

**Procurement, Management, and Administration of Engineering and Design
Related Services - Questions and Answers**

Update History

July 20, 2011 Redesigned web page with complete set of updated Questions & Answers published.

March 2, 2012 Revisions to Conflicts of Interest Questions & Answers Nos. 1, 5 and 6 to further clarify the controls, oversight practices, and issues for a contracting agency to consider regarding conflicts of interest.

Conflicts of Interest Q&A No. 1: Noted consideration of both direct and indirect conflicts of interest as well as the appearance of a conflict of interest. Provided additional links to other Q&As and reference material.

Conflicts of Interest Q&A No. 5: Provided additional guidance for contracting agency consideration with determining if a consultant could provide services on both the design and construction phases of a Federal-aid highway project. Provided additional guidance regarding the procurement of a consultant to perform both design and construction phase services when necessary controls and oversight practices are established.

Conflicts of Interest Q&A No. 6: Identified additional mitigating controls and provided additional links to reference material.

August 1, 2016 Revisions to complete list of Q&A's to reflect new published regulations (23 CFR 172, effective June 22, 2015)

May 23, 2017 Added Competitive Negotiation/Qualifications Based Selection Procurement Procedure Q&A No. 12 regarding technical prequalification.

Fixed broken or misdirected links.

PROCUREMENT, MANAGEMENT, AND ADMINISTRATION OF ENGINEERING AND DESIGN RELATED SERVICES - QUESTIONS AND ANSWERS

Last Updated May 19, 2017

INTRODUCTION

This web page provides guidance that supplements Federal laws and regulations relating to the procurement, management, and administration of engineering and design related services using Federal-aid highway program (FAHP) funding. As Federal laws and regulations governing these service contracts are complex, the purpose of the guidance is to clarify the statutory and regulatory requirements of the Federal Highway Administration (FHWA) associated with the use of engineering and design related consultant services.

DEFINITIONS

Unless indicated otherwise, the questions and answers pertain to engineering and design related service contracts (as defined in 23 U.S.C. 112(b)(2)(A) and 23 CFR 172.3) using FAHP funding and directly related to an ultimate construction project. Unless otherwise specified, the definition of the terms provided within the definition section of the referenced Federal laws and regulations (23 U.S.C. 101, 40 U.S.C. 1102, 23 CFR 172.3, and 48 CFR 31.001) are applicable to these questions and answers.

While several regulatory requirements and policies contained within these questions and answers are applicable to design-build, public private partnerships, and other innovative project-delivery methods, this guidance is not intended to address these methods. For additional information regarding design-build contracting, please visit the FHWA Design Build web site at: <https://www.fhwa.dot.gov/construction/cqit/desbuild.cfm>. Information on other innovative contracting methods may be obtained at: <https://www.fhwa.dot.gov/construction/cqit/sep14.cfm>.

ACRONYMS

AASHTO - American Association of State Highway and Transportation Officials

CASB - Cost Accounting Standards Board

CE - Categorical Exclusion

CFR - Code of Federal Regulations

CPA - Certified Public Accountant

DBE - Disadvantaged Business Enterprise

DOT - Department of Transportation (or equivalent State highway agency)

FAHP - Federal-aid highway program

FAR - Federal Acquisition Regulation

FHWA - Federal Highway Administration
FONSI - Finding of No Significant Impact
GAGAS - Generally Accepted Government Auditing Standards
NEPA - National Environmental Policy Act
ROD - Record of Decision
U.S.C. - United States Code

QUESTIONS AND ANSWERS

The guidance is provided in the form of questions and answers that have been categorized as noted below. The statutory and regulatory bases, as well as references to other resource material, are provided where appropriate within each specific question and answer. The references to related questions and answers, statutory and regulatory provisions, and supporting information contained in each response are intended to enhance understanding and provide further clarification of Federal requirements and FHWA policies associated with the use of engineering and design related consultant services.

Select a category to access the available questions and answers.

- I. [Competitive Negotiation/Qualifications Based Selection Procurement Procedure](#)
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I. Competitive Negotiation/Qualifications Based Selection Procurement Procedure

1. [What is the competitive negotiation procurement procedure?](#) *(Updated 08.01.2016)*
2. [When must competitive negotiation/qualifications based selection \(Brooks Act\) procedures be used for procuring engineering and design related services?](#) *(Updated 08.01.2016)*
3. [What are engineering and design related services?](#) *(Updated 08.01.2016)*
4. [Are competitive negotiation/qualifications based selection \(Brooks Act\) procurement procedures required for FAHP funded consultant services that are not directly related to a construction project or not considered engineering and design related, such as for planning studies?](#) *(Updated 08.01.2016)*
5. [If there is no FAHP funding participating in engineering and design related services contract, are the Federal competitive negotiation/qualifications based selection \(Brooks Act\) procurement procedures still applicable?](#) *(Updated 08.01.2016)*
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[announcement/advertisement from which a qualification based evaluation and selection were conducted?](#) (Updated 08.01.2016)

12. [May a contracting agency disqualify an engineering services consulting firm from a technical prequalification list for Federal-aid highway reimbursed contracts based upon a firm's refusal to provide financial information requested by the agency under a risk-based analysis compliant with 23 CFR 172.11\(c\)\(2\)?](#) (Updated 05.15.2017)
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1. What is the competitive negotiation procurement procedure? (Updated 08.01.2016)

Competitive negotiation (as specified in 23 U.S.C. 112 (b)(2)(A) and 23 CFR 172.7(a)(1)) is based on qualifications based selection procedures (as specified in 40 U.S.C. 1101-1104 (Brooks Act)) and is the primary method of procurement for Federal-aid highway program (FAHP) funded engineering and design related service contracts associated with a construction project.

The Brooks Act requires the selection of engineering and design related services on the basis of demonstrated competence and qualifications for the type of professional services required and negotiation of fair and reasonable compensation for the services provided. The qualifications based selection procedures prescribed in the Brooks Act require public announcement/advertisement of all requirements for the desired services (as specified in 40 U.S.C. 1101 and 23 CFR 172.7(a)(1)) ([See Competitive Negotiation Question & Answer No. 6](#)). The Brooks Act further requires evaluation of current statements of qualifications, performance data, and statements regarding the proposed project or services submitted by prospective consulting engineering firms. Contracting agencies shall then select and rank a minimum of three firms based on demonstrated competence and qualifications in accordance with the established/advertised criteria (as specified in 40 U.S.C. 1103) ([See Competitive Negotiation Question & Answer Nos. 7-10](#)).

Upon completion of the qualifications based evaluation and ranking of proposals, the contracting agency initiates negotiations with the most highly qualified firm to arrive at a fair and reasonable compensation for the solicited services. Fair and reasonable compensation involves consideration of the scope, complexity, professional nature, and estimated value of the services to be rendered (as specified in 40 U.S.C. 1104). If the contracting agency and most highly qualified firm are unable to negotiate a fair and reasonable contract, the agency may formally terminate negotiations and undertake negotiations with the next most qualified firm, continuing the process until an agreement is reached ([See Contract Negotiation Question & Answer No.1](#)).

2. When must competitive negotiation/qualifications based selection (Brooks Act) procedures be used for procuring engineering and design related services? (Updated 08.01.2016)

In general, competitive negotiation/qualifications based selection procedures must be followed when procuring engineering and design related services using FAHP funds where those services are directly related to a construction project (as specified in 23 U.S.C. 112(b)(2)(A) and 23 CFR 172.7(a)(1)). Small purchases and noncompetitive procedures are the only other procurement methods that may be utilized under limited conditions applicable to each method. For additional guidance regarding these procurement methods, please reference the [Other Procurement Procedures Section](#).

3. What are engineering and design related services? (Updated 08.01.2016)

Engineering and design related services are defined as: program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services (as specified in 23 U.S.C. 112(b)(2)(A) and 23 CFR 172.3). The Brooks Act further defines architectural and engineering related services as professional services of an architectural or engineering nature, as defined by State law, if applicable, that are required to be performed, approved, or logically/justifiably performed by a person licensed, registered, or certified as an engineer or architect to provide the services (as specified in 40 U.S.C. 1102(2)).

4. Are competitive negotiation/qualifications based selection (Brooks Act) procurement procedures required for FAHP funded consultant services that are not directly related to a construction project or not considered engineering and design related, such as for planning studies? (Updated 08.01.2016)

Under 23 U.S.C. 112 (b)(2), Brooks Act procurement must have a construction related nexus. For engineering services not related to construction, 2 CFR 200.317 provides that when procuring services under a Federal award, unless a Federal statute, like 23 U.S.C 112(b)(2)/ 23 CFR Part 172 provides otherwise, State (and local public agencies pursuant to 2 CFR 1201.317) follow the same policies and procedures the State uses (or permits the local public agency to use) for procurement with its non-Federal funds.

Thus, the applicable procurement requirements for the engineering services unrelated to highway construction is generally dependent upon the definition of engineering and the procurement code within State and local laws, regulations, policies, and procedures. If the services in question require qualifications based selection under State and local requirements, compliance with these requirements and use of qualifications based selection procedures is required as a condition for participation of Federal-aid funding in the services.

It is important to note that planning studies or other services which are not included in the definition of engineering and design related services ([See Competitive Negotiation Question & Answer No. 3](#)), and generally are not directly related to a construction project, will not require procurement through a qualifications based selection process under Federal laws and regulations pertaining to the FAHP. Planning studies, for example, are typically based on a regional or corridor assessment of a facility or network (not project specific) where subsequent engineering and project development services for a specific project must be undertaken prior to letting the project for construction. Although Brooks Act procurement is not required under 23 U.S.C. 112(b)(2) in those situations, State and local licensing and procurement laws and regulations may require use of a State qualifications based selection procedures to procure these services.

The determining factor for the required use of competitive negotiation/qualifications based selection procedures is whether the services being procured are related to a specific construction project (subject to the provisions of 23 U.S.C. 112(a)) and/or whether the services require work to be performed, provided by, or under the direction of a registered engineer or architect (as specified in 40 U.S.C. 1102(2)). 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.

5. If there is no FAHP funding participating in an engineering and design related services contract, are the Federal competitive negotiation/qualifications based selection (Brooks Act) procurement procedures still applicable? (Updated 08.01.2016)

No, Federal laws and regulations for procuring, managing, and administering engineering and design related services contracts are specific to the use of FAHP funds for the engineering and design related services.

If FAHP funds are not participating in an engineering and design related services contract, the contracting agency may procure the services in accordance with its own established policies and procedures which reflect applicable State and local laws. However, the costs of consultant service contracts that utilize only State or local funding which were not procured, negotiated, or administered in accordance with applicable Federal laws and regulations would not be eligible to be applied toward the non-Federal share of costs for subsequent phases (e.g.,

construction) of a FAHP funded project (as the cost is not authorized by FHWA and may not be in compliance with applicable federal requirements specified in 23 CFR 1.9(a)). More information on non-Federal match requirements may be found at:

<https://www.fhwa.dot.gov/legsregs/directives/policy/memonfmr20091229.htm>.

6. Under competitive negotiation/qualifications based selection (Brooks Act) procurement procedures, do engineering and design related services contracts have to be solicited by public announcement/advertisement? (Updated 08.01.2016)

Yes, in order to assure that in-state and out-of-state consulting firms are given a fair opportunity to be considered for award of an engineering and design related services contract, the contracting agency must solicit services by public announcement/advertisement and identify all requirements that consulting engineering firms must fulfill along with all other factors to be used in evaluating proposals (as specified in 40 U.S.C. 1101 and 23 CFR 172.7(a)(1)).

