copy of the selection notice(s) that the local agency sent to the highest ranked proposer(s). Any proposer claiming to be adversely affected by the selection may submit a written protest to the local agency. The protesting proposer must claim that the protesting proposer is actually the highest ranked proposal because the higher ranked proposer(s) failed to meet the requirements of the RFP or because the other higher ranked proposer(s) are otherwise not qualified to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP. Refer to OAR 137-047-0740 for additional details.

13. Screening and Selection / Interviews

The local agency is responsible for ensuring that the proposals are scored and ranked independently by each evaluator based on the criteria in the solicitation/RFP. The evaluation panel then meets to compile scores, and discuss and select the best consultant(s). The certified local agency shall facilitate this process and it is crucial that this part of the process be fair and equitable and operate without conflicts of interest. [49 CFR 18.36](#)

Consultant interviews are optional. Any interview score is either added to the consultants’ proposal score to make an overall score, or is used as the final stage selection method. Whichever approach is used, the solicitation document should describe how the scoring will be done.

Requirement:

Subject to ODOT approval and legal requirements, the procedures that a local agency creates for the screening and selection of A&E consultants shall be within the discretion of the local agency and may be adjusted to accommodate the local agency’s scope, schedule and budget objectives for a particular project. Adjustments to accommodate a contracting agency’s objectives may include provision for the direct appointment of a consultant if the value of the project does not exceed a threshold amount as determined by the contracting agency. Additional details are available at [OAR 137-048-0200 Direct Appointment](#)

Screening and selection procedures may include a consideration of each candidate's:

- a. Specialized experience, capabilities and technical competence that may be demonstrated by the proposed approach and methodology to meet the project requirements.
- b. Resources available to perform the work and the proportion of the candidate staff's time that would be spent on the project, including any specialized services, within the applicable time limits.
- c. Record of past performance, including quality of work, ability to meet schedules and contract administration.
- d. Ownership status and employment practices regarding minority, women and emerging small businesses or historically underutilized businesses.
- e. Availability to the project locale.
- f. Familiarity with the project locale.
- g. Proposed project management techniques.

NOTE: The consultant selection process must operate without conflict of interest. As indicated in [OAR 137-048-0220\(4\)\(b\)\(A\)](#) "No Proposer will be eligible for award of the Contract under the RFP if Proposer or any Proposer's principals, partners or associates are members of Contracting Agency's RFP evaluation committee for the Contract." See also [49 CFR 18.36](#).

If the local agency, using their A&E consultant screening and selection procedures, determines that two or more candidates are equally qualified, the local agency may select a candidate through any process adopted by the local agency [ORS 279C.110\(4\)](#).

14. Consultant Selection and Negotiation

After selecting the highest ranked consultant(s) and checking references, the certified local agency begins negotiations with the consultant on the Statement of Work and the compensation. If a contract cannot be finalized in a reasonable amount of time and at a reasonable compensation, negotiations with that consultant can be terminated and new negotiations begun with the next highest rated consultant.

Requirement: The certified local agency and the selected candidate shall discuss and refine the scope of services, negotiate compensation and determine the performance schedule based on the scope of services. However, the certified local agency's authority to negotiate a contract under this section does not supersede any provision of [ORS 279A.140](#) or [279C.520](#) [[ORS279C.110\(5\)](#)].

If the contracting agency and the selected candidate are unable for any reason to negotiate a contract at a compensation level that is reasonable and fair to the contracting agency, the contracting agency shall, either orally or in writing, formally terminate negotiations with the selected candidate. The contracting agency may then negotiate with next highest qualified candidate. The negotiation process may continue in this manner through successive candidates until an agreement is reached or the contracting agency terminates the consultant contracting process. [[ORS 279C.110\(6\)](#)].

15. Award

Upon selection of the consultant(s), the local agency shall provide written notice of award. However, certain Certifications and COI disclosures are required by state and federal law prior to entering a contract with contractor. To facilitate the disclosure process, provide a COI disclosure form that must be submitted with proposals.

