

40 U.S.C. Chapter 11, Section 1101 to 1104, Selection of Architects and Engineers (Brooks Act)
(http://www.law.cornell.edu/uscode/html/uscode40/usc_sup_01_40.html)

41 U.S.C. 403(11), Public Contracts, Definitions, Simplified Acquisition Threshold
http://www.law.cornell.edu/uscode/html/uscode23/usc_sup_01_23.html

23 CFR 1.11, Engineering Services

23 CFR 1.33, Conflicts of Interest

23 CFR 172, Administration of Engineering and Design Related Service Contracts

http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=383e9b03f148211a3b016b892c610530&c=ecfr&tpl=/ecfrbrowse/Title23/23tab_02.tpl

48 CFR 31, Contract Cost Principles and Procedures

http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=1ecf72598709982a46e39c4c93875104&c=ecfr&tpl=/ecfrbrowse/Title48/48tab_02.tpl

49 CFR 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (Common Grant Rule)

49 CFR 26, Participation By Disadvantaged Business Enterprises In Department Of Transportation Financial Assistance Programs

http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=383e9b03f148211a3b016b892c610530&c=ecfr&tpl=/ecfrbrowse/Title49/49tab_02.tpl

Contract Administration Core Curriculum Participant's Manual and Reference Guide 2006;

<http://www.fhwa.dot.gov/programadmin/contracts/index.htm>

Federal Highway Administration Area Engineer Manual 2010

http://one.dot.gov/fhwa/CPMDSS/Workforce%20Management%20Documents%20Library/FINAL%202010%20AE%20Manual%206-21-10%20_FINAL.pdf

FHWA Memorandum – “Awarding Engineering and Design Services Contracts Based on Brooks Act Requirements,” December 12, 2005

<http://www.fhwa.dot.gov/programadmin/121205.cfm>

FHWA Employment of Consultants Web Site:

<http://www.fhwa.dot.gov/programadmin/consultant.cfm>

FHWA Internal Consultant Services SharePoint Site:

<http://one.dot.gov/fhwa/DesignDSS/Design%20Topics/Topic%20Area%20-%20Consultant%20Services.aspx>

Administration of Engineering and Design Related Services Contracts – Questions and Answers

<http://www.fhwa.dot.gov/programadmin/172qa.cfm>

Guide for Consultant Contracting, AASHTO, Washington, DC, March 2008

Uniform Audit and Accounting Guide for Audits of Architectural and Engineering (A/E) Consulting Firms, AASHTO, Washington, DC 2010 Edition

<http://audit.transportation.org/Pages/default.aspx>

Increased Reliance on Contractors Can Pose Oversight Challenges for Federal and State Officials, Government Accountability Office Report (GAO-08-198), January 2008
<http://www.gao.gov/new.items/d08198.pdf>

Consultant Procurement and Administration of Engineering and Design Services, Final Report, Office of Professional and Corporate Development, Program Improvement Team, FHWA, December 2008

Oversight of Design and Engineering Firms' Indirect Costs Claimed on Federal-aid Grants, USDOT Office of Inspector General Report (ZA-2009-033), February 2009
<http://www.oig.dot.gov/library-item/4710>

FHWA Order M1100.1A FHWA Delegations and Organization Manual
<http://www.fhwa.dot.gov/legsregs/directives/orders/m11001a.htm>

III. PURPOSE/OBJECTIVE

To assist in the establishment, review, approval, and oversight of procedures for the procurement and administration of engineering and design related services utilizing Federal-aid highway program funding and directly related to projects subject to the provisions of 23 U.S.C. 112(a) to ensure qualified consultants are obtained through an equitable selection process, that prescribed work is properly accomplished in a timely manner, and at a fair and reasonable cost.

IV. DEFINITIONS

Full Oversight Projects – projects that have not been delegated under 23 U.S.C. 106(c).

State Administered Projects – projects that have been delegated under 23 U.S.C. 106(c), also known as Delegated Projects.

STA – State Transportation Administration

Audit – a review to test the contractor's compliance with the requirements of the cost principles contained in 48 CFR part 31.