The solicitation should include the evaluation criteria with its weighting/relative importance that will be used to rate the firms for their competency and qualifications to perform the type of work requested. The solicitation should provide a clear and precise statement of the work to be performed, estimated schedule to accomplish the services, and method of compensation/payment. The solicitation must also allow sufficient time for firms to prepare and submit a proposal in response to the solicitation (as specified in 23 CFR 172.7(a)(1)(ii)(G)).

State-imposed conditions unrelated to performance of the contract or contractor that limit qualified firms from fairly competing or provide advantages to certain classes of potential firms are inconsistent with the competitive negotiation/qualifications based selection process, the guiding principle of Federal laws and regulations applicable to procurement of engineering and design related consultant services. Applicable Federal laws and regulations do not permit any State or local requirements that limit competition except those related directly to the qualifications of consulting firms to perform the work in a competent and responsible manner.

7. Under competitive negotiation/qualifications based selection (Brooks Act) procurement procedures, may price be an evaluation criterion during the advertisement and selection phase? (Updated 08.01.2016)

No. Competitive negotiation procurement is based upon demonstrated competence and qualifications for the type of professional services desired (as specified in 40 U.S.C. 1101 and 23 CFR 172.7(a)(1)(iii)(A)).

As such, price shall not be used as a criterion in the evaluation and ranking/selection of the most highly qualified firm (as specified in 23 CFR 172.7(a)(1)(iii)(B)). All price/cost related items which include, but are not limited to direct salaries/wage rates, indirect cost rates, and other direct costs are prohibited from being used as an evaluation criterion under competitive negotiation/qualifications based selection procedures (as specified in 23 CFR 172.7(a)(1)(iii)(B)).

8. Under competitive negotiation/qualifications based selection (Brooks Act) procurement procedures, may an in-State preference be used in the advertisement and selection phase? (Updated 08.01.2016)

No, an in-State preference does not assess the qualifications of potential service providers and application would limit competition from qualified out-of-State firms.

The intent of a competitive negotiation/qualifications based selection (Brooks Act) process is to develop a wide pool of potential service providers to assess qualifications for the advertised work or task, and selection must be based on qualifications. Therefore, the use of in-State preference as a criterion is prohibited (as specified in 23 CFR 172.7(a)(1)(iii)(C)). Through public advertisement, in-State and out-of-State firms must be given a fair opportunity to be considered for award of a FAHP funded engineering and design related services contract (as specified in 23 CFR 172.7(a)(1)). ([See Competitive Negotiation Question & Answer No. 6](#))

9. Under competitive negotiation/qualifications based selection (Brooks Act) procurement procedures, may a local office presence be an evaluation criterion during the advertisement and selection phase? (Updated 08.01.2016)

Yes, historically a local office presence has been authorized to be used as a nominal evaluation criterion where appropriate in assessing the qualifications of firms to perform the solicited services (as specified in 23 CFR 172.7(a)(1)(iii)(D)(1)).

A nominal local office criterion of no more than ten (10) percent of the total evaluation criterion may be used. This criterion cannot be based on political boundaries and should be used on a project-by-project basis for projects where a need has been established for a consultant to provide a local presence (office). If a firm currently outside the locality area indicates that, as part of its proposal, it will satisfy that criterion in some manner, such as establishing a local project office, that commitment should be considered to have satisfied the local presence criterion. The intent is to only apply this evaluation criterion on projects where a local presence will add value to the quality and efficiency of the project provided that application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project, available to compete for the services.

To maintain the integrity of a competitive negotiation/qualifications based selection procurement, the total of all allowable non-technical evaluation criterion (including local presence and/or Disadvantaged Business Enterprise (DBE) participation) should not exceed ten (10) percent of the total evaluation criteria. ([See DBE Considerations Question and Answer No. 2](#) regarding DBE participation as an evaluation criterion).

10. May a contracting agency require that a consultant performing engineering work have a State Professional Engineer license to work in that State? (Updated 08.01.2016)

Yes, as licensure as a Professional Engineer serves as a means to validate the competence and qualifications to perform the desired engineering and design related services.

While such a requirement is based on the licensing and procurement laws of a State, the requirement to hold a license as a Professional Engineer is directly related to the qualifications of a consultant to perform the desired engineering and design related services. Furthermore, licensure as a Professional Engineer serves as a means to protect the public interest of the State in employment of professional engineers familiar with State procedures and requirements and satisfying professional liability standards of the State.

Similarly, a consultant may also be required to maintain any State business permits to practice/provide engineering services in a State as required by State laws and regulations.

11. May a contract be modified to add engineering and design related services that were not included in the advertised scope of services and evaluation criteria of the announcement/advertisement from which a qualification based evaluation and selection were conducted? (Updated 08.01.2016)

No, as the addition of work not included in the advertised scope of services and evaluation criteria would be contrary to the intent of the competitive negotiation/qualifications based selection (Brooks Act) process to publicly announce all requirements and ensure qualified firms are provided a fair opportunity to compete and be considered to provide the prescribed services (as specified in 23 U.S.C. 112(b)(2)(A) and 23 CFR 172.7(a)(1)).

A modification to a contract that adds services beyond the publicly advertised services for which the consultant was selected as the most highly qualified to perform would, in effect, circumvent the qualifications-based evaluation and selection process. Only services included in the original solicitation may be incorporated into a contract. Necessary or desired additional services which were not included in the original solicitation from which the qualifications-based selection was made should be procured under a new advertisement, accomplished with in-

house contracting agency staff, or performed under an existing on-call contract which allows for the desired services, necessary qualifications, costs, and schedule.

For example, if a consulting firm was selected to conduct an environmental assessment of a project and the advertised scope and evaluation criteria related to only environmental work, the contract could not be modified to include design tasks. However, if the scope and selection criteria also included design elements for evaluation and ranking of consultants, then it would be permissible to modify the contract to include the design elements advertised.

As another example, if a consulting firm was selected to complete the design of a roadway and the advertised scope and evaluation criteria included only geometric, drainage, and other roadway design elements, the contract could not be modified to include the design of a bridge unless structure/bridge design was included in the advertised scope and evaluation criteria from which the consultant was selected based on qualifications to perform.

12. May a contracting agency disqualify an engineering services consulting firm from a technical prequalification list for Federal-aid highway reimbursed contracts based upon a firm's refusal to provide financial information requested by the agency under a risk-based analysis compliant with 23 CFR 172.11(c)(2)? (Updated 05.15.2017)

A contracting agency may request certain financial information, such as the capital structure and the financial strength of the firm, to assess potential performance and qualification for the work to be awarded under a risk based analysis.

Other financial information, such as requiring information on executive compensation or bonus information to be submitted to prequalify the firm for Federal-aid reimbursed work, has no bearing on technical qualifications or the firm's performance. Such information, or the firm's failure to disclose such information, cannot be used as a basis to disqualify a firm from a prequalification list for FAHP funded engineering consultant contracts.

II. Other Procurement Procedures

1. [In addition to competitive negotiation/qualifications based selection \(Brooks Act\) procedures, what other procedures are allowed for the procurement of engineering and design related services funded with FAHP funding? \(Updated 08.01.2016\)](#)
2. [What are small purchase/simplified acquisition procedures and when may this procurement method be utilized for engineering and design related services funded with FAHP funding? \(Updated 08.01.2016\)](#)
3. [What is the small purchase/simplified acquisition threshold amount? \(Updated 08.01.2016\)](#)
4. [What happens if a contract modification causes a small purchase contract to exceed the Federal simplified acquisition threshold or a lesser State established threshold? \(Updated 08.01.2016\)](#)
5. [What are noncompetitive procedures and when may this procurement method be utilized for engineering and design related services funded with FAHP funding? \(Updated 08.01.2016\)](#)
6. [For FAHP funded engineering and design related services with total estimated contract costs exceeding the established small purchase/simplified acquisition threshold and which do not satisfy noncompetitive procurement requirements, may a contracting agency use its own procurement procedures that are different from the competitive negotiation/qualification based selection \(Brooks Act\) procedures? \(Updated 08.01.2016\)](#)

1. In addition to competitive negotiation/qualifications based selection (Brooks Act) procedures, what other procedures are authorized for the procurement of engineering and design related services funded with FAHP funding? (Updated 08.01.2016)

In addition to competitive negotiation/qualifications based selection, small purchase/simplified acquisition and noncompetitive procedures may be used under limited conditions applicable to each method (as specified in 23 CFR 172.7(a)(2)-(3)). ([See Other Procurement Procedures Question & Answer Nos. 2 and 5](#))

2. What are small purchase/simplified acquisition procedures and when may this procurement method be used for engineering and design related services funded with FAHP funding? (Updated 08.01.2016)

Small purchase procedures (as specified in 23 CFR 172.7(a)(2)) involve contracts with total costs below the lesser of the Federal simplified acquisition threshold (as specified in 48 CFR 2.101 and currently established at \$150,000) or the State's established threshold ([See Other Procurement Procedures Question & Answer No. 3](#)). Small purchase/simplified acquisition procedures for engineering and design related services do not have to follow a competitive negotiation/qualifications based selection (Brooks Act) process ([See Competitive Negotiation Question & Answer Nos. 1-2](#)) given the amount of contract award, however, the contracting agency should take steps to ensure that an adequate number of qualified firms be considered. The FHWA considers three sources as the minimum number to meet the adequate number of sources requirement.

For small purchase procurements, State and local public agencies must follow the State's laws, regulations, and procurement procedures which are not in conflict with applicable Federal laws and regulations (as specified in 23 CFR 172.7(a)(2), 2 CFR 200.101, 2 CFR 200.317, and 2 CFR 1201.317). Project phases and contract requirements should not be broken down into smaller components merely to permit the use of small purchase procedures (as specified in 23 CFR 172.7(a)(2)).

In the rare instance where Federal-aid funds are awarded directly to a recipient (grantee) other than a State, such as a city or a county, the provisions of 2 CFR 200.318-200.326 apply. The subsequent procurement, management, and administration of these services must comply with these provisions. Section 2 CFR 200.320 also requires that price and rate quotations shall be obtained from an adequate number of sources for small purchase/simplified acquisition procedures.

3. What is the small purchase/simplified acquisition threshold amount? (Updated 08.01.2016)

The maximum total cost of a contract for services procured under small purchases procedures is established in 23 CFR 172.7(a)(2) shall be the lesser of the Federal simplified acquisition threshold as specified in 48 CFR 2.101 (currently established at \$150,000) or a State's established threshold.

4. What happens if a contract modification causes a small purchase contract to exceed the Federal simplified acquisition threshold or a lesser State established threshold? (Updated 08.01.2016)

The full amount of any contract modification or amendment that would cause the total contract amount to exceed the Federal simplified acquisition threshold (currently established at \$150,000), or a lesser State established threshold ([See Other Procurement Procedures Question & Answer No. 3](#)), would be ineligible for FAHP funding. The FHWA reserves the right to withdraw all FAHP funding from a contract if it is modified or amended above the applicable established simplified acquisition threshold.

For small purchase procurements, State and local public agencies must follow the State's laws, regulations, and procedures which are not in conflict with applicable Federal laws and regulations (as specified in 23 CFR 172.7(a)(2) and 2 CFR 200.101, 2 CFR 200.317 and 2 CFR 200.318). Project phases and contract requirements should not be broken down into smaller components merely to permit the use of small purchase procedures (as specified in 23 CFR 172.7(a)(2)(i)).

