

LPA Non-A&E PSK Requirements Guide

Overview of Federal, State and ODOT Requirements for Federally Funded Non-A&E Planning and other Personal Services Procurements by Local Public Agencies

This guide provides an overview of requirements for state and federally funded procurements for non-A&E planning services and other non-A&E services, 2 CFR part 200 (including exemptions in part 1201), ORS 279B and the DOJ Model Rules. The [Stewardship Agreement with FHWA](#) outlines the mechanisms that ODOT will use to establish roles, responsibilities, and processes to ensure that all project and program actions will be carried out according to the appropriate laws, regulations, and policies. These responsibilities also apply to federal aid projects administered by local public agencies (LPA). Regardless of the rules adopted by an LPA, for federal aid A&E contracts, ODOT requires the LPA to meet, at minimum, the solicitation document, contract document and procedural requirements stated or referenced herein.

[**Note:** This guide is updated from time to time. Rather than printing or saving the document to hard drive, use version posted on line at: <https://www.oregon.gov/ODOT/Business/Procurement/Pages/LPA.aspx>.]

REVISION SUMMARY

- 12/28/20 - Update section 2 to add link to guidance: [How to Automate SOW Reviews to Find Problem Areas](#).
- 7/28/20 – Minor revisions to address review comments: add definition of “Predominant Purpose”, remove several references to “Architectural and Engineering services”, and fix a few broken links in several sections. Posted for use.
- 5/28/20 – Draft Created; posted for 3 week review and comment period.

APPLICABILITY

This guide applies to procurements when the *Predominant Purpose (more than 50% of the cost) of the prospective contract will be for non-A&E planning services or other non-A&E/non-construction services. Non-A&E planning services:

- Are not directly related to a specific public improvement project. This typically includes, but is not limited to: Corridor Plans, Transportation System Plans (TSPs), Regional Transportation Plans, Interchange Area Management Plans (IAMPs), Refinement Plans, and other planning studies not directly related to a specific public improvement project. Guidance from FHWA states: *“If a planning study is to determine the need for improvements within a corridor, conduct travel demand studies, or to obtain information on costs for planning and programming processes, the consultant may not need to be procured under a qualifications based selection process. If a planning study involves development and consideration of detailed alternatives in a corridor or any activities or analyses that pertain to development and furtherance of a specific project, the consultant may need to be procured under a qualifications based selection process. The determination is based upon the scope of services needed and the applicable State and local laws, regulations, policies, and procedures.”*
- Do not meet the ORS 279C.100(9) definition of “Transportation planning services”, which is defined as “transportation planning services for projects that require compliance with the National Environmental Policy Act, 42 U.S.C. 4321 et seq”; (i.e., projects that require NEPA process and documentation).
- Do not meet the ORS 279C.100(2) definition of “Architectural, engineering, photogrammetric mapping, transportation planning or land surveying services” - “professional services that are required to be performed by an architect, engineer, photogrammetrist, transportation planner or land surveyor”.

Use the [LPA A&E Requirements Guide](#) for planning services that: **1) are directly related to a specific public improvement project, or 2) meet the ORS 279C.100 definition of Transportation planning services, or 3) meet the ORS 279C.100 definition of A&E services or A&E Related Services.** For additional information on appropriate procurement method, see [FHWA guidance](#) (Section 1, Question 4, regarding planning services). If unsure which method applies for a particular procurement, please contact [Kim Rice](#) (503-986-6931) at ODOT.

*** Predominant Purpose.** Some planning services would clearly be procured as non-A&E, like Regional TSPs, which generally include a small percentage of A&E services. With corridor plans or other planning projects that require concept designs and alternative analysis that must be prepared by a professional engineer or architect, these can easily get close to or exceed 50% A&E costs under the contract. Making the determination requires cost analysis, including reviews of previous similar projects, if any, to determine an estimate of percentage of costs for A&E vs. non-A&E tasks. It's recommended to classify mixed contracts as A&E anytime cost analysis and internal estimates show that more than 40% of costs will likely go to tasks for A&E services. Not doing so could result in a failed procurement if, during negotiations of the contract or any contract amendment, it's determined that A&E costs will exceed 50% of total contract amount.

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1. APPLICABLE LAW; FEDERAL LAW PREVAILS; CONFLICTS

The Oregon Revised Statutes applicable to non-A&E contracting are ORS 279A (except for provisions applicable to “State Procurement”) and ORS 279.B. Oregon Administrative Rules 137-046 and 137-047 are applicable to non-A&E goods and services procurements conducted by agencies that have adopted DOJ’s Model Rules, and set forth solicitation, contract and procedural requirements. The rules and procedures adopted by the LPA may not be in conflict with Federal and State statutes or rules (see “Notes regarding conflicts” below).