Architectural and engineering services –

1. professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;
2. 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; and

3. such 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 operation and maintenance manuals, and other related services.

Brooks Act- commonly used term for the Federal Property and Administrative Services Act of 1949 (Public Law 92–582, 86 Stat. 1278 (1972) and 40 U.S.C. Chapter 11, Section 1101-1104, that requires all architectural and engineering services are negotiated based on demonstrated competence and qualifications and at fair and reasonable prices.

Cognizant agency – any Federal or State agency that has conducted and issued an audit report of the consultant's indirect cost rate that has been developed in accordance with the requirements of the cost principles contained in 48 CFR part 31.

Competitive negotiation – any form of negotiation that utilize qualifications-based procedures complying with the Brooks Act (40 U.S.C. 1101-1104) (23 CFR 172.5(a)(1)).

Consultant – the individual or firm providing engineering and design related services as a party to the contract.

Consultant performance evaluation – a process in which the STA monitors the consultant's work and prepares a consultant performance evaluation (23 CFR 172.9(a)(5)) which may be used to provide feedback on their performance, identify areas of improvement, or as input into selection of the consultant for future assignments.

Contracting agencies – State Transportation Agency (STA) or local governmental agencies that are responsible for the procurement of engineering and design related services.

Engineering and design related services – program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services with respect to a construction project subject to 23 U.S.C. 112(a).

One-year applicable accounting period – the annual accounting period for which financial statements are regularly prepared for the consultant.

Prequalification – a procedure to review and evaluate the qualifications of professional and technical firms before their services are needed by an STA.

RFP – Request for Proposals, is an invitation for consultants through a competitive process, to submit a proposal on a specific project or service.

RFQ – Request for Qualifications, the document issued by the contracting agency prior to the RFP that typically: describes the project in enough detail to let potential proposers determine if they wish to compete; and forms the basis for requesting qualifications submissions in a "two-phase" selection process. It is used to gather vendor information from multiple companies to generate a pool of prospects and may ease the RFP review process by preemptively short-listing candidates which meet the desired qualifications.

On-call contracts or IDIQ – indefinite delivery/indefinite quantity, this is a type of contract that provides for an indefinite quantity of supplies or services during a fixed period of time. These contracts must contain maximum limits for both contract time and costs to comply with the requirements of the Brooks Act.

Noncompetitive Contract Negotiations- procurement method which may be used to contract with a single contractor when a service is only available from a single source, an emergency situation does not permit the time necessary to conduct competitive negotiations, or competition is determined to be inadequate after solicitation from a number of sources (23 CFR 172.5(a)(3)).

Simplified acquisition (small purchase) threshold - with regard to Federal-aid highway program participation, the simplified acquisition threshold is the lesser of the Federal threshold of \$100,000(as established in [41 U.S.C. 403\(11\)](#)) or a State's threshold established in State laws, regulations, or policies.

Small Purchases Threshold – "The term 'simplified acquisition threshold' means \$100,000." ([41 U.S.C 403 \(11\)](#))

V. SCOPE

This standard operating procedure (SOP) is intended for Indiana Division Office personnel performing review and approval of consultant procurement, management, and administration of program and project level activities. For full oversight projects, FHWA performs this review in accordance with the procedures outlined in this SOP. For State administered projects, the Indiana DOT performs this review in accordance with their FHWA approved "Professional Services Contract Administration Manual". Programmatic reviews and approvals of these procedures are included in the scope of this document.

VI. PROCEDURES

The procedures outlined in this SOP are applicable engineering and design related services (as defined in 23 U.S.C.112(b)(2)(A) and 23 CFR 172.3) utilizing Federal-aid highway program funding and directly related to an ultimate construction project subject to the provisions of 23 U.S.C.112(a). These procedures may not be applicable to planning, research, or design-build contracts. The Federal Highway Administration (FHWA) approved procedures for Indiana to comply with the Federal-aid requirements are outlined in the "Professional Services Contract Administration Manual".