5. What are noncompetitive procedures and when may this procurement method be utilized for engineering and design related services funded with FAHP funding? (Updated 08.01.2016)

Noncompetitive procurement (as specified in 23 CFR 172.7(a)(3)) involves the procurement of engineering and design related services when it is not feasible to award the contract using competitive negotiation or small purchase procurement methods. Noncompetitive procurement may only be used under limited circumstances and should be addressed within the STA's written policies and procedures as specified in 23 CFR 172.5(c)(7) and approved by FHWA.

Circumstances under which a contract may be awarded by noncompetitive procurement procedures are limited to the following: the service is only available from one source, there is an emergency which will not permit the time necessary to conduct competitive negotiations, or after solicitation of a number of sources, competition is determined to be inadequate (as specified in 23 CFR 172.7(a)(3)(iii)).

In addition, State and local public agencies must follow the State's laws, regulations, and procedures which are not in conflict with applicable Federal laws and regulations (as specified in 2 CFR 200.101 and 2 CFR 200.317).

6. For FAHP funded engineering and design related services with total estimated contract costs exceeding the established small purchase/simplified acquisition threshold and which do

not satisfy noncompetitive procurement requirements, may a contracting agency use its own procurement procedures that are different from the competitive negotiation/qualification based selection (Brooks Act) procedures? (Updated 08.01.2016)

No, competitive negotiation/qualifications based selection procedures must be used to procure these engineering and design related services (as specified in 23 U.S.C. 112(b)(2)(A) and 23 CFR 172.7(a)(1)).

Section 174 of the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006 ("the FY 2006 Appropriations Act") amended 23 U.S.C 112(b)(2) and removed provisions of law authorizing the use of equivalent or alternative procedures to the Brooks Act and required that engineering and design contracts be awarded in the same manner as a contract for architectural and engineering services is negotiated under the Brooks Act. As a result, State and local public agencies are no longer entitled to procure engineering and design related service contracts with FAHP funding using either "alternative" or "equivalent" procedures that were permitted prior to the amendment.

III. Indirect Cost Rates and Audits

Minnesota and West Virginia are granted exceptions from the audit and indirect cost rate requirements established in 23 U.S.C. 112(b)(2)(B)-(E) (See 23 U.S.C. 112(b)(2)(F)). However, the allowability of consultant costs remains governed by the Federal Acquisition Regulations (FAR) cost principles (48 CFR 31) applicable to commercial, for-profit organizations (as specified in 23 U.S.C 112(b)(2) (B)).

1. [Are audits required for FAHP funded engineering and design related services contracts?](#) *(Updated 08.01.2016)*
2. [Are pre-negotiation/pre-award audits or reviews allowed for FAHP funded engineering and design related services contracts?](#) *(Updated 08.01.2016)*
3. [What does a contracting agency audit risk assessment process/risk management framework consist of?](#) *(Updated 08.01.2016)*
4. [What are the Federal requirements for use and application of indirect cost rates of a consulting engineering firm on FAHP funded engineering and design related services contracts?](#) *(Updated 08.01.2016)*
5. [Do the cognizant audit requirements \(as specified in 23 U.S.C. 112\(b\)\(2\)\(C\)-\(D\)\) apply to sub-consultant indirect cost rates?](#) *(Updated 08.01.2016)*
6. [What is a "cognizant agency"?](#) *(Updated 08.01.2016)*
7. [Can a local public agency or some other non-State recipient or sub-recipient of FAHP funding be a cognizant agency?](#) *(Updated 08.01.2016)*
8. [What is a "cognizant approved indirect cost rate"?](#) *(Updated 08.01.2016)*
9. [How will a contracting agency know if a consulting engineering firm has a cognizant approved indirect cost rate?](#) *(Updated 08.01.2016)*
10. [Must a contracting agency notify consulting engineering firms prior to sharing audit information with another contracting agency in complying with the cognizant audit requirements?](#) *(Updated 08.01.2016)*
11. [What may potentially trigger a cognizant indirect cost rate approval?](#) *(Updated 08.01.2016)*

12. [What work should be performed by a State DOT to accept an audit performed by a CPA firm \(hired by the consulting engineering firm or contracted and directed by the State DOT\) and issue a cognizant letter of concurrence making the indirect cost rate cognizant approved? \(Updated 08.01.2016\)](#)
13. [Are consulting engineering firms required to certify the allowability of costs used to establish indirect cost rates for FAHP funded engineering and design related services contracts? \(Updated 08.01.2016\)](#)
14. [Are States required to perform cognizant approvals of indirect cost rates? \(Updated 08.01.2016\)](#)
15. [May a State accept and use an indirect cost rate submitted by a consulting engineering firm if such rate has not received cognizant approval? \(Updated 08.01.2016\)](#)
16. [What should a contracting agency do if an audit of a consulting engineering firm has not been performed to establish an indirect cost rate for the applicable one-year accounting period? \(Updated 08.01.2016\)](#)
17. [When a cognizant approved indirect cost rate exists, may a contracting agency use an indirect cost rate other than the one established by the cognizant agency? \(Updated 08.01.2016\)](#)
18. [May a contracting agency request or negotiate a lower indirect cost rate than was established by a cognizant approved audit? \(Updated 08.01.2016\)](#)
19. [May a contracting agency adjust or modify a consulting engineering firm's cognizant approved indirect cost rate, such as through disallowance of certain cost items? \(Updated 08.01.2016\)](#)
20. [Are State and local income taxes an allowable cost item in accordance with the FAR cost principles for inclusion in the development of a consulting engineering firm's indirect cost rate for application on FAHP funded engineering and design related services contracts? \(Updated 08.01.2016\)](#)
21. [May a contracting agency use a definition of compensation that differs from the FAR cost principles to determine what costs are to be allowed under compensation? \(Updated 08.01.2016\)](#)

22. [What is the Benchmark Compensation Amount \(BCA\) and how does it apply to compensation on FAHP funded engineering and design related services contracts?](#) *(Updated 08.01.2016)*
 23. [May a consulting engineering firm choose to develop a national \(company-wide\), a State/regional/branch, or a business segment/discipline indirect cost rate\(s\)?](#) *(Updated 08.01.2016)*
 24. [If engineering and design related services require establishment of a field office or performance of services in an office provided by the contracting agency, may the contracting agency require establishment of a field indirect cost rate?](#) *(Updated 08.01.2016)*
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1. Are audits required for each FAHP funded engineering and design related services contract? *(Updated 08.01.2016)*

Neither 23 U.S.C. 112(b)(2) nor 23 CFR 172 specifically require audits be performed on individual engineering and design related services contracts funded in whole or in part with FAHP funds.

However, contracting agencies must provide assurance that any indirect cost rate considered for acceptance and use in its contracts has been developed in accordance with the FAR cost principles (as specified in 23 U.S.C. 112(b)(2)(B), 23 CFR 172.11(c)(2), and 48 CFR 31). A contracting agency may determine, in accordance with its established risk assessment process/risk management framework ([See Indirect Cost Rates and Audits Question & Answer](#)

[No. 3](#)) and its approved written policies and procedures (as specified in 23 CFR 172.5(c)), when an audit is required and the scope of the audit to be performed. When contracting agency procedures call for audits of contracts or subcontracts, these audits shall be performed to test compliance with the requirements of the cost principles contained in the FAR (as specified in 23 CFR 172.11(c)(2)(ii)(A)).

2. Are pre-negotiation/pre-award audits or reviews allowed for FAHP funded engineering and design related services contracts? (Updated 08.01.2016)

Yes, contracting agencies may perform pre-negotiation/pre-award audits or reviews and the costs to perform those audits or reviews are eligible for Federal-aid participation.

A contracting agency may determine, in accordance with its established risk assessment process/risk management framework and its approved written policies and procedures (as specified in 23 CFR 172.5(c)), when a pre-negotiation/pre-award audit is required and the scope of the audit to be performed. In some cases, a contracting agency may have to perform a pre-negotiation audit to ensure that the consulting firm has an acceptable accounting system, has adequate and proper justification for the various rates charged to perform work, and is aware of cost eligibility and documentation requirements. Costs of project related audits performed in accordance with Generally Accepted Government Auditing Standards (GAGAS) and benefiting Federal-aid highway projects are eligible for Federal participation (as specified in 23 CFR 140.803).

3. What does a contracting agency audit risk assessment process/risk management framework consist of? (Updated 08.01.2016)

The primary objective of contracting agency evaluation and acceptance of consulting firm indirect cost rates is to ensure such rates are developed in accordance with the FAR cost principles (as specified in 48 CFR 31). A risk management framework may be employed by a contracting agency to provide reasonable assurance that consulting firm costs, including those stemming from indirect cost rates, are established in accordance with the FAR cost principles.

A contracting agency risk management framework may include, but is not limited to, the following tools: FAR cost principles compliant audits (which may result in cognizant approved indirect cost rates), desk reviews, reliance on work performed by other State DOTs (in accepting an indirect cost rate for use in their respective State), or other procedures, as appropriate. The scope of a risk management framework may include pre-award and post-award audits, where appropriate. The framework should consider the following risk criteria: dollar thresholds; history/reputation of the consulting firm; the number of States in which the consulting firm does business; audit frequency; experience of the CPA firm performing audits on the consulting

firm's indirect cost rate; responses to the consulting firm's internal control questionnaire; and/or other risk criteria, as deemed appropriate.

An audit risk assessment process/risk management framework employed by a contracting agency should be established as a component of the contracting agency's approved written policies and procedures (as specified in 23 CFR 172.5(c)).

4. What are the Federal requirements for use and application of indirect cost rates of a consulting engineering firm on FAHP funded engineering and design related services contracts? (Updated 08.01.2016)

Contracting agencies shall accept cognizant approved indirect cost rates established in accordance with the FAR cost principles (as specified in 48 CFR 31) for a consulting firm's applicable one-year accounting period, if such rates are not currently under dispute (as specified in 23 U.S.C. 112(b)(2)(C) and 23 CFR 172.11(b)(1)). Contracting agencies shall apply accepted (cognizant approved) indirect cost rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment; and the rate shall not be limited by administrative or de facto ceilings of any kind (as specified in 23 U.S.C. 112(b)(2)(D) and 23 CFR 172.11(b)(1)).

Note that the States of Minnesota and West Virginia are granted statutory exceptions from the audit and indirect cost rate requirements established in 23 U.S.C. 112(b)(2)(B)-(E) (as specified in 23 U.S.C. 112(b)(2)(F)). However, the allowability of consultant costs remains governed by the FAR cost principles (48 CFR 31) applicable to commercial, for-profit organizations (as specified in 23 U.S.C. 112(b)(2)(B)-(D)). ([See Indirect Cost Rates and Audits Question & Answer No. 5](#) for sub-consultant audit requirements and [Nos. 14-29](#) for additional discussion regarding acceptance, use, and application of indirect cost rates).

5. Do the cognizant audit requirements (as specified in 23 U.S.C. 112(b)(2)(C)-(D)) apply to sub-consultant indirect cost rates? (Updated 08.01.2016)

No, the cognizant audit requirements do not apply to sub-consultant indirect cost rates.

Prime consultants, who were selected under a competitive negotiation/qualifications based selection (Brooks Act) procurement process, will frequently hire sub-consultants to perform specialty work. Sub-consultants hired by the prime consultant do not fall under the requirements of 23 U.S.C. 112(b)(2)(C)-(D). As such, sub-consultant indirect cost rates would not be subject to establishment via cognizant agency audit. However, subcontracts must comply with the FAR cost principles (as specified in 23 U.S.C. 112(b)(2)(B) and 48 CFR 31). Should a sub-consultant have a cognizant approved indirect cost rate, a contracting agency may

choose to accept and apply that rate. As required with all procurements for property and services under a Federal grant, State and local public agencies must follow all State and local laws, regulations, policies, and procedures which are not in conflict with applicable Federal laws and regulations (as specified in 2 CFR 200.101 and 2 CFR 200.317).