For an example COI Disclosure form and the Certification language, refer to the Overview of Federal, State and ODOT Requirements for Procurements by Local Agencies Section 3.8 Certifications and COI Disclosures ([LPAaeRequirements](#)).

16. Amendment to the Contract

A contract shall be amended in writing.

E. NON-A&E PERSONAL SERVICES CONTRACTS

Certified local agencies have the ability to determine what constitutes a personal services contract. [[ORS 279A.055](#)] In addition, certified local agencies may designate certain non-A&E personal services contracts as contracts for A&E services or related services. [[ORS 279C.105\(2\)](#)].

Some specific examples of non-A&E personal services are listed in the [Appendix](#) to this chapter. It is important to note that the list of examples is for information only. If a local agency questions whether a particular service would be considered an A&E or personal service, then the local agency should contact their [Regional Local Agency Liaison](#).

NOTE: There has been a lot of confusion around certain services historically associated with non-A&E personal services, which are actually A&E Related Services, such as those identified in [OAR 137-048](#). A&E Related Services that are related to a public improvement project must be procured under the same procedures as A&E Services, which disallows price as a selection criterion. Generally, FHWA does not pay for non-A&E services and a local agency should review closely with their Regional Local Agency Liaison any items identified as Non-A&E for a federally funded project.

Also, ODOT does not have procurement authority for non-A&E personal service contracts over \$150,000. That authority rests with Department of Administrative Services. Contact your Regional Local Agency Liaison for this process.

1. Identify and Define Project

The certified local agency selects and initiates a federal-aid highway project and the project must be in the Statewide Transportation Improvement Plan (STIP). See Chapter 3, Federal Funding Programs in Section A of this *LAG Manual* for more information regarding the STIP, funding programs and related required planning processes.

Requirement: The selected project must be included within the STIP.

2. Determine Method of Procurement and Project Phases

Considering staffing and funding resources, the certified local agency may choose to hire a qualified private consultant to perform the required work. A certified local agency could choose to select a non-A&E consultant by one of three methods: formal, informal or by direct appointment. For more details on the different process requirements on each of these procurement types, refer to [“Determine Method of Procurement” section above.](#)

When projects cover two or more distinct phases, and the cost for the second phase depends on decisions reached during the first phase, the contract should cover only the first phase. The agreement for preliminary engineering should state that the consultant may be considered for subsequent phases, provided this option was 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 phase(s). Separate contract consultants may be considered for preliminary engineering and construction engineering.

In addition, when the project involves similar or related tasks, segmenting the consultant work appropriately increases efficiency and cost effectiveness. For example, combining preliminary engineering tasks with the preparation of the required environmental analysis is often desirable. Further details regarding environmental processes are available in [Chapter 5 in the Non-Certified Section](#) and in [Chapter 6 in the Certified Section of this *LAG Manual*.](#)

3. Appoint Contract Administrator and Retain Records

The certified local agency assigns a Contract Administrator who is generally responsible for the quality of consultant products and services through the duration of the contract.

Requirement: The Contract Administrator must be qualified to ensure the work pursued is complete, accurate and consistent with the terms, conditions and specifications of the contract.

As indicated in [OAR 166-200-0050\(8\)](#), regarding “Competitive Bid Records,” local agencies must retain accepted bids for a minimum of 10 years, after substantial completion (as defined by [ORS 12.135\(3\)](#)) other accepted bids must be retained for a minimum of 6 years, and rejected bids and bid exemptions must be retained for a minimum of 2 years.

Specific details regarding record retention for local agencies is available on the [Secretary of State's website](#), under "General Record Retention Schedule."

4. Create Scope / Determine Deliverables and Timelines

The certified local agency is responsible for developing a contract including a scope of work -- a detailed description listing the products or services the consultant will provide, and a schedule of when they must be delivered. Environmental services are a common type of non-A&E personal service contract needed by local agencies. ODOT's geo-environmental website has templates available for common services which may be edited for a specific project.