Federal-aid local public agency (LPA) projects that utilized consultant services are required by INDOT LPA policy to comply with INDOT's "Architectural and Engineering Firm Selection Process for Local Public Agencies"

Indiana DOT Written Procedures

The "Professional Services Contract Administration Manual" is updated by INDOT's Division of Contract Administration. The process of updating the "Professional Services Contract Administration Manual" may involve INDOT Divisions that utilize consultant services and also includes INDOT's Legal Counsel, Economic Opportunity Department, Finance Department and is approved by the FHWA Division Office.

In the review of INDOT's written procedures as required by 23 CFR 172.9(a), the following items need to be addressed:

- Do the written policies and procedures define the types of engineering and design related consultant services subject to a Brooks Act compliant procurement as defined in 23 U.S.C. 112(b)(2)(A) and 23 CFR 172?
- Are State equivalent or alternate procedures (allowed prior to November 30, 2005) now excluded from the selection process when Federal-aid highway funding is utilized? (See <http://www.fhwa.dot.gov/programadmin/121205.cfm>)
- Are all procurement methods that Indiana DOT is interested in using (competitive negotiation, small purchase, or noncompetitive negotiation) described in the approved written procedures (23 CFR 172.5)?
- In reviewing the written procedures of the Indiana DOT or subrecipient, are the following items addressed as appropriate to the method of procurement for each proposed project? (40 U.S.C. § 1101 - 1104)
 - Preparing a scope of work, evaluation factors and cost estimate for selecting a consultant;
 - Soliciting proposals from prospective consultants;
 - Use of prequalification (if applicable);
 - Evaluation of proposals and the ranking/selection of a consultant;
 - Negotiation of the reimbursement to be paid to the selected consultant;
 - Monitoring the consultant's work and in preparing a consultant's performance evaluation when completed; and
 - Determining the extent to which the consultant, who is responsible for the professional quality, technical accuracy, and coordination of services, may be

reasonably liable for costs resulting from errors or deficiencies in design furnished under its contract.

- Do the written procedures require advertising the engineering services contracts to encourage competition including both in-state and out-of-state firms?
- Do the written procedures describe how on-call contacts are solicited and approved and when it is appropriate to use an on-call contractor rather than an independent solicitation?
- Do the written procedures prohibit certain items from being included in selection criteria? (Per Brooks Act, selection is to be based on demonstrated competence and qualification for the type of professional services required). For example:
 - Price
 - Indirect cost rate
 - In-state preference
 - Locality preference criterion in excess of 10 percent
 - Disadvantaged Business Enterprise (DBE) / Small Business Enterprise (SBE) participation criterion in excess of 10 percent
- For projects that have been delegated under 23 U.S.C.106(c) (State administered), do the written procedures (PPM 300.12 and/or IM 3.305) outline the method of approvals for contracts, contract modifications, and contract settlements satisfactorily?
- For projects that have not been delegated under 23 U.S.C.106(c) (full oversight) or that are subject to 23 U.S.C.106(h) (major projects), do the written procedures outline the process for obtaining prior approval from the Division for contracts, contract modifications, and contract settlements (23 CFR 172.9(a) to (c))?
- Do the written procedures require FHWA approval prior to using Federal-aid highway funding to procure a consultant to act in a management role for the Indiana DOT (23 CFR 172.9(d))?
- For State administered projects and subrecipient projects, does the Stewardship and Oversight Agreement require that the Indiana DOT act in the role of FHWA in administering these projects (23 U.S.C.106)?
- Do the written procedures address that adding extra work/scope to the contract should be checked against violating procurement under the Brooks Act by including work/scope not included in the original advertisement/request for proposal (RFP) from which a qualifications based selection was made?