Although an audit of an indirect cost rate of a sub-consultant on a FAHP funded contract is not required, State and local public agencies are not precluded from prescribing sub-consultant audit requirements in their laws, policies, and/or procedures. As such, and in accordance with a State's established audit risk assessment process/risk management framework, the requirement to audit or require sub-consultants to prepare an audit may be incorporated as an acceptable policy and/or procedure of a State or local public agency consultant services program. Such policies and procedures, which are subject to approval by FHWA (as specified in 23 CFR 172.5(c)), may be warranted to ensure sub-consultant costs are properly accumulated and allowable in accordance with the FAR cost principles. Care should be taken by contracting agencies to avoid placing an undue burden on small firms as a result of such policies and procedures.

6. What is a "cognizant agency"? (Updated 08.01.2016)

The term "cognizant agency" means any governmental agency that has performed an audit and issued an audit report of a consulting firm's indirect cost rate established in accordance with the FAR cost principles (48 CFR 31) (as defined in 23 CFR 172.3). When providing a cognizant indirect cost rate approval, a cognizant agency may either perform an audit and issue an audit report or review work papers related to an audit performed by a CPA and then issue a cognizant letter of concurrence. A cognizant agency may be any of the following: (1) a Federal agency; (2) a State transportation agency of the State where the consulting firm's accounting and financial records are located); or (3) a State transportation agency to which cognizance for the particular indirect cost rate(s) of a consulting firm has been delegated or transferred in writing by the State transportation agency identified in subparagraph (2) above. ([See Indirect Cost Rates and Audits Question & Answer Nos. 7-9](#))

7. Can a local public agency or some other non-State recipient or sub-recipient of FAHP funding be a cognizant agency? (Updated 08.01.2016)

No, the law requires the cognizant agency to be either a Federal or State government agency (as defined in 23 CFR 172.3).

8. What is a "cognizant approved indirect cost rate"? (Updated 08.01.2016)

The term "cognizant approved indirect cost rate" refers to the indirect cost rate established by an audit performed in accordance with GAGAS to test compliance with the FAR cost principles (as specified in 48 CFR 31) and accepted by a cognizant Federal or State agency.

9. How will a contracting agency know if a consulting engineering firm has a cognizant approved indirect cost rate? (Updated 08.01.2016)

In the consulting firm's cost proposal, the firm is responsible for providing the contracting agency with its indirect cost rate along with evidence of cognizant approval, if cognizance has been established. Additionally, a State DOT may consult with DOTs in other States where the firm is located or where the firm has worked for the past year to ascertain whether cognizant approval of indirect cost rates has been provided. However, if audited cost or rate data pertaining to a consulting engineering firm is shared between contracting agencies (as specified in 23 U.S.C. 112(b)(2)(E) and 23 CFR 172.11(d)), notice must be given to the affected firm. ([See Indirect Cost Rates and Audits Question & Answer No. 10](#))

10. Must a contracting agency notify consulting engineering firms prior to sharing audit information with another contracting agency in complying with the cognizant audit requirements? (Updated 08.01.2016)

Yes. FAHP fund recipients and subrecipients may share audit information about a consulting firm with other recipients and subrecipients provided advance notice is given to the firm for each use or exchange of information (as specified in 23 U.S.C. 112(b)(2)(E) and 23 CFR 172.11(d)) to assist in complying with requirements for acceptance of indirect cost rates. Permission to share the information is not required. The notification should include the name of the requesting contracting agency, the name, title, and contact information of the agency official requesting the audit information, and the proposal/project name, number, or other identification information.

However, audit information shall not be provided to other consultants or any other government agency for a purpose unrelated to compliance with FAHP requirements without the written permission of the affected consulting firm. If prohibited by law, audit information may not be shared under any circumstance, but should a release be required by law or court order, such release of audit information shall make note of the confidential nature of the data (as specified in 23 CFR 172.11(d)).

11. What may potentially trigger a cognizant indirect cost rate approval? (Updated 08.01.2016)

A consulting engineering firm that has had an indirect cost rate audit performed by a CPA firm or an agency contracting with the consulting engineering firm may request approval from a cognizant agency ([See Indirect Cost Rates and Audits Question & Answer No. 6](#)) or the cognizant audit agency may choose to provide approval as part of its audit risk assessment process/risk management framework ([See Indirect Cost Rates and Audits Question & Answer No. 3](#)).

12. What work should be performed by a State DOT to accept an audit performed by a CPA firm (hired by the consulting engineering firm or contracted and directed by the State DOT) and issue a cognizant letter of concurrence making the indirect cost rate cognizant approved? (Updated 08.01.2016)

Regardless of who contracted for the work of the CPA firm, the State DOT should perform a review of the CPA's workpapers, using the Review Program for CPA Audits of Consulting Engineers' Indirect Cost Rates identified in Appendix A of the [AASHTO Uniform Audit & Accounting Guide \(2016 Edition\)](#), in order to issue a cognizant letter of concurrence, making the rate cognizant approved. Inquiries, discussions, or other information provided by the CPA firm may be useful, but are not an acceptable substitute to a review of the CPA's workpapers.

13. Are consulting engineering firms required to certify the allowability of costs used to establish indirect cost rates for FAHP funded engineering and design related services contracts? (Updated 08.01.2016)

Yes. To ensure overall compliance with FAR cost principles (as specified in 23 U.S.C. 112(b)(2)(B)-(D)), and 23 CFR 172.11(c)(3), indirect cost rate proposals shall not be accepted and no agreement shall be made by a contracting agency to establish final indirect cost rates for application to FAHP funded engineering and design related services contracts, unless the costs have been certified by an official of the consulting firm as being allowable in accordance with the applicable FAR cost principles (as specified in 48 CFR 31).

14. Are States required to perform cognizant approvals of indirect cost rates? (Updated 08.01.2016)

No, States are not required to perform cognizant approvals of indirect cost rates. However, States are encouraged to perform cognizant audits or issue cognizant letters of concurrence since this will ultimately lead to a more efficient indirect cost rate approval process across all States.

Contracting agencies must accept indirect cost rates established in accordance with the FAR cost principles (48 CFR 31) by a cognizant Federal or State agency, if such rates are not under dispute (as specified in 23 U.S.C. 112(b)(2)(C) and 23 CFR 172.11(b)(1)). There is no statutory or regulatory requirement for issuance of a cognizant approved rate, only acceptance and application of an established cognizant approved rate, if one exists.

However, if a cognizant approved rate does not exist, contracting agencies must provide assurance that any indirect cost rate considered for acceptance and use in its contracts has been developed in accordance with the FAR cost principles (as specified in 48 CFR 31). A contracting agency may determine, in accordance with its established risk assessment process/risk management framework ([See Indirect Cost Rates and Audits Question & Answer No. 3](#)) and its approved written policies and procedures (as specified in 23 CFR 172.5(c)), when an audit is required and the scope of the audit to be performed. When contracting agency procedures call for audits of contracts or subcontracts, these audits shall be performed to test compliance with the requirements of the cost principles contained in the FAR cost principles (as specified in 23 U.S.C. 112(b)(2)(B) and 23 CFR 172.11(c)(2)).

Contracting agencies shall also require a consulting firm to certify the allowability of costs used to establish an indirect cost rate prior to acceptance and application to engineering and design related services contracts. ([See Indirect Cost Rates and Audits Question & Answer Nos. 13](#))

15. May a State accept and use an indirect cost rate submitted by a consulting engineering firm if such rate has not received cognizant approval? (Updated 08.01.2016)

Yes, a State may accept an indirect cost rate audit performed by a CPA firm or another State if a cognizant approved rate does not exist.

If a cognizant approved rate does not exist, contracting agencies must provide assurance that any indirect cost rate considered for acceptance and use in its contracts has been developed in accordance with the FAR cost principles (as specified in 48 CFR 31) as evaluated through an established risk assessment process/risk management framework ([See Indirect Cost Rates and Audits Question & Answer No. 3](#)) and its approved written policies and procedures (as specified in 23 CFR 172.5(c)). When contracting agency procedures call for audits of contracts or subcontracts, these audits shall be performed to test compliance with the requirements of the cost principles contained in the FAR cost principles (as specified in 23 U.S.C. 112(b)(2)(B) and 23 CFR 172.11(c)(2)).

Contracting agencies shall also require a consulting firm to certify the allowability of costs used to establish an indirect cost rate prior to acceptance and application to engineering and design related services contracts. ([See Indirect Cost Rates and Audits Question & Answer No. 13](#))

16. What should a contracting agency do if an audit of a consulting engineering firm has not been performed to establish an indirect cost rate for the applicable one-year accounting period? (Updated 08.01.2016)

A contracting agency may perform its own audit or other evaluation of the consulting firm's indirect cost rate. A contracting agency may alternatively establish a provisional indirect cost rate and subsequently adjust contract costs based upon an audited final rate. The process employed by a contracting agency for providing assurance of compliance with the FAR cost principles must be consistent with the established risk assessment process/risk management framework ([See Indirect Cost Rates and Audits Question & Answer No. 3](#)) and its approved policies and procedures (as specified in 23 CFR 172.5(c)).

17. When a cognizant approved indirect cost rate exists, may a contracting agency use an indirect cost rate other than the one established by the cognizant agency? (Updated 08.01.2016)

No, unless the rate is currently under dispute (as specified in 23 CFR 172.11(b)(1)). ([See Indirect Cost Rates and Audits Question & Answer Nos. 25-27](#))

Contracting agencies shall use and apply a cognizant approved indirect cost rate established in accordance with the FAR cost principles (as specified in 48 CFR 31) for the purposes of contract estimation, negotiation, administration, reporting, and contract payment, and the rate shall not be limited by administrative or de facto ceilings of any kind (as specified in 23 U.S.C. 112(b)(2)(C)-(D) and 23 CFR 172.11(b)(1)).

Federal agencies can and do perform cognizant agency audits for indirect cost rate establishment and may not share their audit background information. In some cases, the cognizant agency may provide several rates, representing the various cost pools and business segments of the firm under audit. The result is still a cognizant approved indirect cost rate and must be used, as long as the audit was performed in accordance with GAGAS to ensure compliance with the FAR cost principles, covers the business segment applicable to contracts administered under the FAHP, and represents an equitable distribution of allowable costs to the benefiting cost objective (contract).

A contracting agency may accept an indirect cost rate lower than the cognizant approved rate, but only if voluntarily offered by a firm. ([See Indirect Cost Rates and Audits Question & Answer No. 18](#))

If a consulting firm does not currently have a field indirect cost rate or does not propose such a rate for a field-based contract, it may be appropriate to negotiate the use of a field indirect cost

rate to reflect an equitable distribution of allowable costs to a field-based contract (as specified in 48 CFR 31.203(f)). ([See Indirect Cost Rates and Audits Question & Answer No. 24](#))

18. May a contracting agency request or negotiate a lower indirect cost rate than was established by a cognizant approved audit? (Updated 08.01.2016)

No, a contracting agency shall not request or start negotiations of a lower indirect cost rate than was established by a cognizant approved audit (as specified in 23 U.S.C 112(b)(2)(C)-(D)).