5. Prepare Cost Estimate

The certified local agency prepares an independent, confidential cost estimate so the certified local agency can ensure that consultant services will be obtained at a fair and reasonable price. A good cost estimate can be prepared only if the scope of work is defined clearly.

The development of an estimate involves:

- Past experience from similar work.
- Percentage of cost of services compared to total project cost, for similar types of projects.
- A detailed cost estimate including:
 - Direct labor costs
 - Indirect costs
 - General and administrative costs
 - Other direct costs
 - Sub-consultant costs
 - Net fee

Additional information regarding cost estimates is available from ODOT's [Audit Guide](#).

6. Formulate Selection Criteria

The local agency must determine the quality needed for a particular project from which the proposals will be evaluated and the method to measure the qualifications of each proposal. Lastly, the local agency must develop a process that applies the project against the additional items listed in the [Screening and Selection Criteria](#) in the previous section above that may be considered.

7. Identify Disadvantaged Business Enterprises (DBE) Program and Goals

Through the DBE program, the certified local agency will practice nondiscrimination on the basis of race, color, sex and/or national origin in the award and administration of USDOT assisted contracts. At this point in the process, ODOT will assign a DBE goal. See sub-section 7 and 8 from above previous section for more information.

Requirement:

The certified local agency, when participating in programs funded in whole or in part with funds made available by ODOT, shall comply with ODOT's [DBE Program Document](#).

8. Advertise and Solicit Bids for the RFP

In order for the Office of Civil Rights to track certified projects being advertised, a certified agency is required to submit two additional forms; "[Certified Agency Notice of intent to Advertise](#)" and "[Certified Agency Notice of Intent to Award](#)". These two forms must be submitted to the Regional Local Agency Liaison, who will forward them to OCR prior to advertisement and award. Refer to the [OCR Forms Matrix on the OCR website](#).

The following activities represent ODOT's recommended practices for advertising RFP's:

- Advertise the availability of the Solicitation in a major newspaper of general circulation or technical publication of widespread circulation (e.g. Daily Journal of Commerce) for a period not less than 14 calendar days.
- Identify and send the solicitation to organizations qualified to do specified work as well as professional societies and recognized DBE organizations.

The advertisement should contain the following information:

- A project title, estimated project cost and estimated start and end dates.
- The general scope and nature of the project or work for which services are required, and the address of a representative of the local agency that can provide further details.
- Solicitations must clearly set forth sufficient detail on how applicant qualifications will be evaluated.
- For personal services, consultant fees or costs may be requested.
- Non-A&E personal service applicants should be asked to provide estimates for the number of hours and classifications needed to complete the project.
- All prospective consultants must be advised that federally funded projects will be held to federal EEO requirements (see Chapter 8 in the Non-Certified Section of this *LAG Manual* for more EEO information).
- Consultants will also be held to [ADA](#) and civil rights language for the employing agency.
- Due date for responses and publication dates.

In addition, during the time the solicitation is open, potential respondents can write or email the certified local agency member identified in the solicitation with their questions, and the following items apply:

- Answers shall only be supplied in writing.
- Answers to substantive questions (those that materially impact the Statement of Proposal) should be advertised as an addendum to the solicitation/RFP.

- Unless otherwise specified, the period for questions ends seven days before the proposal due date.

Local Contracting Agencies, pursuant to ORS 279B.050(4)(a), may also adopt these division 47 rules to govern the Procurement of Personal Services Contracts or elect to award Personal Services Contracts under procedures set forth in ORS 279B.055 through 279B.085.

Requirement:

The certified local agency must meet or exceed the minimum legal requirements for advertising the RFP as adopted by the local agency and approved by ODOT through the Certification process. For additional details, see [OAR 137-048](#) as it applies to all public contracting agencies pursuant to [ORS 279A.065](#).