Per ORS 279A.030 “...applicable federal statutes and regulations govern when federal funds are involved and the federal statutes or regulations conflict with any provision of ORS 279C.005 to 279C.670 or this chapter or ORS chapter 279B, or require additional conditions in public contracts not authorized by ORS 279C.005 to 279C.670 or this chapter or ORS chapter 279B.” If applicable state statutes, OARs or other local rules are in conflict or silent regarding federal requirements, then they are not in conformance and the federal requirements apply.

All non-A&E procurements with FHWA funding must comply with applicable State laws and applicable requirements of [2CFR Part 200](#) (including exemptions in [part 1201](#)), [48CFR Part 31](#) and any [FHWA directives and policies](#)

applicable to non-A&E services contracting.

Notes regarding conflicts: Procurements with federal-aid and/or state funding may not include provisions or rule/statute citations that are in conflict with federal or state requirements. For example –

- **ORS 279A.100 Limited Competition and in-state preferences in ORS 279A.120 and 279A.128** are both in conflict with federal requirements [see [FHWA Guidance](#)] and may not be applied if any federal funding is involved.
- **ORS 279C and OAR 137-048 do not apply to non-A&E contracting.** Citations and references to requirements of ORS 279C and OAR 137-048 must not be in non-A&E procurement documents. [See ORS 279A.020 Organization of Public Contracting Code.]
- **Overtime for professional services.** References to ORS 279B.020 are related to requirements to pay overtime on service contracts but do not apply to individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

2. REQUIRED PROCUREMENT TEMPLATES & SOW RESOURCES

LPAs in ODOT’s certification program for consultant selection shall use the following standard procurement templates for all federal aid non-A&E procurements and shall follow the instructions included in the templates:

Non-A&E RFP Template – Used for formal and intermediate solicitations.

A&E/non-A&E Contract Template – Used for A&E Direct Appointments/Small Purchases and all A&E and non-A&E contracts awarded by formal or intermediate solicitation.

All required templates, forms and guidance related to non-A&E procurements by LPAs in ODOT’s certification program are maintained at the following locations:

- **Certified LPA Resources:** <https://www.oregon.gov/ODOT/Business/Procurement/Pages/LPA.aspx>.
- **SOW Writing Guide and optional SOW templates:**
<https://www.oregon.gov/ODOT/Business/Procurement/Pages/SOW.aspx>
- **How to Automate SOW Reviews to Find Problem Areas:**
https://www.oregon.gov/odot/Business/Procurement/DocsSOW/SOW_AutomatedReview.docx

3. WRITTEN PROCEDURES

Basic Expectation Regarding Consultant Selections: Regardless of the selection method used, LPA staff will not engage in favoritism or diminish the integrity of the public contracting process by repeatedly selecting the same consulting firm for contract award when there are multiple firms qualified to provide the needed services.

3.1 Small Procurements

“Small Procurement” is a procurement method set forth in ORS 279B.065. LPAs may follow the administrative rules adopted by the LPA for purchases up to \$10,000. An LPA may not artificially divide or fragment a procurement so as to constitute a small procurement.

3.2 Intermediate & Formal Selection

3.2.1 Intermediate Solicitations (up to \$150,000 including potential amendments)

Intermediate solicitations do not require public advertising and may be used for procurements up to \$150,000 (ORS limit) or such lower amount as provided in LPA’s administrative rules. Formal selection procedures may be used for contracts under \$150,000, at LPA’s discretion, especially if the anticipated contract amount is close to the applicable dollar threshold for intermediate procurement or may exceed it if amendments become necessary.

Intermediate procurements must be conducted in conformance with ORS 279B.070, this Non-AE LPA Requirements Guide, and any additional requirements of LPA’s rules/policies (to the extent LPA’s

requirements do not conflict with State or Federal requirements). Procedure minimum requirements include:

1. **Complete needs analysis and prepare project scope/statement of work** in conformance with ODOT's [Statement of Work Writing Guide](#) or a description of the services needed.

"Needs analysis" is step 1 of the procurement process. For procurement of non-A&E planning services, this generally means:

- conducting analysis of the LPA's planned/budgeted non-A&E planning projects,
- determining and documenting which elements of the needed planning services the LPA has capacity and expertise to perform in-house within the needed delivery schedule,
- determining which planning projects, or elements thereof, will need to be outsourced for each project, and
- developing a procurement plan/schedule with sufficient lead time to allow for conducting needed procurements in conformance with applicable local, state and federal requirements.

2. **Prepare RFP** using the approved non-A&E RFP Template.

- 2.1 Include background and project description information, project schedule, schedule for completion of the needed services, and scope of work for services needed. Select applicable options in RFP template and fill in fields with procurement-specific information as necessary.
- 2.2 Follow instructions in RFP template to develop appropriate evaluation criteria and points available for each criterion.
- 2.3 DBE Goal Assignment does not apply to non-A&E services.
- 2.4 **Enter due date that allows a reasonable time** for Proposal preparation and submission, taking into consideration size and complexity of the project as well as the amount of information required for proposals.