However, a consulting firm may wish to voluntarily offer a lower rate than was established by a cognizant approved audit. As such, a contracting agency is free to accept a lower rate if offered by a consulting firm on its own volition. A lower indirect cost rate may be accepted and used only if offered/submitted voluntarily by a consulting firm as part of a cost proposal during contract negotiations. A consulting firm's offer of a lower indirect cost rate shall not be a condition or qualification to be considered for the work or contract award (as specified in 23 CFR 172.11(b)(1)). ([See Contract Negotiation Question & Answer Nos. 3 and 4](#))

19. May a contracting agency adjust or modify a consulting engineering firm's cognizant approved indirect cost rate, such as through disallowance of certain cost items? (Updated 08.01.2016)

No, unless such rate is currently in dispute. The allowability of a consulting engineering firm's costs is governed by the FAR cost principles (48 CFR 31) (as specified in 23 U.S.C. 112(b)(2) and 23 CFR 172.11).

Contracting agencies are not permitted to place limitations on indirect cost rates established in accordance with applicable FAR cost principles and must apply the firm's cognizant approved indirect cost rate for estimation, negotiation, administration, and payment of contracts for engineering and design related services that utilize FAHP funding and directly relate to a construction project (as specified in 23 U.S.C. 112(b)(2)(C)-(D) and 23 CFR 172.11(b)(1)).

Exclusion of cost elements that are allowable under the FAR cost principles from calculation or application of the indirect cost rate effectively places a ceiling on the firm's rate, and is in direct conflict with 23 U.S.C. 112(b)(2)(D).

For firms required to submit a Cost Accounting Standards Board (CASB) Disclosure Statement, contracting agencies may not request reclassifications between direct and indirect cost elements. Consulting firms required to comply with the Cost Accounting Standards (CAS) must disclose their cost accounting practices in writing and follow them consistently (as specified in 41 U.S.C. 1502). Therefore, any such request/requirement to reclassify costs between direct

and indirect cost categories may cause a CAS compliant consulting firm to be in violation of Federal statutes.

A contracting agency shall not request or start negotiations of a lower indirect cost rate than was established by a cognizant approved audit, but may accept a lower rate only if voluntarily offered by a consulting engineering firm. ([See Indirect Cost Rates and Audits Question & Answer No. 18](#))

If a consulting firm does not currently have a field indirect cost rate or does not propose such a rate for a field-based contract, it may be appropriate to negotiate the use of a field indirect cost rate to reflect an equitable distribution of allowable costs to a field-based contract (as specified in 48 CFR 31.203(f)). ([See Indirect Cost Rates and Audits Question & Answer No. 24](#))

20. Are State and local income taxes an allowable cost item in accordance with the FAR cost principles for inclusion in the development of a consulting engineering firm's indirect cost rate for application on FAHP funded engineering and design related services contracts? (Updated 08.01.2016)

Yes, in accordance with 48 CFR 31.205-41(a)(1), required Federal, State, and local taxes paid by a consulting firm are allowable except as provided in paragraph (b) of the same part which expressly disallows Federal income and excess profits taxes. While Federal income taxes are expressly disallowed, State and local income taxes are not specifically identified as disallowed within the FAR cost principles. As such, the FHWA has determined these types of taxes are allowable cost items and therefore must be accepted as allowable by a contracting agency when submitted in a consulting firm's indirect cost rate proposal for application to FAHP funded engineering and design related services contracts.

Exclusion of cost elements that are allowable under the FAR cost principles from calculation or application of the indirect cost rate effectively places a ceiling on the firm's rate, and is in direct conflict with 23 U.S.C. 112(b)(2)(D).

When procuring property and services under a Federal grant, States and local public agencies must use their own procurement procedures, except if a Federal statute or regulation has more specific requirements in conflict with State procedures (as specified in 2 CFR 200.101 and 2 CFR 200.317 and 2 CFR 200.318). When FAHP funds are involved and State or local procedures are in conflict with Federal requirements, the Federal requirements prevail. As such, even if State and local income taxes are disallowed under State or local laws and regulations, these taxes must be treated as allowable for participation of FAHP funding in the contract.

21. May a contracting agency use a definition of compensation that differs from the FAR cost principles to determine what costs are to be allowed under compensation? (Updated 08.01.2016)

No, compliance with the FAR cost principles (48 CFR 31) is required in the procurement, management, and administration of engineering and design related service contracts that utilize FAHP funding (as specified in 23 U.S.C. 112(b)(2) and 23 CFR 172.11).

The allowability of contract costs is governed by the FAR cost principles. As such, deviations from the definition of compensation and how total compensation is calculated, and more importantly, deviation from the basis for disallowance of associated costs as specifically provided for in the FAR cost principles is not permitted on contracts utilizing FAHP funding.

Consistent with the reasonableness provisions contained in the FAR cost principles (as specified in 48 CFR 31.201-3 and 31.205-6(b)(2)), a contracting agency may limit or benchmark total compensation. (See Chapter 7 of the [AASHTO Uniform Audit & Accounting Guide \(2016 Edition\)](#))

22. What is the Benchmark Compensation Amount (BCA) and how does it apply to compensation on FAHP funded engineering and design related services contracts? (Updated 08.01.2016)

An engineering consultant is permitted to charge reasonable compensation to FAHP funded contracts as either a direct cost, indirect cost, or a combination of both (as specified in 48 CFR 31.205-6). The BCA is a statutory limitation on allowable total compensation for senior executives which may be charged to FAHP funded contracts (as specified in 48 CFR 31.205-6(p)). While the BCA is established based on the compensation of executives of publicly-owned U.S. corporations with annual sales over \$50 million for the fiscal year, it applies to the compensation of executives of firms at all sales levels, regardless of whether the firm is publicly or privately held.

The BCA must not be construed as an entitlement or guaranteed amount which may be claimed and charged to a FAHP funded contract. Instead, individual elements of compensation must be reviewed for allowability in compliance with the FAR cost principles. Compensation is reasonable if the aggregate of each measureable and allowable element sums to a reasonable total (as specified 31.205-6(b)(2)). (See Chapter 7 of the [AASHTO Uniform Audit & Accounting Guide \(2016 Edition\)](#))

23. May a consulting engineering firm choose to develop a national (company-wide), a State/regional/branch, or a business segment/discipline indirect cost rate(s)? (Updated 08.01.2016)

Yes. The consulting firm decides on the rate structure and it is up to the consulting firm to propose an indirect cost rate(s). There may be multiple rates for a single firm; however, once the firm develops its indirect cost rate(s), the rate(s) must be consistently and fairly applied. Regardless of the consulting firm's organization, consistency in allocating costs to cost objectives is critical.

While a firm may choose its accounting practices, those practices must meet applicable Federal requirements, including the FAR cost principles and applicable cost accounting standards. Specifically, a firm's indirect cost rate structure must result in an allocable distribution of indirect costs to the benefiting cost objectives on the basis of relative benefits received (as specified in 48 CFR 31.201-4).

24. If engineering and design related services require establishment of a field office or performance of services in an office provided by the contracting agency, may the contracting agency require establishment of a field indirect cost rate? (Updated 08.01.2016)

For projects where the consulting firm employees do not work out of their established home or branch offices, some of the indirect costs incurred by the home or branch office may not equitably benefit the field-based contract. The purpose of a field rate is to pay the consulting firm for the fringe benefits, project employee management, and home/branch office administrative support provided to the field employees. Negotiation and application of a field rate, where appropriate to ensure only allocable indirect costs are charged to a contract, is not an administrative or de-facto ceiling (prohibited in 23 U.S.C. 112(b)(2)(D) and 23 CFR 172.11(b)(1)). Rather, it may help to achieve an appropriate allocation of costs to the project, based on the benefits received.

If a consulting engineering firm has a cognizant approved field indirect cost rate, the contracting agency may require its use on a field-based contract. If a consulting firm does not currently have a field indirect cost rate or does not propose such a rate for a field-based contract, it may be appropriate to negotiate the use of a field indirect cost rate to reflect an equitable distribution of allowable costs to the contract (as specified in 48 CFR 31.203(f)). However, a contracting agency may not unilaterally require establishment of a field indirect cost rate as part of a solicitation/advertisement for field-related services, pre-award audit process, or for a consulting firm to become pre-qualified to perform field-related services. Application of any field rate must remain consistent with the firm's CASB Disclosure Statement, if applicable (as specified in 48 CFR 9904.406)).

Regardless of the consulting firm's organization, consistency in allocating costs to benefiting cost objectives is critical. While a firm may choose its accounting practices, those practices must meet applicable Federal requirements. Indirect cost rate proposals must reflect an equitable distribution of allowable costs to the benefiting contract(s) in accordance with the FAR cost principles. Once a consulting firm has an established field rate, the rate must be consistently applied across all business segments and disciplines, as appropriate. For consistent cost accounting application, a single company-wide rate should not be used when home and field office indirect cost rates have been established and are in use.

25. What parties may dispute a cognizant approved indirect cost rate, and under what conditions may a rate be disputed? (Updated 08.01.2016)

Except in the case of error or the failure to follow GAGAS, in which case the contracting agency may raise concerns, only the consulting firm may dispute the established cognizant approved indirect cost rate. If either an error is discovered in the established indirect cost rate, or if GAGAS were not followed in the establishment of the rate, any contracting agency may dispute the rate (as specified in 23 CFR 172.11(b)(1)). The term "error" does not refer to differing and legitimate interpretations of the FAR cost principles (as specified in 48 CFR 31). Errors may consist of complete misinterpretation or misapplication of the FAR cost principles or simple mathematical errors of calculation.

26. What steps may be included in a dispute resolution process for a disputed cognizant approved indirect cost rate? (Updated 08.01.2016)

The cognizant agency, consulting firm, and its CPA/auditor, as applicable, should work together to resolve any issues. Involvement of the FHWA Division Office in discussions with the parties to a dispute may be a final step in dispute resolution, if necessary. In resolving such disputes, the FHWA Division Office may, at times, consult with FHWA Headquarters, as deemed necessary.

States may choose to employ dispute resolution policies and procedures to establish the dispute resolution processes within their respective jurisdictions. Such processes likely will include provisions for appeal within the State DOT audit organization, within the State DOT chain of command, and, as stated, to the local FHWA Division Administrator. Those policies and procedures may either be referenced or specifically cited within the provisions of a State's written procurement policies and procedures approved by FHWA (as specified in 23 CFR 172.5(c)), and/or they may be referenced specifically within the contract document itself.

States should work to develop a level of confidence in the audit work performed by other States. In the case where a contracting agency believes that there are obvious errors in the calculation of the cognizant indirect cost rate, or that GAGAS may not have been followed in

the performance of the audit, that contracting agency should contact the cognizant agency to discuss its concerns. The contracting agency's objection to the cognizant approved rate must be based upon objective criteria and a reasonable factual basis.

27. How may an indirect cost rate be obtained if the cognizant approved rate is under dispute? (Updated 08.01.2016)

If a cognizant approved indirect cost rate is under dispute ([See Indirect Cost Rates and Audits Question & Answer No. 25](#)), the contracting agency does not have to accept the rate. A contracting agency may perform its own audit or other evaluation of the consulting firm's indirect cost rate for application to a specific consultant contract, until or unless the dispute is resolved. A contracting agency may alternatively establish a provisional indirect cost rate and subsequently adjust contract costs based upon an audited final rate. The process employed by a contracting agency for providing assurance of compliance with the FAR cost principles must be consistent with the established risk assessment process/risk management framework and its approved policies and procedures (as specified in 23 CFR 172.5(c)).