- Do the written procedures address that extra work/scope on small purchase contracts in excess of the smaller of either the Federal limit of \$100,000 (41 U.S.C.403(11)) are not eligible for Federal-aid and the entire contract may become ineligible for Federal-aid (23 CFR 172.5(a)(2))?
- Do the written procedures prohibit payment methods such as cost plus a percentage of cost and percentage of construction cost (23 CFR 172.5(c))?
- Do the written procedures describe the methods to check for suspended or debarred contractors before awarding the work (49 CFR 29, 23 CFR 630.112(c)(4), and FHWA Order 2000.2A)?
- Do the written procedures outline a records retention policy in accordance with 49 CFR 18.42(b)?
- Do the written procedures address conflicts of interest (23 CFR 1.33)?
- Do the roles and responsibilities defined in the Indiana DOT written policies and procedures agree with those defined in the Stewardship and Oversight Agreement?

After the procedures have been reviewed and all deficiencies have been addressed the procedures should be approved, the approval returned to INDOT, and a copy of the procedures and approval filed in Subject File 550.

Procurement, Contracts, and Approvals

For full oversight or potential oversight projects the Indiana DOT and Indiana Division use a two-step approval process. If the Indiana DOT determines the Federal-aid will or may be used on the subject consultant contract and that the project is or may be a full oversight project the selection package is sent to FHWA for concurrence.

The selection package consists of a copy of the RFP, web publication of advertisement, blank selection matrix and the ranked listing approved by the INDOT Commissioner. This package will either be transmitted in paper format or transmitted electronically (sent to the applicable FHWA Transportation Engineer).

In performing the review of selection the following will be considered:

- Was the appropriate method of procurement used (Reference Chapter 2 of INDOT's "Professional Services Contract Administration Manual")?
 - Standard Architectural and Engineering (A/E) Firm Selection Process (2.1.1)
 - Non-Architectural and Engineering Firm Selection Process (2.2.1)
 - Small purchase (2.3.1)
 - Sole Source Selection (2.4.1)

- Two-step Selection Process (2.5.1)
 - Consideration of Disadvantaged Business Enterprises (DBE) in the procurement of engineering and design related services subject to 23 U.S.C.112(b)(2) in accordance with 49 CFR 26 (23 CFR 172.5(b))
 - Ensure that small purchase procedures limits are in compliance with 41 U.S.C.403(11) (currently \$100,000)

The FHWA Transportation Engineer will review the consultant agreements or supplements for their respective program area with assistance as needed from members of other office teams. They will ensure that INDOT's certification is included in the request letter and that the consultant agreement checklist has been completed. The checklist will be used to review each consultant agreement. INDOT's independent estimate of man-days will be reviewed and compared to the consultant's negotiated estimate to determine if the consultant's proposal is reasonable. If there are any questions then INDOT should be contacted for clarification.

Review and concurrence/rejection of the selection package should be completed in less than two weeks and the concurrence/rejection returned to the party who transmitted the request to FHWA. Rejections should be discussed with the Program Delivery Team Leader prior to transmitting to INDOT.

When reviewing the agreement for approval the checklist in Appendix A should be completed as a guide. **INDOT should prepare and supply an independent estimate for the work requested that should be included in the approval request.**

Payment method should also be checked by the Transportation Engineer during the review. Those specifically prohibited include cost plus a percentage of cost and percentage of construction cost. If lump sum payment method is used, the scope of work should be reviewed to ensure the deliverables are well defined.

Contract settlements will be handled in a manner similar to contract revisions. IN DOT should keep FHWA informed during all negotiations or this may be reason for nonparticipation in the settlement.

Audits

Audits of consulting firms will be reviewed against the following requirements:

- Audits of consultants are to be conducted in accordance with the cost principles contained in 48 CFR 31 (23 U.S.C. 112(b)(2)(B) and 23 CFR 172.7(a)).
- The acceptance of indirect cost rates established in accordance with the FAR by the cognizant agency if they are not under dispute and application of those rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment (23 U.S.C. 112(b)(2)(C) to (D) and 23 CFR 172.7(b)) will be used for contracts by Indiana DOT and local public agencies utilizing Federal-aid.
- These rates shall not be subject to any administrative or de facto ceiling (23 U.S.C. 112(b)(2)(D) and 23 CFR 172.7(b)).
- If the indirect cost rates are under dispute, a provisional rate negotiated or an independent audit may be performed to establish a rate for the specific contract (23 CFR 172.7(c)).