3. **Distribute the RFP** and sample contract to a minimum of 3 firms identified by the LPA as experienced and qualified sources of the needed services.

4. **Proposer questions, requests for change, and protests must be in writing.**

- LPA responses shall only be supplied in writing.
- Answers to substantive questions (those that may materially impact the Statement of Proposal) must be issued as an addendum to the solicitation/RFP.
- The period for questions/protests ends 7 calendar days before the proposal due date (unless otherwise stated in intermediate RFPs).

5. **Evaluator(s) review and rank all proposals** received according to the criteria set forth in the RFP. If LPA's rules/policies require 2 or more evaluators for intermediate RFPs, then the LPA's requirement must be followed. Each evaluator must sign a **COI Disclosure for Proposal Evaluators Form** prior to completing evaluations. Review references as necessary, including consideration of consultant's documented performance under contracts for similar services in the prior 3 years, if any. If the RFP included potential for interviews, determine if interviews are necessary and conduct them if needed.

6. **Award Protest Period.**

- 6.1 Unless required by LPA's rules and procedures, State and federal procurement laws do not require providing for award protest on intermediate procurements.

7. **Negotiations.** If the RFP is not cancelled, contact the highest ranked proposer to:

- 7.1 Request submittal of Award Submittal Requirements listed in section 4 of the RFP template,
- 7.2 Discuss project and begin negotiations of scope, schedule and costs per procedures in [section 3.6](#) - Estimates, Cost Analysis, Negotiations, Profit, and Method of Compensation.

8. **Use approved Contract Template** required for FHWA funded contracts. Include final negotiated statement of work in conformance with the [Statement of Work Writing Guide](#) and follow instruction in template to identify appropriate insurance, method of compensation and no-goal DBE provisions.

9. **Document procurement file** with applicable evaluation, selection, and negotiation documentation as listed in [section 4](#). Continue appropriate documentation throughout contract administration actions and final contract closeout.

3.2.2 Formal Solicitations (over \$150,000 including potential amendments)

All formal solicitations will be conducted in a manner providing full and open competition.

Formal solicitation and award process must be conducted by an employee of the LPA that meets the minimum requirements set forth in [the Certification Guidance](#) document for Formal Selection of A&E and Related Services.

LPA shall follow these procedures and OAR 137-047-0260 as well as any additional requirements of LPA's rules/policies (to the extent LPA's requirements do not conflict with State or Federal requirements).

Procedure minimum requirements include:

1. **Complete needs analysis and prepare project scope/statement of work** in conformance with ODOT's [SOW Writing Guide \(Non-A&E Services\)](#) or a description of the services needed.
2. **Prepare RFP** using the approved **Non-A&E RFP Template**. Select applicable options in template and fill in fields with procurement-specific information as necessary.
 - 2.1 Include background, objectives, project description information, overall project schedule, schedule for completion of the needed A&E services, scope of work for services needed, and detailed statement of work if available (if a detailed SOW is not available for the RFP include, at minimum, a list of the tasks/disciplines and deliverables needed).
 - 2.2 Follow instructions in template to develop appropriate evaluation criteria and points available for each criterion.
 - 2.3 Enter due date that allows a reasonable time for Proposal preparation and submission, taking into consideration size and complexity of the project as well as the amount of information required for proposals.
 - 2.4 **RFP review.** LPA's procurement coordinator obtains reviews by appropriate stakeholders, legal review by LPA's attorney if over \$150,000 (or any lower threshold required by LPA), and any other reviews required by LPA.
3. **LPA's procurement coordinator publicly advertise the RFP and sample contract. The public notice and advertisement period must comply with requirements set forth in OAR 137-047-0300.** Whichever format of public notice is used, LPA must use a public forum or method that assures qualified in-State and out-of-State consultants are given a fair opportunity to be considered for award of the contract.
4. **Proposer questions, requests for change, and protests must be in writing.**
 - 4.1 LPA responses shall only be supplied in writing.
 - 4.2 Answers to substantive questions (those that may materially impact the Statement of Proposal) must be advertised as an addendum to the solicitation/RFP.
 - 4.3 The period for questions/protests ends 7 calendar days before the proposal due date (unless otherwise stated in Intermediate RFPs)
5. **Administrative Reviews of Proposals.** LPA's procurement coordinator completes responsiveness and pass/fail reviews of proposals that were received before the RFP closing time.
6. **A minimum of 3 evaluators complete an independent review and scoring of all responsive proposals received.** LPA may appoint to the evaluation committee LPA employees or employees of other public agencies with experience in transportation planning services. At least one member of the evaluation committee must be an employee of the LPA. If the LPA's procedure permits, the LPA may include on the evaluation committee private certified planners, practitioners of architecture, engineering, land surveying or related disciplines as applicable to the current procurement. Evaluators must be knowledgeable about the project and informed about the scoring process. Any scorer who has a conflict of interest with any of the submitting firms, or who believes that he is otherwise unqualified, must excuse themselves from any of the scoring.
 - 6.1 Conduct pre-evaluation meeting, as needed, to provide instructions to eval committee;
 - 6.2 Designate one of LPA's employees who also is a member of the evaluation committee as the evaluation committee chairperson;
 - 6.3 Each evaluator must sign a **COI Disclosure for Proposal Evaluators** form prior to completing evaluations;