9. RFP Protest Procedures

Local agencies must provide consultants an opportunity to submit a written protest regarding the terms of an RFP or request a change to the RFP. Such protests will not be accepted later than seven days prior to the proposal due date.

Requirement:

As outlined in [OAR 137-048-0240\(1\)](#), within seven calendar days prior to the date proposals are due, unless another date is specified in the RFP, consultants may submit a written protest or request a change to any provision, specification or contract term contained in the RFP. Each protest or request for change must include the reasons for the protest or request, and any proposed changes to the RFP provisions, specifications or contract terms.

10. Closing the Solicitation Process

After the due date for submission, the certified local agency evaluates the Statements of Proposal on the Pass/Fail criteria listed in the solicitation/RFP. The proposals that pass are forwarded to an evaluation panel chosen by the Contract Administrator.

11. Notice of Intent to Award

Upon selection of the consultant(s), the local agency shall provide written notice of intent to award and submit the “Certified Agency Notice of Intent to Award Form to the Regional Local Agency Liaison and the Office of Civil Rights.

Requirement: Local agencies shall provide written notice of intent to award to all bidders and proposers pursuant to [ORS 279B.135](#) at least seven days before the award of a contract.

Local agencies may choose to follow the procedures outlined in [OAR 137-047-0610](#).

12. Consultant Selection Protest Procedures

In the event of a single award, or an award to more than one proposer, adversely affected or aggrieved proposers may submit a written protest of the selection no later than seven days after the consultant(s) selection.

Requirement:

As outlined in OAR 137-047-0740, no later than seven days after the selection of a consultant, the local agency shall provide to all proposers, a copy of the selection notice(s) that the local agency sent to the highest ranked proposer(s). Any proposer claiming to be adversely affected by the selection may submit a written protest to the local agency. The protesting proposer must claim that the protesting proposer is actually the highest ranked proposal because the higher ranked proposer(s) failed to meet the requirements of the RFP or because the other higher ranked proposer(s) are otherwise not qualified to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP. Refer to OAR 137-047-0740 for additional details.

13. Screening and Selection / Interviews

The certified local agency is responsible for ensuring that the proposals are scored and ranked independently by each evaluator based on the criteria in the solicitation/RFP. The evaluation panel then meets to compile scores, and discuss and select the best consultant(s). The certified local agency shall facilitate this process and it is crucial that this part of the process be fair and equitable and operates without conflicts of interest. [49 CFR 18.36](#)

Consultant interviews are optional. Any interview score is either added to the consultants' proposal score to make an overall score, or is used as the final stage selection method. Whichever approach is used, the solicitation document should describe how the scoring will be done.

Requirement:

Each certified local agency entering into personal services contracts shall create procedures for the screening and selection of persons to perform personal services. [[ORS 279A.070](#)]. Additional information is available at [ORS 279B.060 through ORS 279B.083](#) and [OAR 137-047-0265 through 137-047-0290](#).

NOTE: The consultant selection process should operate without conflict of interest. See [49 CFR 18.36](#).

14. Consultant Selection and Negotiation

After selecting the highest ranked consultant(s) and checking references, the certified local agency begins negotiations with the consultant on the Statement of Work and the compensation. If a contract cannot be finalized in a reasonable amount of time and at a reasonable compensation, negotiations with that consultant can be terminated and new negotiations begun with the next highest rated consultant.

15. Award

Upon selection of the consultant(s), the local agency shall provide written notice of award.

16. Amendments to the Contract

A contract shall be amended in writing.

