



## Section 6 – Consultant Contracts

---

### GENERAL

If the local agency is not adequately staffed to provide the necessary engineering (including utility negotiations), they may engage a consulting engineer to provide professional services. The cost of both design and construction related services work by consultants is eligible for federal participation provided that prior approval of the contracts by MoDOT is received. Federal participation in the cost of construction engineering is limited to 15% of the net federal participating construction costs, whether performed by consultant, in-house, or both for all contracts statewide. Construction engineering can be greater than 15% if requested by the local agency on a case-by-case basis prior to the award of the contract. Construction inspection services may be included in the same agreement with design services. Preliminary engineering charges are permitted through the construction contract award stage. Charges after the award of the construction contract are considered to be construction engineering and cannot be charged against the design portion of the agreement. RW Acquisition Services shall be handled under a separate RW Services Agreement. This contract/agreement will be submitted at the same time the Request for Obligation of RW Funds (A-Date Request) is submitted.

RW Project Cost Estimates, Title Work, RW Plan Development, and Legal Description Writing may be included in the same agreement with Design Services and are reimbursable as preliminary engineering expenses. All other RW Acquisition Activities eligible for reimbursement cannot be incurred or invoiced for reimbursement until the A-Date has been approved and the LPA has been notified.

On federal aid projects, RW costs and incidental expenses are only reimbursable after MoDOT District staff reviews and approves the LPA personnel or the RW Acquisition Contractor that will perform the RW Acquisition Activities.

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

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

The local agency should include a letter stating the necessity for utilizing a consultant for the

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

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

All consultants receiving individual awards for \$100,000 or more and all sub recipients must certify that the organization and its principals are not suspended or debarred. Each local agency may, but is not required to, check the Nonprocurement List. Copies may be obtained by purchasing a yearly subscription from the Superintendent of Documents, US Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Inquiry and Order Desk at (202) 783-3238. The electronic version can be accessed on the Internet at <http://www.arnet.gov/epls>. The user will be required to record their name and organization for purposes of the Computer Matching and Privacy Act of 1988.

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

## **SUBCONSULTANTS**

### **Sub consultant cost exceeding \$25,000**

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

### **Sub consultant cost NOT exceeding \$25,000**

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

## **SELECTION PROCEDURES**

Local agencies must use competitive negotiation for the procurement of engineering and design-related services when Federal-aid highway funds are involved in the contract. Local agencies must submit to MoDOT a description of procedures they use to evaluate and select consultants. Figure 6-2 lists criteria that should be considered when selecting a consultant. These criteria

must meet minimum federal requirements and also be in compliance with Sections 8.289 and 8.291, RSMo (Figure 6-3).

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

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

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

## **SCOPE OF SERVICES**

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

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

## **BASIS OF PAYMENT**

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

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

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

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

## **EVALUATIONS**

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

## **CONTRACT SUBMITTAL**

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

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

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

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

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

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

## **SUPPLEMENTAL AGREEMENTS**

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

## **CONSULTANT PERFORMANCE APPRAISAL**

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