- 6.4 Scoring must be based only on the criteria set forth in the RFP. Each evaluator must score all proposals that met pass/fail review and document comments to support scores given for each proposal. Any changes made to any of the data entered on the evaluation score form must be initialed by the person who signed the evaluation form.
- 6.5 Following independent scoring of proposals, conduct selection meeting to compile evaluator scores, discuss any significant scoring discrepancies, and determine ranking of proposers. Changes to scores should only be made (and initialed) if it is determined that information in the proposal was clearly missed by the evaluator.
- 6.6 Review references as necessary, including consideration of consultant's documented performance under contracts for similar services in the prior three years, if any.
- 6.7 If the RFP included potential for interviews, determine if interviews are necessary and conduct them if needed in accordance with criteria and scoring set forth in the RFP.
- 6.8 Compile evaluator scores in a tabulation sheet to document ranking of proposers.
- 6.9 Prior to issuance of intent to award notice, double-check math to ensure evaluator scoresheets and the tabulation sheet are calculated correctly to support final ranking of proposers.
- 7. **Issue notice of intent to award** to highest ranked firm and not selected notice to all other proposers. Request submittal of Award Submittal Requirements listed in section 4 of the RFP template, including billing rates (if approved rates are not on file), insurance certs, Certification Regarding Debarment & Other Responsibility Matters (if contract is over \$150,000 including as may be amended), W-9 Form, and Business Registry Number/Registered Agent.
- 8. **Provide debriefings** to not-selected proposers as requested, and respond to protests if any.
- 9. **Award Protest Period (Formal RFPs only).**
 - 9.1 Award protests and the LPA responses must both be submitted in writing. LPA shall disclose information regarding the award protest to ODOT.
- 10. **Negotiations.** If the RFP is not cancelled, contact the highest ranked proposer to:
 - 10.1 Request submittal of Award Submittal Requirements listed in section 4 of the RFP template,
 - 10.2 Discuss project and begin negotiations of scope, schedule and costs per procedures in section 3.6 - Estimates, Cost Analysis, Negotiations, Profit, and Method of Compensation.
- 11. **Use approved Contract Template** required for FHWA funded contracts. Include final negotiated statement of work in conformance with the [Statement of Work Writing Guide \(Non-A&E Services\)](#) and follow instruction in template to identify appropriate insurance, method of compensation and DBE No-Goal provisions.
- 12. **Contract Reviews.** Obtain review by LPA's Procurement Coordinator, legal review by LPA's attorney if over \$150,000 (or any lower threshold required by LPA), and any other reviews required by LPA.
- 13. **Document procurement file** with applicable evaluation, selection, and negotiation documentation as listed in [section 4](#). Continue appropriate documentation throughout contract administration actions and final contract closeout.

3.3 Statement of Work Preparation

Statements of work must be prepared in conformance with the [Statement of Work Writing Guide \(Non-A&E Services\)](#).

3.4 DBE Goals:

ODOT Office of Civil Rights (OCR) is required to establish DBE Goals and administer the DBE Program for projects with federal aid funding, including projects let and administered by LPAs.

3.4.1 Standard Goals

"No-Goal" is the standard assignment for non-A&E planning services. DBE "no-goal" is self-assigned by the LPA - requests for goal assignment are not sent to OCR.

3.4.2 DBE Related Forms and Procedures

[The forms referenced below are available at the following OCR Forms page (under DBE Forms, and Other Forms): <https://www.oregon.gov/ODOT/Business/OCR/Pages/Forms.aspx>.]

- If the contract will include any federal funding, leave the “No-Goal” provisions in the RFP and include the DBE “No-Goal” Exhibit in the contract.
- Once a federally funded contract has been awarded, email the **Notice of Award (form 734-2849)** to the OCR PSK mailbox (ocr.psk@odot.state.or.us) within 3 days of contract award.
- Email copy of all executed contracts and amendments that include FHWA funding (this includes “Goal” and “No-Goal” contracts) to ocr.psk@odot.state.or.us.
- The LPA shall ensure the consultant submits Paid Summary Reports required for non-goal contracts by the solicitation and contract provisions:
 - **Paid Summary Report (form 734-2882)** – Consultant shall complete and submit initial, intermediate and final Paid Summary Report(s) per the instructions on the form. Consultant must report payment information for all subcontractors and suppliers used under the contract throughout the period of performance. **This reporting is required for all contracts that include subs, regardless of whether or not a DBE goal is assigned.** LPA shall follow instructions on the Paid Summary Report and submit the completed form to OCR (with cc to ODOT Local Agency Liaison)

3.5 Billing Rates

Costs as applied to cost estimates and invoices for work performed under Agency contracts must be in conformance with Federal Cost Principles (48CFR Part 31).