28. How long is an audited indirect cost rate valid? (Updated 08.01.2016)

One year. The one-year applicable accounting period means the annual accounting period for which financial statements are regularly prepared for the consulting engineering firm (as defined in 23 CFR 172.3). However, once an indirect cost rate is established for a contract, it may be extended beyond the one-year applicable accounting period provided all concerned parties agree (as specified in 23 CFR 172.11(b)(1)). Extension of the one-year applicable accounting period shall be only on a contract-by-contract basis where all concerned parties agree and shall not be a condition of contract award or requirement of the contract (as specified in 23 CFR 172.11(b)(1)(vi)).

29. What happens if a cognizant approved indirect cost rate expires during the contract period? (Updated 08.01.2016)

In general, and in accordance with the FAR cost principles (as specified in 48 CFR 31.203(e)), a new indirect cost rate should be established by a cognizant agency. However, once an indirect cost rate is established for a contract, it may be extended beyond the one-year applicable accounting period provided all concerned parties agree (as specified in 23 CFR 172.11(b)(1)). Extension of the one-year applicable accounting period shall be only on a contract-by-contract basis where all concerned parties agree and shall not be a condition of contract award or requirement of the contract.

IV. Compensation (Payment) Methods

1. [What compensation methods are allowed for FAHP funded engineering and design related services contracts?](#) (Updated 08.01.2016)
 2. [What are the differences between the "specific rates of compensation" payment method and the prohibited "cost plus a percentage of cost" payment method?](#) (Updated 08.01.2016)
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1. What compensation methods are allowed for FAHP funded engineering and design related services contracts? (Updated 08.01.2016)

Lump sum, cost plus fixed-fee, cost per unit of work, and specific rates of compensation payment methods may be used. A single contract may contain different payment methods as appropriate for compensation of different elements of work. The payment method(s) used to compensate the consulting engineering firm for all work required should be specified in the original contract and any subsequent contract modifications.

Compensation based on a "cost plus a percentage of cost" payment method whereby fee/profit increases with actual costs incurred or a "percentage of construction cost" payment method whereby compensation increases with the cost of project construction shall not be used (as specified in 23 CFR 172.9(b)(2)). These payment methods provide no incentive for effective cost control by the consulting engineering firm.

2. What are the differences between the "specific rates of compensation" payment method and the prohibited "cost plus a percentage of cost" payment method? (Updated 08.01.2016)

The "specific rates of compensation" payment method provides for reimbursement for consultant services on the basis of direct labor hours at specified fixed hourly rates (including direct labor costs, indirect costs, and fee (profit)) plus any other direct expenses/costs, subject to an agreement maximum amount. The "specific rates of compensation" payment method should only be used when it is not possible at the time of procurement to estimate the extent or duration of the work or to estimate costs with any reasonable degree of accuracy. Use of this payment method requires close monitoring by the contracting agency to ensure efficient methods and cost controls are employed by the consultant.

While the inclusion of fee (profit) in the loaded hourly rate(s) established for a contract allows the fee earned to be based on the labor hours worked on the project, this is not considered a "cost plus a percentage of cost" payment method. A key distinction for the "specific rates of

compensation" payment method is that indirect costs and fee must be recovered as a component of the established, fixed hourly billing rates for labor hours worked. Payment of fee as a separate percentage based on actual labor and indirect costs incurred creates a "cost plus a percentage of cost" arrangement whereby the consultant's fee is increased automatically with increases in either direct labor or overhead costs.

Both the "specific rates of compensation" and "cost plus a percentage of cost" payment methods could in theory render the same total compensation for services performed, however the prohibited "cost plus a percentage of cost" method allows the fee earned by the consultant to increase over the performance period of the contract with increases in the cost of direct labor and/or overhead. The "specific rates of compensation" method establishes a loaded, fixed hourly rate up front which will not change for the duration of the contract and provides reimbursement to the consultant based on the labor hours worked. The "cost plus a percentage of cost" method establishes fee percentages up front which are then applied to actual labor and indirect costs incurred by the consultant over the life of the project.

For example, should a consultant's direct salary rates increase during the performance period of a contract, compensation under the "specific rates of compensation" payment method would not change. Whereas under the "cost plus a percentage of cost" method, as the actual direct labor or indirect cost rates increase, so does the associated fee recovered by the consultant. Under both methods, the more labor hours a consultant works, the more fee that is earned by the consultant, subject to an established total contract maximum amount. However, only under the "cost plus a percentage of cost" method, does the fee earned increase with increases in the cost of the labor hours worked.

Since the cost plus a percentage of cost method provides no incentive for cost control, it is prohibited from use on engineering and design related services funded with FAHP funding (as specified in 23 CFR 172.9(b)(2)).

While the establishment of fixed hourly rate(s) and a maximum contract amount provide some cost control for the contracting agency under the "specific rates of compensation" payment method, consultants still have minimal incentive for efficiency. As such, this payment method is the least preferred allowable payment method and its use on contracts or for components of contracts generally should be limited to only smaller, basic tasks where it is difficult at the time of procurement to estimate the extent or duration of the work. If the scope of work and/or level of effort for the desired services become better defined, a more traditional "lump sum" or "cost plus fixed-fee" payment method should be employed.

Federal laws and regulations for use and application of cognizant approved indirect cost rates still apply in the development of the fixed hourly rate(s) for the "specific rates of

compensation" method. Additionally, since financial risk to the consultant is minimal under the "specific rates of compensation" payment method, the fee component of the fixed hourly rate(s) should be commensurate with that limited risk. As with other payment methods, the fee should be based on the anticipated scope and complexity at the time of contract negotiation.

[\(See Contract Negotiation Question & Answer No. 2\)](#)

V. Contract Negotiation

1. [Under competitive negotiation/qualifications based selection \(Brooks Act\) procurement procedures, what are the requirements for negotiation of a contract?](#) *(Updated 08.01.2016)*
 2. [How should fixed fee be established or negotiated on FAHP funded engineering and design related services contracts?](#) *(Updated 08.01.2016)*
 3. [May a contracting agency utilize statewide average indirect cost rates in the estimation, negotiation, administration, and payment of FAHP funded engineering and design related services contracts?](#) *(Updated 08.01.2016)*
 4. [May a contracting agency question the reasonableness of indirect cost rates for use and application to FAHP funded engineering and design related services contracts?](#) *(Updated 08.01.2016)*
 5. [When advertising for services, estimating and negotiating contract costs and terms, or administering a contract, may a contracting agency request/establish limitations of a consulting engineering firm's direct salaries and wages?](#) *(Updated 08.01.2016)*
 6. [Does the method used to procure engineering and design related services influence the ability for a State or local public agency to limit/benchmark a consulting engineering firm's indirect cost rate or the direct salary or total compensation of employees on contracts?](#) *(Updated 08.01.2016)*
 7. [May a contracting agency limit/benchmark a consulting engineering firm's indirect cost rate or direct salary rates on engineering and design related service contracts that do not utilize FAHP funding?](#) *(Updated 08.01.2016)*
 8. [May a contracting agency require discount payment terms \(e.g. 2% 10 Net 30\) on FAHP funded engineering and design related services contracts?](#) *(Updated 08.01.2016)*
 9. [Once a FAHP funded engineering and design related services contract has been negotiated, signed, and becomes binding, may a contracting agency request or require a consulting firm to reduce fees or overall contract costs?](#) *(Updated 08.01.2016)*
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1. Under competitive negotiation/qualifications based selection (Brooks Act) procurement procedures, what are the requirements for negotiation of a contract? (Updated 08.01.2016)

Upon completion of a qualifications-based evaluation and ranking of proposals, the contracting agency initiates negotiations with the most highly qualified consulting engineering firm to arrive at a compensation that is fair and reasonable which considers the scope, complexity, professional nature, and estimated value of the services to be rendered (as specified in 23 U.S.C. 112(b)(2)(A), 40 U.S.C. 1104, and 23 CFR 172.7(a)(1)).

The primary objective in negotiation is to reach agreement on a price which is fair and reasonable while providing the consulting firm the greatest incentive for efficient and economical performance. A successful negotiation will result in a fair and reasonable price for the government and fair and reasonable compensation for the consulting firm. The focus of negotiations should be on improving identification of the scope/tasks to be performed, the level of effort to complete those tasks, the experience and classifications of staff required/assigned to complete those tasks (which collectively result in total direct labor costs), other direct contract costs, and fixed fee.

Following ranking and selection, the contracting agency and most highly qualified consulting firm will typically meet 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 detailed, mutual understanding of the scope has been made, the most highly qualified consulting firm will prepare a complete cost proposal to perform the services and the contracting agency will prepare/refine an independent estimate. The contracting agency 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.

Prior to receipt of the consulting firm's cost proposal, the contracting agency will prepare/refine an independent estimate of the work to be performed on the contract as specified in 172.7(a)(1)(v)(B). This independent estimate should contain an appropriate breakdown of the work or labor hours, types or classifications of labor required, other direct costs, and consultant's fixed fee for the defined scope of work. As required by law and the contracting agency must use and apply the consulting firm's approved indirect cost rate for estimation, negotiation, and administration of the contract (See [Indirect Cost Rates and Audits Question & Answer Nos. 4](#) and [14-27](#), and [Contract Negotiation Question & Answer Nos. 3 and 4](#)).

As the allowability of costs is determined by the FAR cost principles, a contracting agency may limit or benchmark consulting firm direct salary rates only if a contracting agency has

performed an assessment of the reasonableness of proposed direct salary rates consistent with the FAR cost principles (as specified in 48 CFR 31.201-3 and 31.205-6(b)(2)). To ensure a fair and reasonable negotiation of costs, the consulting firm's actual direct salary rates or those established via this assessment for particular employees or classes of employees must be used in the negotiation and administration of the contract (as specified in 23 CFR 172.11(b)(2)(ii)). If an assessment of reasonableness in accordance with the FAR cost principles has not been performed, the consulting firm's actual direct salary rates must be applied to the contract without limitations (as specified in 23 CFR 172.11(b)(2)(iii)). Limitations or benchmarks on direct salary rates which do not consider the factors prescribed in the FAR cost principles are contrary to qualifications based selection procedures (as specified in 23 U.S.C. 112(b)(2)(A), 40 U.S.C. 1104(a), and 23 CFR 172.7(a)(1)), which require fair and reasonable compensation considering the scope, complexity, professional nature, and value of the services to be rendered. ([See Contract Negotiation Question & Answer No. 5](#))

The most highly qualified consulting firm will submit a complete cost proposal which proposes the firm's person-hours and classifications to complete project tasks, direct contract costs, and fixed fee and applies the firm's direct salary rates and approved indirect cost rate. Overall cost or bottom line price alone are not justification to terminate negotiations with a firm, as the contracting agency must make a good faith effort to negotiate the scope, level of effort, and reasonable price with the highest rated firm (as specified in 40 U.S.C. 1104(a)). If the contracting agency and the most highly qualified firm are unable to negotiate a fair and reasonable contract, the contracting agency may formally terminate negotiations and undertake negotiations with the next most qualified firm, continuing the process until an agreement is reached (as specified in 40 U.S.C. 1104(b)).