Administration

As contracts, extra work orders, or contract settlements are approved by FHWA, the Transportation Engineer should check that appropriate Federal funds are authorized/obligated for the work outlined in the agreement. The authorization/obligation of these projects will follow the procedures outlined in the Indiana Division procedure for project authorization. The authorization/obligation of this work must take place prior to the consultant starting the work or the work will be declared ineligible (23 CFR 630.106).

As extra work/scope is added to the contract, it will be checked for compliance with procurement under the Brooks Act by including work/scope not included in the original advertisement/request for proposal (RFP) from which a qualifications based selection was made. For contracts procured under the small purchase procedure an additional check should be done on extra work requests to ensure that the total contract cost does not exceed the appropriate limits of \$100,000 (41 U.S.C. 403(11)). If the contract amount with the extra work would exceed the prescribed limit, this amount will be declared not eligible for Federal-aid and the entire contract checked to determine if all Federal-aid should then be withdrawn (23 CFR 172.5(a)(2)).

For full oversight projects:

- At the completion of the contract, the Transportation Engineer will verify with contracting agency's project manager that the deliverables specified in the contract have been provided in a satisfactory manner.

Final vouchers for consultant contract projects will be handled in accordance with the Indiana Division's SOP for project closeout.

Reviews of the consultant program for the Indiana Division will be based upon the outcome of the risk assessment process rather than scheduled on a cyclical basis.