For non-A&E planning services (and any other non-A&E services) use the fully burdened billing rates competitively proposed by consultant for evaluation and scoring under the RFP. The fully burdened rates -

- Must be inclusive of labor cost, overhead, and profit and list the name, classification/job title, rate for each of the staff proposed.
- Shall remain in effect for not less than the first 12 months of the contract.

The pricing data evaluated and scored under the RFP may be: 1) detailed price proposals - used when a well-defined scope and statement of work can be prepared for the RFP; or 2) fully burdened billing rates – used when a well-defined statement of work is not available for the RFP.

3.6 Estimates, Cost Analysis, Negotiations, Profit and Method of Compensation

The effort that goes into preparing the internal estimate, cost analysis, pre-negotiation plan, record of negotiations, and negotiating costs should be directly related to the dollar value, importance, and complexity of the contract or amendment.

A cost analysis is required when adequate price competition is lacking, such as contract amendments and any procurements that do not result in two or more competitive price proposals (or fully burdened billing rate schedules) for evaluation. When cost analysis is required, the method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, LPAs must prepare internal cost estimates before receiving contractor’s cost estimate.

3.6.1 Internal Cost Estimate

Depending on the circumstances that apply to the procurement, a detailed internal estimate prepared by LPA may or may not be required.

- **If any of the following apply, then a detailed internal estimate must be prepared for cost analysis:**

- only billing rates were scored in the RFP (detailed price proposals were not scored)
 - less than 30% weight of overall proposal scoring was given to evaluation and scoring of competitive price proposals,
 - only one proposal is received resulting in no competitive price proposals,
 - submitted cost proposals vary substantially from LPA's budget or among proposers,
 - Contract amendments that add cost
- **If a detailed internal estimate is required**, then following consultant selection, the LPA and consulting firm will enter discussions to establish a detailed understanding of the scope, services to be provided, and responsibilities for project development, deliverables, schedules, and other important facets of a project. Once a mutual understanding of the scope and a detailed statement of work has been developed, the consulting firm will prepare a complete cost proposal to perform the services and the LPA will prepare/refine an independent estimate. The LPA's independent estimate becomes the basis for ensuring the consultant services are obtained at a fair and reasonable cost and will be used as the basis for negotiations. A detailed breakdown of estimated costs for the elements of the work must be prepared by LPA prior to receiving the consultant's breakdown of estimated costs. A budget line-item amount or simple range based on a percentage of the dollar amount programmed for the construction project is sufficient for determining solicitation method (i.e., formal versus Intermediate), but is not sufficient for purposes of the cost analysis and negotiation required for A&E and other no-bid pricing actions. For additional guidance, see [FHWA requirements for negotiation of a contract](#).
 - **Best practices for internal estimate include:**
 - Similar level of detail as the consultant estimate for ease of comparison and valid cost analysis
 - Breakdown of hours by task (and subtask, if applicable)
 - LPA's assessment of appropriate classifications needed for particular tasks
 - Apply fully burdened billing rates as provided by the prime and subs prior to negotiation
 - Estimated travel or other direct non-labor expenses
 - Estimated amounts for any proposed contingency tasks
 - Obtain input (regarding level of effort and appropriate classifications) from individuals with applicable technical expertise for the type(s) of services sought.

3.6.2 Consultant's Cost Estimate

Consultant's cost estimate (whether submitted for evaluation and scoring under the RFP, submitted after intent to award, or submitted for a contract amendment) must include:

- the assigned staff classifications and names of Key Personnel (and other staff if requested), fully burdened billing rates, and the number of hours per task and sub-task. **If fully burdened billing rates or cost estimates were submitted and scored as part of the evaluation under the RFP, then the proposed rates used in the cost estimate may not be higher than the pricing data scored under the RFP.];**
- an itemization of 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 fully burdened billing rates, assigned staff (classifications and names) and hours per task and sub-task and itemized direct non-labor costs;
- **Contingency Tasks.** These are tasks that may or may not be required based on circumstances that are determined after the work has begun. These must be negotiated and identified in the contract as Contingency Tasks. Amounts for any Contingency Tasks must be shown on the estimate as a separate line-item for each task. The amount for a Contingency Task must include all labor costs and non-labor expenses directly applicable to 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.
- **Breakdown of Costs (BOC) Template.** Cost estimates with fully-loaded billing rates must use the [BOC-NBR](#) or a similar spreadsheet that properly calculates costs for labor and expenses per task and subtask.

3.6.3 Cost Analysis

If preparation of a detailed internal estimate is not required per section 3.6.1 above, then a comprehensive cost analysis is not required. Otherwise, prepare a detailed internal estimate and perform a cost analysis as described in the following paragraph.