If the programmed funding or contracting agency budget are not adequate to accommodate the cost of the contract once a firm's approved cognizant indirect cost rate and direct salary rates are applied to the agreed/negotiated scope, person-hours, and classifications, then the contracting agency should consider reducing, clarifying, and/or re-negotiating the details of the scope (e.g., tasks, schedules, deliverables, assumptions), person-hours, or classifications for completing tasks. Arbitrary reduction or capping of indirect cost rates or direct salary rates is not permitted under Federal laws and regulations. Failure to negotiate in good faith by focusing on only overall cost or bottom line price, without regard for the scope of work and associated level of effort, is contrary to the intent of the qualifications-based selection process.

It may become necessary to re-advertise for the desired services if the scope or other parameters of the project are modified from the original announcement/advertisement during the course of negotiations. It also may be necessary to re-advertise for the desired services if the project's scope is modified and there is not sufficient funding programmed or available for

the project. Additionally, all actions and decisions made throughout the procurement and negotiation process should be adequately documented and maintained to demonstrate compliance with applicable Federal laws and regulations in accordance with 23 CFR 172.7(a)(1)(v)(E) and as specified in 2 CFR 200.333.

2. How should fixed fee be established or negotiated on FAHP funded engineering and design related services contracts? (Updated 08.01.2016)

The establishment of the fixed fee should be project specific and shall consider scope, complexity, and professional nature of the services to be rendered (as specified in the 40 U.S.C. 1104(a)). Other considerations may include the size and type of contract as well as the duration and degree of risk involved in the work. In accordance with 172.11(b)(3)(iii), fixed fees in excess of fifteen (15) percent of the total direct and indirect costs of the contract may be justified only when exceptional circumstances exist.

3. May a contracting agency utilize statewide average indirect cost rates in the estimation, negotiation, administration, and payment of FAHP funded engineering and design related services contracts? (Updated 08.01.2016)

No. Contracting agencies shall use and apply a consultant's cognizant approved indirect cost rate, or an accepted rate established in accordance with the FAR cost principles (as specified in 48 CFR 31), for the purposes of contract estimation, negotiation, administration, reporting, and contract payment, and the rate shall not be limited by administrative or de facto ceilings of any kind (as specified in 23 U.S.C. 112(b)(2)(C)-(D) and 23 CFR 172.11(b)(1)(v)). Use of a statewide average indirect cost rate in the analysis of contract costs or the negotiation and administration of the contract creates an arbitrary limitation which does not comply with Federal requirements.

A contracting agency may use a statewide average indirect cost rate to estimate overall project costs to initially scope or program a project and to serve as an indicator of the level of effort moving forward. However, once the most highly qualified consulting firm is identified, contracting agencies must use the consulting firm's cognizant approved indirect cost rate, or rate accepted for use by the contracting agency if a cognizant approved rate does not exist ([See Indirect Cost Rates and Audits Question & Answer Nos. 4 and 14-27](#)), in preparing/revising an independent cost estimate to be used in negotiating and administering contracts or contract amendments in accordance with the aforementioned Federal laws and regulations.

4. May a contracting agency question the reasonableness of indirect cost rates for use and application to FAHP funded engineering and design related services contracts? (Updated 08.01.2016)

Reasonableness is determined during the audit or other evaluation of the indirect cost rate, conducted in accordance with GAGAS, and following the AASHTO Uniform Audit & Accounting Guide, and risk assessment process/risk management framework ([See Indirect Cost Rates and Audits Question & Answer No. 3](#)). Contracting agencies shall use and apply a cognizant approved indirect cost rate established in accordance with the FAR cost principles (as specified in 48 CFR 31) for the purposes of contract estimation, negotiation, administration, reporting, and contract payment, and the rate shall not be limited by administrative or de facto ceilings of any kind (as specified in 23 U.S.C. 112(b)(2)(C)-(D) and 23 CFR 172.11(b)(1)(v)). ([See Indirect Cost Rates and Audits Question & Answer Nos. 14-27](#) for a detailed discussion of the use of indirect cost rates other than as established through the cognizant approval process or when such rates are under dispute (as specified in 23 CFR 172.7(c)))

A contracting agency shall not request or start negotiations to obtain a lower indirect cost rate than was established by a cognizant approved audit (as specified in 23 U.S.C 112(b)(2)(C)-(D)). A lower indirect cost rate may be used only if offered/submitted voluntarily by a consulting firm as part of a cost proposal during contract negotiations. A consulting firm's offer of a lower indirect cost rate shall not be a condition or qualification to be considered for the work or contract award (as specified in 23 CFR 172.11(b)(1)(iv)). ([See Indirect Cost Rates and Audits Question & Answer No. 18](#))

5. When advertising for services, estimating and negotiating contract costs and terms, or administering a contract, may a contracting agency request/establish limitations of a consulting engineering firm's direct salaries and wages? (Updated 08.01.2016)

State and local public agency recipients of Federal grant assistance are required to apply the FAR cost principles to determine the allowable costs for personal services contracts with commercial, for-profit entities (as specified in 23 U.S.C. 112(b)(2)(B)-(D)). Limitations or benchmarks on consulting firm direct salaries and wages may be acceptable only if a contracting agency has performed an assessment of the reasonableness of proposed direct salary rates and established the limitations in accordance with the reasonableness provisions of the FAR cost principles (as specified in 48 CFR 31.201-3 and 31.205-6(b)(2)).

This assessment of reasonableness should include a variety of factors. In addition to the provisions specified in 48 CFR 31.201-3, in determining the reasonableness of compensation for particular employees or job classes of employees, a contracting agency must consider factors determined to be relevant by the contracting office. Factors that may be relevant include, but

are not limited to, conformity with compensation practices of other firms: (i) of the same size; (ii) in the same industry; (iii) in the same geographic area; and (iv) engaged in similar non-government work under comparable circumstances.

An assessment consistent with the FAR cost principles for determining the reasonableness of direct salary costs would permit contracting agencies to establish direct salary compensation limitations or benchmarks based upon the objective consideration of the compensation factors discussed above. This assessment would be used to determine what is reasonable for the subject work to be performed based on the classification, experience, and responsibility of the employee performing the work, taking into consideration the factors identified above.

To ensure a fair and reasonable negotiation of costs, the consulting firm's actual direct salary rates or those established via this assessment for particular employees or classes of employees must be used in the negotiation and administration of the contract (as specified in 23 CFR 172.11(b)(2)(ii)). If an assessment of reasonableness in accordance with the FAR cost principles has not been performed, contracting agencies must use and apply the consulting firm's actual direct salary rates in preparing or revising the independent cost estimate to be used in negotiating or administering contracts or contract amendments (as specified in 23 CFR 172.11(b)(2)(iii)).

Limitations or benchmarks on direct salary rates which do not consider the factors prescribed in the FAR cost principles are contrary to qualifications based selection procedures (as specified in 23 U.S.C. 112(b)(2)(A), 40 U.S.C. 1104(a), and 23 CFR 172.7(a)(1)), which require fair and reasonable compensation considering the scope, complexity, professional nature, and value of the services to be rendered. Additionally, if limitations or benchmarks on direct salary rates are too low, their use is likely to limit the number of consulting firms and the qualifications of the firms which submit proposals to perform work on projects. Furthermore, as a consulting firm's indirect cost rate is applied to direct labor costs, any direct labor limitations or benchmarks not supported by the FAR cost principles have the effect of creating an administrative or de facto ceiling on the indirect cost rate, contrary to FAHP requirements (as specified in 23 U.S.C. 112(b)(2)(D) and 23 CFR 172.11(b)(1)(v)).

6. Does the method used to procure engineering and design related services influence the ability for a State or local public agency to limit/benchmark a consulting engineering firm's indirect cost rate or the direct salary or total compensation of employees on contracts?
(Updated 08.01.2016)

Yes, subject to State laws, policies, and approved procedures, State and local public agencies may be able to place a limitation or benchmark on a consulting firm's indirect cost rate when using the small purchase procedures or noncompetitive negotiation (e.g., emergency

procurement) procurement methods ([See Other Procurement Procedures Question & Answer Nos. 2-5](#)) for engineering and design related services contracts that utilize FAHP funding. Regardless of the procurement method utilized, State and local public agencies may establish limitations or benchmarks on consultant direct salary rates provided the limitations are established in accordance with the reasonableness provisions of the FAR cost principles (as specified in 48 CFR 31.201-3 and 31.205-6(b)(2)). ([See Contract Negotiation Question & Answer No. 5](#))

Small purchase and non-competitive negotiation procurement methods are not required to follow a qualifications-based selection process (as specified in 23 U.S.C. 112(b)(2)(A), 40 U.S.C. 1101-1104, and 23 CFR 172.7(a)(1)) and therefore are not required to comply with the indirect cost rate provisions specified in 23 U.S.C. 112(b)(2)(C)-(E). For simplified or non-competitive procurement methods, the State or local public agency must complete the procurement in accordance with its own State or local laws, regulations, policies, and procedures provided that these requirements are not in conflict with applicable Federal laws and regulations (as specified in 2 CFR 200.101 and 200.317). When the State or local policies or procedures are in conflict with Federal requirements, the Federal requirements prevail where use of Federal funds is involved.

As such, State and local public agencies may negotiate indirect cost rates in accordance with applicable State and local laws, regulations, policies, and procedures when procuring engineering and design related services contracts under small purchase or non-competitive negotiation procedures.

7. May a contracting agency limit/benchmark a consulting engineering firm's indirect cost rate or direct salary rates on engineering and design related service contracts that do not utilize FAHP funding? (Updated 08.01.2016)

Yes, subject to State laws, policies, and procedures, State and local public agencies may place a limitation on or benchmark a consulting firm's indirect cost rate and direct salary rates if the engineering and design related services contract does not utilize FAHP funding.

The reasonableness provisions of the FAR cost principles (as specified in 48 CFR 31.201-3 and 31.205-6(b)(2)) for determination of allowable costs apply only when any Federal-aid is used for engineering and design related services related to construction. Additionally, the indirect cost rate provisions of 23 U.S.C. 112(b)(2)(C)-(E) apply only when FAHP funding is participating on engineering and design related service contracts that directly relate to a highway construction project subject to the provisions of 23 U.S.C. 112(a).

However, as with other project expenditures that do not comply with Federal requirements, the cost of consultant service contracts that utilize only State or local public agency funding which were not procured, negotiated, or administered in accordance with applicable Federal and State laws and regulations would not subsequently be considered as eligible for the purpose of meeting the non-Federal share of costs for subsequent phases of a FAHP funded project (as specified in 23 CFR 1.9(a)). More information on non-Federal match requirements may be found at:

<https://www.fhwa.dot.gov/legsregs/directives/policy/memonfmr20091229.htm>.

8. May a contracting agency require discount payment terms (e.g. 2% 10 Net 30) on FAHP funded engineering and design related services contracts? (Updated 08.01.2016)

No, a requirement for a unilateral discount from a consulting firm's negotiated compensation due to early payment would be in violation of Federal laws and regulations applicable to engineering and design related services contracts utilizing FAHP funding and directly related to a construction project.

Given the ability for most contracting agencies to promptly pay invoices via electronic methods, required discount payment terms would essentially provide the contracting agency an arbitrary discount beyond the negotiated fair and reasonable compensation. A required discount of a firm's invoiced amount, if paid within an established time frame, essentially creates an arbitrary reduction of the negotiated fair and reasonable compensation required by the Brooks Act (as specified in 40 U.S.C. 1104(a)); creates an arbitrary ceiling on the firm's approved indirect cost rate required to be applied to contract negotiation and payments (as specified in 23 U.S.C. 112(b)(2)(D) and 23 CFR 172.11(b)(1)(v)); and creates an arbitrary reduction of direct salary/wage rates which does not provide consideration of the reasonableness provisions of the FAR cost principles (as specified in 48 CFR 31.201-3 and 31.205-6(b)(2)). ([See Contract Negotiation Question & Answer Nos. 1, 4, and 5](#))

As such, a contracting agency may not require or request discount payment terms via a solicitation/request for proposal, during the subsequent evaluation and selection process, as a negotiation point, or through standardized contract documents/templates. However, if a consulting firm, in the interest of its own financial management of the contract, voluntarily offered a discount payment term in its price proposal during negotiations, the contracting agency could accept the discount payment terms provided the firm's offer is not a condition or qualification to be considered for the work or contract award. FAHP funding participation would then be limited to the Federal share of the discounted payments actually made by the contracting agency.