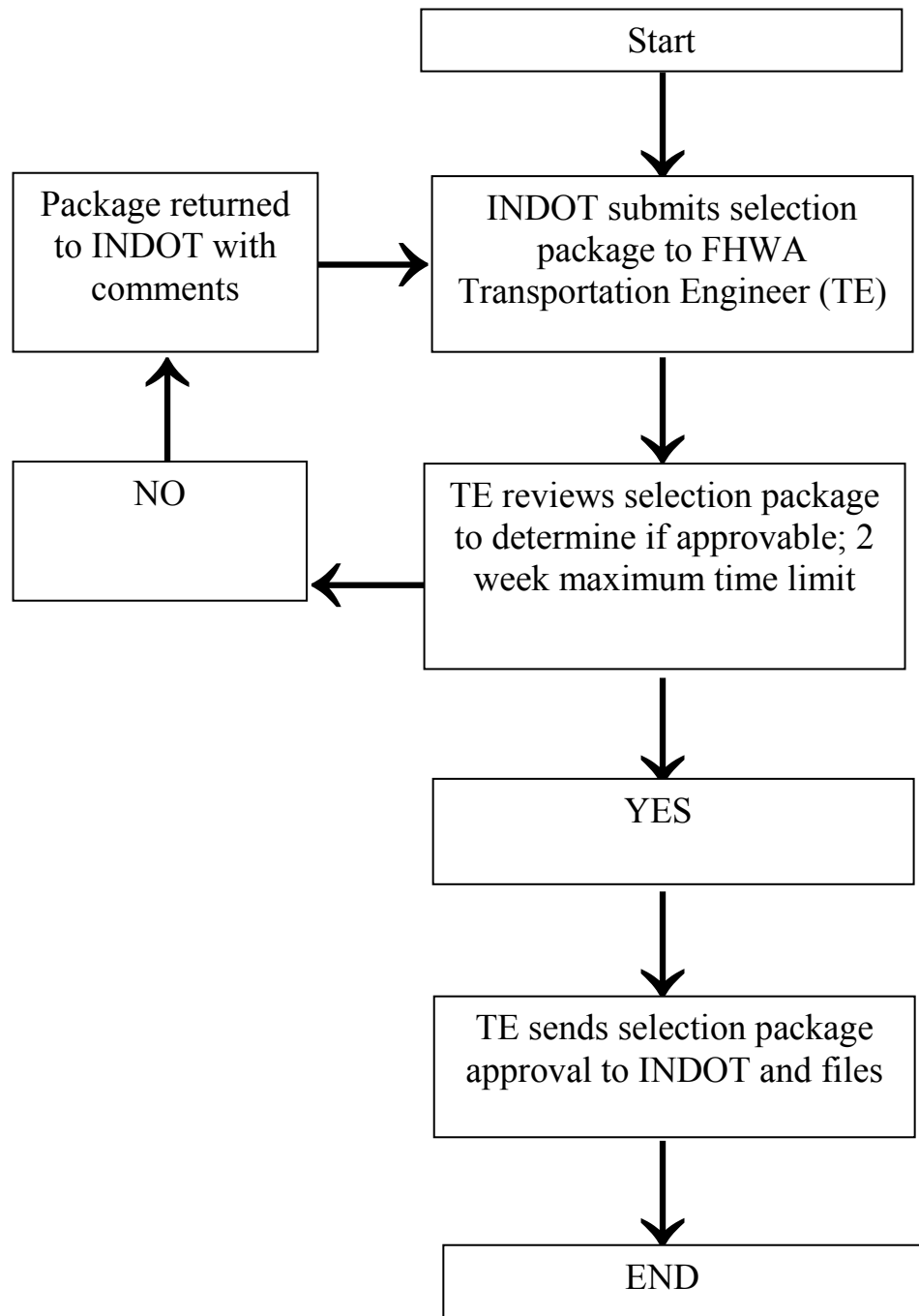
VII. CONTROLS

Approvals of consultant selection, contracts, and modifications will be in accordance with FHWA and the Indiana Division's Delegation of Authority.

For full oversight projects, prior to final voucher approval, a review will be conducted to ensure that all contract requirements have been met and that contract and contract modifications have been approved and accounted for appropriately.

VIII. FLOWCHART

FULL OVERSIGHT CONSULTANT SELECTION



IX. APPENDIX

Appendix A – Consultant Agreement Checklist

* Questions to be answer by Indiana DOT	YES	NO	COMMENTS
*1) Is the consultant’s prequalification status current? If not, please explain			
*2) Has an audit to establish a consultant’s indirect cost rate been performed in accordance with the cost principles contained in 48 CFR 31 (23 U.S.C. 112(b)(2)(C) and 23 CFR 172.7(b))?			
*3) When was the consultant’s audited indirect cost rate last approved (The rate to be approved annually)?			Date of Audit _____
*4) What is the consultant’s latest audited indirect cost rate?			Indirect Cost Rate _____
5) Is the latest indirect cost rate the same as shown in the consultant agreement?			
6) Does the Scope of Work appear to be appropriate? (Does it cover all work necessary for the completion of the project?)			
7) Was Indiana DOT's independent estimate submitted? If not, request Indiana DOT's independent estimate.			
8) Does the consultant’s estimate compare favorably to Indiana DOT’s independent estimate. Compare consultant’s estimate for each personnel classification (i.e., Project Manager, Project Engineer, Technician, etc.) for each task/work item to the Indiana DOT estimate. Does it look reasonable?			
9) Is the Net Fee Rate (Profit) reasonable, typically less than 15 percent?			
*10) Has a DBE goal been set by Indiana DOT? What is the goal?			DBE Goal _____
*11) What percent of the total contract amount will be paid to the DBE(s)			Percent Paid to DBE _____
12) Are the appropriate Title VI Clauses included in the contract? (Consult with the Civil Rights Specialists, if necessary)			
13) Is the certification clause regarding debarment, and suspension included in the contract? Has the consultant concurred without any modifications to the clause?			

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Check to make sure known suspended or debarred consultants are not being used (49 CFR 29, 23 CFR 630.112(c)(4), and FHWA Order 2000.2A).			
14) Supplemental Agreements: Is the scope of work within the original advertised scope in the request for proposal from which a qualifications based selection was made? If not, Explain.			
15) Is the payment method prescribed in the contract allowable? Those specifically prohibited include cost plus a percentage of cost and percentage of construction cost.			
16) Other			

Signature (INDOT) Date

Signature (FHWA) Date