Perform cost analysis as appropriate for the dollar value and complexity of the procurement. Cost Analysis is 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 estimate 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. **Cost analysis, at the most basic level, is comparing the consultant's cost breakdown to the agency's internal breakdown. Significant discrepancies are documented as points for: a) further analysis of what something should cost, and b) discussion/negotiation with consultant.**

3.6.4 Negotiations (billing rates, hours, and direct expenses)

Any procurement action that lacks adequate price competition (e.g. - competitive complete price proposals are not submitted and scored under the RFP; only one proposer responds to the RFP; contract amendments; and sole source contracts) is considered a negotiated procurement subject to cost analysis and negotiation to determine reasonableness of price.

If more than one competitive price estimate is received for evaluation and scoring as part of the selection criteria, then negotiation of price may not be necessary. However, if pricing does not appear to be reasonable, the RFP template states "Agency reserves the right to negotiate the final price and billing rates under the prospective contract with the apparent successful Proposer".

When applicable, after preparing the internal estimate, receiving contractor's estimate and completing cost analysis, enter negotiations with the selected proposer with the objective of agreeing on a contract at a compensation level that is reasonable and fair to the Agency. If the Agency and the selected candidate are unable for any reason to reach agreement within a reasonable time, the Agency shall, either orally or in writing, formally terminate negotiations with the selected candidate. The Agency may then negotiate with the next highest ranked candidate. The negotiation process may continue in this manner through successive candidates until an agreement is reached or the Agency terminates the consultant contracting process.

3.6.5 Profit

Profit is already included in fully-burdened billing rates used for non-A&E planning services, so profit would not be negotiated as a separate negotiation item and added to the fully burdened rates. The fully burdened billing rates may be negotiated, including the profit included in the rates, if the rates are not reasonable (as determined by the LPA's analysis of typical rates for the services needed).

3.6.6 Determining Appropriate Compensation Method

The appropriate method of compensation for the contract is determined on a case by case basis. Per FTA's Best Practices Procurement Manual:

"The selection of contract type is probably the single most important decision that the procurement specialist will make in the acquisition process." The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used - **see 23CFR 172.5(c)**.

Acceptable methods of compensation include:

- **Time and Materials with not-to-exceed (T&M)** T&M (or "Specific Rates of Compensation") may be used for contracts using NBRs when fixed price is not appropriate per the guidance below. For firms using NBRs, ensure profit and overhead is not added. NBRs are fully-loaded billing rates that include all labor, overhead and profit. The contract must include a ceiling price that the consultant exceeds at its own risk.

- **Fixed Price or Fixed Price per Deliverable** when determined appropriate for the specific project. Fixed Price should be considered for use when:
 - Complexity of the project is moderate to low,
 - The scope of work is clearly defined and level of effort required to complete the work can be determined with a fair amount of confidence, and
 - For contracts awarded without adequate price competition, the LPA has developed a solid internal estimate and completed cost analysis to establish that the contract amount is reasonable.
- **Mixed Methods.** Contracts may use more than one method of compensation provided it's clear which method applies to which tasks. For example, some clearly defined tasks, contingencies, or phases of the work may be fixed price, while T&M may be appropriate for tasks where the level of effort necessary cannot be reasonably determined until the work is underway.
- **Cost-Plus-Fixed-Fee (CPFF) is not used for contracts with fully-burdened Negotiated Billing Rates (NBRs)** – NBRs already include profit.

3.6.7 Record of Negotiations

For any negotiations that occur, a record of the negotiations (RON) must be prepared for the procurement 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 must identify how reasonableness of cost was determined. This includes documentation such as:

- Minutes/summary of SOW discussion meeting(s)
- LPA's detailed estimate (prepared prior to receiving the consultant's estimate)
- Consultant's initial and revised final estimate
- Cost analysis and any pre-negotiation plan prepared by LPA
- Minutes/summary of negotiation meeting(s)
- Copies of relevant correspondence.

[Sample RoN form](#)

3.7 Contract Administration Procedures

LPA's will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts.

3.7.1 Overview of Contract Administration Responsibilities

Following execution of the contract, the Contract Administrator is responsible for "hands on" contract Administration duties. These duties include, but are not limited to the following:

- Act as LPA's key point of contact with consultant, other LPA staff, and other agencies as applicable for the contract/project.
- Review contract to become familiar with its terms, conditions, tasks, deliverables, schedule requirements and all consultant and LPA obligations of the contract.
- Ensure consultant fulfills all requirements, terms and conditions of the contract and that all Tasks and Deliverables are complete and submitted within schedule requirements.
- Review and approve all deliverables for compliance with requirements in the contract and standards for completion that are incorporated by reference into the contract. This includes requiring consultant to correct non-conformance with contract requirements, at no additional cost, prior to final acceptance and approval. Provide written notice to consultant of deliverable acceptance status, including timely written notice of deficiencies,
- Review for compliance with contract requirements and recommend approval of consultant's monthly invoices and supporting documentation.
- Verify utilization of subcontractors included on the invoice and forward the **Paid Summary Report** (completed by prime consultant) by email to Office of Civil Rights at ocr.psk@odot.state.or.us
- Track invoices received and payments made to ensure total amount paid against contract does not exceed the total not-to-exceed amount or fixed-price amount(s) of the contract.