F. REQUIRED CONTRACT PROVISIONS

There are a number of required contract provisions that must be included in public contracts for projects with federal funding. The contract clauses required by applicable CFRs must be included in contracts with FHWA funding. Provisions required by state statute must be in all contracts (except any state provisions that are in conflict with federal requirements). [49CFR 18.37](#) requires states to ensure that sub-recipients are aware of federal requirements and that “every sub-recipient includes any clauses required by Federal Statute and executive orders and their implementing regulations.” For the complete list of provisions as well as example language refer to OPO publication [“Overview of Federal, State, and ODOT Requirements Federally Funded A&E Procurements by local agencies” \(LPAaeRequirements\)](#). The required contract clauses of 49 CFR 18.36(i) for A&E contracts include:

- Remedies for breach and possible sanctions
- Termination procedure and availability
- Progress Reporting obligations
- Patent Rights regarding discovered or invented items under the contractual terms
- Copyrights and Data Rights
- Ownership of Work product
- Records Maintenance and Access
- Tax law Certification per Oregon Statute
- Compensation and invoice requirements including federal cost principles per 48 CFR 31
- DBE provisions
- Title VI Nondiscrimination provisions
- False Claims per ODOT requirement

For contracts, subcontracts and grants in amounts in excess of \$100,000 must include contract provisions addressing compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15).

For contracts to design or construct public buildings must contain the requirement of mandatory standards and policies relating to energy efficiency contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871).

Many agencies have standard contracts that are used when hiring consultants. For contracts with federal funding, there are also professional organizations that publish standard contract templates. ORS also dictates specific contract provisions for public contracting, such as payment, drug testing, prevailing wage. It is recommended that standard contract templates be reviewed by an attorney before used.

G. MANAGING THE CONSULTANT

A local agency is responsible for certain consultant actions and should be monitoring and supervising, including performing:

- Invoice reviews
- Work product reviews

The local agency should also provide guidance and act as the liaison between the consultant and other public agencies.

H. NON-DELEGATED RESPONSIBILITIES

ODOT retains approval authority for the following regardless of a local agency's certification status per [FHWA's "Administration of federally funded projects by local public agencies"](#) and ODOT's [Local Program Quick Reference Guide](#):

- Authorization to proceed using Federal funds
- Preparation of federal agreements
- Bid or proposal rejections
- Sole source awards
- DBE Goals
- Pre-award audit review of consultant contract over \$250,000
- NEPA documents (ODOT and FHWA)
- Local design standards
- Design exceptions
- Utility Relocation Agreements involving federal reimbursement
- Specific Authorization for Utility Relocation involving federal reimbursement
- Independent Assurance Sampling and Testing (IAST) for National Highway System (NHS) projects
- Owner force account work
- Payments from ODOT to local agencies
- Right of Way Certification
- Issuance of rail grade crossing orders
- Project final inspection and acceptance (ODOT and FHWA)

Required FHWA Approvals per 23CFR 172(9)

- Major projects. Any contract, revision of a contract or settlement of a contract for design services for a project that is expected to fall under [23 U.S.C. 106\(h\)](#) [i.e., expected to exceed \$500,000,000] shall be submitted to the FHWA for approval.
- Consultant services in management roles. When Federal-aid highway funds participate in the contract, the contracting agency shall receive approval from the FHWA before hiring a consultant to act in a management role for the contracting agency.

I. CONTRACT CLOSURE FOR A&E AND RELATED SERVICES AND NON-A&E PERSONAL SERVICES

Upon completion of the work under the consultant contract, the certified local agency will ensure that the consultant has complied with all terms and conditions of the contract and that all services to be performed under the contract have been completed prior to final payment and release of the consultant. The certified local agency should evaluate the consultant's performance and retain such related documents in their records. Per CFR 23.172.9 - Recipients and sub-recipients of FHWA funds shall have written procedures regarding “monitoring the consultant's work and in preparing a consultant's performance evaluation when completed”.

Documented performance evaluations may be considered in any future procurement if past performance is a criterion within the RFP or as a part of the Responsibility Review. Performance evaluation documentation is maintained in project files either 6 or 10 years, depending on the relevant statutes. For more information refer to [Overview of Federal, State and ODOT requirements for Procurements of Federally Funded Projects by Local Agencies](#).