- Draft and negotiate (in conformance with section 3.6) any necessary, allowable contract Amendments within the scope identified in the solicitation/contract up to the lower of:
 - the total contract dollar amount allowed under the procurement method used, or
 - any other limits set forth in applicable administrative rules and statutes.
- Monitor consultant's performance and timeliness throughout the project. Are they meeting schedule and performance requirements for deliverables?
- Prepare Consultant Performance Evaluation(s) to document evaluation of all performance under the contract (prime and subcontracts) and provide copy to the prime consultant.
- Complete contract closeout review and documentation.
- Ensure all contract Administration-related documentation is prepared and maintained on file for each contract.

3.7.2 Invoice Review Requirements

State DOTs and LPAs are required to comply with the Federal cost principles (48 CFR 31) to determine allowability of costs for personal services contracts with commercial, for-profit entities such as consulting or engineering firms. Costs determined to be unallowable under these cost principles are not eligible for Federal-aid reimbursement. Agency controls must ensure that invoiced costs are allowable (allocable to the project, necessary, and reasonable; that the State has authority to participate in the cost; are consistent with the terms of the contract; and are adequately supported by source documentation and verification of the completed work.

A copy of a status/progress report of work completed by the consultant for the applicable invoiced period should be maintain in the agency's files with each paid invoice. At a minimum, LPA's Contract Administrator must verify the following when reviewing and approving consultant invoices:

- The invoice includes all required information and backup documentation.
- Consultant submitted a monthly progress report that meets the requirements of the contract.
- Deliverables that were due during the billing period have been received, reviewed and accepted. This includes required Paid Summary Reports, if applicable, and any other forms required under the contract.
- All work performed/invoiced was within the scope of work as specified in the contract.
- The percentage of contract NTE invoiced to date reasonably reflects the actual percentage of tasks and deliverables completed to date.
- For cost reimbursement {Time & Materials (T&M)} contracts, confirm that NBR rates do not exceed the rates approved for the contract and do not include additional profit or overhead (NBRs are fully-loaded rates inclusive of profit and overhead).
- For cost reimbursement (i.e., T&M) contracts, confirm that labor hours invoiced are appropriate for the work performed during the billing period.
- For cost reimbursement (i.e., T&M) contracts, confirm that other direct costs (ODC) invoiced are appropriate for the services performed during the billing period and that all appropriate backup documentation has been received.
- For Fixed Price (aka lump sum) contracts, confirm that amounts do not exceed the fixed price amount(s) in the contract.
- Ensure payments are made to consultant (or notices of invoice/deliverable deficiencies) within the time required by the contract and State and Federal laws. If needed, complete follow-up with consultant for required corrections on invoice.

3.7.3 Contract Amendments

Any necessary, allowable contract Amendments must meet the following requirements:

- Must be in writing and will not take effect until executed by LPA and Consultant representatives authorized to sign the contract amendment.
- Must be within the scope identified in the solicitation/contract.
- Must not increase the contract not-to-exceed or fixed-price amount to an amount that exceeds the dollar threshold applicable to the procurement method used for award of the contract.
- Amendments that delete tasks or otherwise reduce the scope of services required under the

- contracts must result in reduction in compensation commensurate with reduced services.
- Negotiations must be conducted and documented as set forth in section 3.6 for any amendments that increase costs under the contract.

3.7.4 Consultant Performance Evaluation

Per CFR 23.172.9 – Recipients and subrecipients of FHWA funds shall have written procedures regarding “monitoring the consultant’s work and in preparing a consultant’s performance evaluation when completed”.

A sample **Consultant Performance Evaluation Form** for LPA use is available on the LPA Resources for Consultant Selection webpage. LPAs may use this sample form provided by ODOT, or they may use their own form if, at minimum, it includes the following evaluations factors:

- an evaluation of the timely completion of work,
- adherence to contract scope and budget, and
- quality of the work.

Contracting agencies should prepare consultant performance evaluation(s) annually but, at minimum, must complete evaluation at the time the work under a contract is completed. The evaluation should include clear relevant information that accurately depicts the consultant’s performance, and should be based on objective facts.

Evaluations of contractor performance, including both negative and positive evaluations, shall be provided to the consultant as soon as practicable after completion of the evaluation. Consultants shall be given a minimum of 30 days to submit comments, rebutting statements, or provide additional information. Agencies shall provide for review at a level above the Agency Contact to consider disagreements between the parties regarding the evaluation. The ultimate conclusion on the performance evaluation is a decision of the LPA. Copies of the evaluation, Consultant response, and review comments, if any, shall be retained in LPA’s files as part of the evaluation.

When making future selections for consultant contracts, LPA shall consider past performance information that is within 3 years of the completion of performance of an evaluated contract.

3.7.5 Errors and Omissions (E&O) Procedure

ODOT’s procedure for Errors and Omissions is applicable to design services and included as Exhibit I within the approved contract template for LPAs. Generally, Exhibit I should be labeled as “RESERVED” when the contract template is used for non-A&E planning or other personal services.

3.7.6 Contract Closeout

LPAs shall, at minimum, comply with the contract closeout procedures set forth in this subsection along with any additional requirements in the policies and procedures adopted by the LPA. Following completion of the contract, LPA’s shall complete contract closeout documentation to certify: acceptance of all required tasks and deliverables, all invoices have been received and paid, prime has paid all subs, an accounting of expenditures under the contract has been completed, consultant performance evaluation has been completed, and all required procurement and contract administration documentation has been completed and placed in the applicable files.

ODOT has developed a Certified LPA Contract Closeout Form for use on federal-aid projects where ODOT has oversight of Local Public Agency (LPA) administered contracts [ref 23CFR 172.5(c)(14)]. This is a required form unless LPA has an equivalent form with the certifications from the above referenced form included.

The [Contract Closeout Form](#) is available at:

4. DOCUMENTATION REQUIREMENTS

Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement (per Oregon law, the retention schedule for most procurement files is 6 years).

The basic expectation is that the effort and documentation for contracting and contract administration should be directly related to the dollar value, importance, and complexity of the contract or amendment. The documentation must include, as applicable, appropriate internal estimates, cost analysis, negotiation, SOW detail, documentation detail, etc.

These records must include, but are not necessarily limited to the following:

(Procurement File for Direct Appointments and all other A&E contracts)

- The basis for determining reasonableness of the contract price (and any amendment that adds cost). Per FARs, FHWA and section 3.6 above, this includes (as applicable):
 - Agency's breakdown of estimated costs
 - Consultant's breakdown of estimated costs
 - Documentation of cost analysis
 - Record of negotiations of the statement of work, costs and profit-fee, with rationale for the compensation method selected
 - approvals of fully loaded negotiated billing rates. (Documentation of use of ODOT approved rates is sufficient to meet this requirement)
- The record of the actions used to develop the contract
- A copy of the executed contract and any amendments

(Procurement File, Additional Requirements for Intermediate and Formal Solicitations)

- Rationale for the method of procurement used
- A copy of the solicitation document(s)
- Documentation of public notice/advertisement, (Formal RFPs only)
- A list of prospective contractors notified of any Solicitation
- Any material communications from interested consultants, solicitation protests or requests for change and responses or addenda issued
- Copies of proposals received, and notices of any proposal rejections
- Evaluation scoring documents with comments to support scores
- Intent to award and not selected notices
- Any award protests, responses and related correspondence (involve ODOT)

(Contract Administration File)

- Documentation/correspondence related to contract administration
- Invoices and approvals
- Consultant progress/status report (maintain copy with each invoice paid that shows work completed)
- Consultant performance evaluation
- Documentation/correspondence related to any contract amendments, including independent cost estimates and negotiations of SOW/costs
- Contract closeout

5. CONFLICT OF INTEREST (COI) DISCLOSURE REQUIREMENTS

No employee, officer or agent of the LPA or ODOT shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

- (i) The employee, officer or agent,
- (ii) Any member of his immediate family,

- (iii) His or her partner, or
- (iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The LPA's and ODOT's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements.

LPAs shall be in conformance with federal, state and local laws regarding conflicts of interest and shall require appropriate disclosures from consultants. For state and federal laws and policies regarding conflicts of interest, see **ODOT COI Guidelines**: <https://www.oregon.gov/ODOT/Business/Procurement/DocsPSK/coiguideines.pdf>.

LPAs shall, to the greatest extent practicable, prevent, identify, and mitigate conflicts of interest for employees of both the contracting agency and consultants **and promptly disclose in writing any potential conflict to ODOT and FHWA**, as specified in 2 CFR 200.112 and 23 CFR 1.33, and the requirements of 23 CFR Part 172.5.

6. VARIOUS FEDERAL REGULATIONS & FHWA POLICIES

6.1 Award to Responsible Contractors

Grantee (ODOT) and subgrantees (LPAs) will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

6.2 Protest Procedures

Grantee and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

- (i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and
 - (ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest.
- Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

6.3 Awarding Agency Review

(1) Grantees and subgrantees must make available, upon request of the awarding agency (ODOT/FHWA), technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

- (i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or
- (ii) The procurement is expected to exceed the simplified Acquisition threshold (\$250,000 - see FAR 2.101 and [FHWA Notice](#)) and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or
- (iii) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.