9. Once a FAHP funded engineering and design related services contract has been negotiated, signed, and becomes binding, may a contracting agency request or require a consulting firm to reduce fees or overall contract costs? (Updated 08.01.2016)

No. Unilateral modifications to the pricing of FAHP funded engineering and design related services contracts without engaging in good faith negotiations with the consulting firm are contrary to applicable Federal laws and regulations.

An arbitrary reduction of fees or overall contract costs is inconsistent with qualifications based selection procedures (as specified in 23 U.S.C. 112(b)(2)(A), 40 U.S.C. 1104(a), and 23 CFR 172.7(a)(1)) for negotiation of fair and reasonable compensation considering the scope, complexity, professional nature, and estimated value of the services to be rendered. Reductions to overall contract costs also creates a de facto ceiling on a firm's approved indirect cost rate required to be applied to contract negotiations and payment (as specified in 23 U.S.C. 112(b)(2)(D) and 23 CFR 172.11(b)(1)(v)) and creates an arbitrary reduction of direct salary/wage rates which does not provide consideration of the reasonableness provisions of the FAR cost principles (as specified in 48 CFR 31.201-3 and 31.205-6(b)(2)). ([See Contract Negotiation Question & Answer Nos. 1, 2, 4, and 5](#))

In order to reduce expenditures associated with existing FAHP funded engineering and design related services contracts, a contracting agency may cancel or delay a contract as permitted within the provisions of the contract, re-negotiate the terms of the contract, or terminate the project.

VI. Contract Administration

1. [What record keeping and retention requirements apply to a contracting agency for the procurement \(solicitation, evaluation, selection, and contract negotiation\) of a consulting engineering firm for FAHP funded engineering and design related services?](#)
(Updated 08.01.2016)
 2. [Are contracting agencies required to conduct performance evaluations of consulting firms working on FAHP funded engineering and design related services contracts?](#)
(Updated 08.01.2016)
 3. [May on-call \(indefinite delivery/indefinite quantity \(IDIQ\)\) type contracts be utilized for FAHP funded engineering and design related services?](#) (Updated 08.01.2016)
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1. What record keeping and retention requirements apply to a contracting agency for the procurement (solicitation, evaluation, selection, and contract negotiation) of a consulting engineering firm for FAHP funded engineering and design related services? (Updated 08.01.2016)

FAHP funding recipients and sub-recipients must maintain adequate and readily accessible project performance and financial records, supporting documents, and other records which are considered pertinent to the grant agreement and compliance with applicable Federal laws and regulations (e.g., 23 U.S.C. 112, 40 U.S.C. 1101-1104, 23 CFR 172, 48 CFR 31, and 2 CFR 200) (as specified in 2 CFR 200.333). These records shall be maintained for a minimum period of three years following submittal of the final voucher (as specified in 23 CFR 172.9(c)(1)(v)).

As such, contracting agencies must maintain records to detail the significant history of a procurement which must adequately demonstrate compliance with applicable Federal laws and regulations (as specified in 23 CFR 172.9(c)(1)(iv)). These records should include, but are not necessarily limited to: rationale for the method of procurement, contract type, and payment method; the solicitation (advertisement/announcement) for services including the scope, requirements, and evaluation criteria for selection; documents supporting evaluation, discussion, ranking, and final selection; and documents supporting the analysis, negotiation, and agreement on fair and reasonable compensation.

The extent of procurement history documentation should be reasonable and commensurate with the size and complexity of the procurement itself. Procurement record keeping

requirements should be defined within a contracting agency's written policies and procedures to ensure records are consistently and uniformly maintained.

Similar record keeping and retention requirements for consulting firms are to be included in all contracting agency contract provisions (as specified in 2 CFR 200.333).

2. Are contracting agencies required to conduct performance evaluations of consulting firms working on FAHP funded engineering and design related services contracts? (Updated 08.01.2016)

Yes. In accordance with 23 CFR 172.9(d)(2), contracting agencies are required to prepare an evaluation summarizing the consultant's performance on a contract. The performance evaluation should include, but not be limited to, an assessment of the timely completion of work, adherence to contract scope and budget, and quality of the work conducted.

Many agencies also perform interim evaluations, providing constructive feedback and encouraging communication throughout the performance period. Interim evaluations also allow for a focused evaluation of components/milestones of a project, mitigating loss of knowledge from changes in personnel and fostering continuous improvement by the consultant and contracting agency. Some contracting agencies even perform a construction quality assessment during or after construction to capture the role that the quality of design plans may have in the construction of the project. Typically, consultant performance evaluations are captured in a database and then utilized as a measure of past performance in the selection process on future projects consistent with the Brooks Act (as specified in 40 U.S.C. 1103(c)). As such, consulting firms should be provided an opportunity to respond in writing to an evaluation or pursue an established appeals process if the consultant believes an evaluation is incorrect.

3. May on-call (indefinite delivery/indefinite quantity (IDIQ)) type contracts be utilized for FAHP funded engineering and design related services? (Updated 08.01.2016)

Yes, the procurement of services to be performed under on-call contracts is allowed under 23 CFR 172.9 and must follow either competitive negotiation or small purchase procurement procedures, as specified in 23 CFR 172.7.

A standard on-call contract requires a consulting firm to provide work and services on an as-needed or on-call basis. On-call contracts are typically used when a specialized service will be needed for a number of different projects (e.g., field surveying, geotechnical boring, wetland determination, hazardous waste analysis, traffic signal design, lighting design, etc.). To maintain the intent of the Brooks Act (40 U.S.C. 1101-1104) in promoting open competition and selection based on demonstrated competence and qualifications, a maximum length of contract, not to

exceed 5 years including extensions, and maximum dollar amount of contract must be defined within the solicitation and provisions of an on-call contract. These thresholds provide for a defined termination of the contract to prevent an infinite amount of workload over an infinite period of time being awarded to a single consulting firm. Should additional services be required after an established threshold has been met, a solicitation for a new contract would be required, ensuring open competition and selection of the most highly qualified firm are achieved.

If multiple firms are to be procured through a single solicitation for specific on-call services, the number of consultants that may be selected or contracts that may be awarded along with procedures for award of task orders among the selected firms must also be defined in the solicitation and contract provisions. Task orders may not be competed and awarded among the selected, qualified consultants on the basis of costs. Contracting agencies may, however, select qualified firms on a regional basis (as described in 23 CFR 172.9(a)(3)(iv)(B)(2)) or through an additional qualifications-based procedure with opportunity for discussions between the contracting agency and qualified firms for each specific task order. All requirements for FAHP funded engineering and design-related services contracts shall be made by public announcement with evaluation and selection based on demonstrated competence and qualifications for the type of services required (as specified in 23 U.S.C. 112(b)(2)(A), 40 U.S.C. 1101, and 23 CFR 172.7(a)(1)).

Policies and procedures for the procurement, management, and administration of on-call contracts must be provided in a contracting agency's approved written procurement policies and procedures (as specified in 23 CFR 172.5(c)).

VII. Disadvantaged Business Enterprise (DBE) Considerations

1. [Are contracting agencies required to give consideration to DBE consulting engineering firms in the procurement of engineering and design related services?](#) *(Updated 08.01.2016)*
 2. [Under competitive negotiation/qualifications based selection \(Brooks Act\) procurement procedures, may a contracting agency consider the use/participation of DBEs as an evaluation criterion in the selection of the most highly qualified consulting firm/team?](#) *(Updated 08.01.2016)*
 3. [May a contracting agency set goals for DBE participation on engineering and design related services contracts?](#) *(Updated 08.01.2016)*
 4. [May a contracting agency advertise or solicit engineering and design related services with set-asides exclusive for DBE consulting firms?](#) *(Updated 08.01.2016)*
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1. Are contracting agencies required to give consideration to DBE consulting engineering firms in the procurement of engineering and design related services? *(Updated 08.01.2016)*

Yes, contracting agencies are required to give consideration to DBE consultants in the procurement of engineering and design related services contracts using FAHP funding (as specified in 23 CFR 172.7(b)(2) and 49 CFR 26).

Recipients of FAHP funding must develop a DBE program that includes procedures and methods for: establishing DBE program participation goals, setting participation goals on specific contracts, and monitoring and reporting on the performance of its DBE participation (as specified in 49 CFR 26). The use of DBE set-aside contracts or quotas for DBEs is prohibited by Federal regulations (as specified in 49 CFR 26.43) ([See DBE Program Question & Answer Nos. 3 and 4](#) and the Preamble to 49 CFR Part 26 in 64 FR 5097 for a discussion of set-asides, quotas, and goals). Contracting agencies are not eligible to receive FAHP funding unless FHWA has approved the agency's DBE program and the agency remains in compliance with its approved program (as specified in 49 CFR 26.21(c)).

DBE program participation goals, as well as the method for achieving them, are specific to the DBE program developed by the contracting agency and subject to FHWA approval. To the extent practical, a contracting agency must achieve DBE program participation goals through race and gender-neutral measures (as specified in 49 CFR 26.39 and 26.51(a)). DBE participation

on all contracts funded with FAHP funds, whether for professional or construction services, may be counted toward overall DBE program participation goals.

When overall DBE program participation goals cannot be met through race-neutral measures, additional DBE participation on engineering and design related services contracts may be achieved through either one of two methods in accordance with an agency's FHWA approved DBE program:

- Use of an evaluation criterion for DBE participation in the qualifications based selection of firms ([See DBE Considerations Question & Answer No. 2](#)); or
- Establishment of a contract DBE participation goal ([See DBE Considerations Question & Answer No. 3](#)).

For additional information regarding the DBE Program, please visit the FHWA Office of Civil Rights web site at: <https://www.fhwa.dot.gov/civilrights/programs/dbess.htm> and the U.S. Department of Transportation DBE Program web site at: <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise>.

2. Under competitive negotiation/qualifications based selection (Brooks Act) procurement procedures, may a contracting agency consider the use/participation of DBEs as an evaluation criterion in the selection of the most highly qualified consulting firm/team? (Updated 08.01.2016)

Yes, the use/participation of certified DBE sub-consultant firms may be utilized as an evaluation criterion where appropriate in assessing the qualifications of firms/teams to perform the solicited services. Use of an evaluation factor for DBE participation in the procurement of engineering and design related services must comply with Federal laws and regulations (as specified in 49 CFR 26) and be consistent with the agency's FHWA approved DBE program. ([See DBE Considerations Question & Answer No. 1](#))

The competitive negotiation/qualifications based selection process required for the procurement of FAHP funded engineering and design related services requires evaluation and selection based on demonstrated competence and qualifications to perform the solicited services. However, agencies are required to give consideration to DBE consultants in the procurement of engineering and design related services contracts using FAHP funding (as specified in 23 CFR 172.7(b)(2) and 49 CFR 26). To harmonize Federal regulations related to qualifications based selection and DBEs, a contracting agency may establish the use/participation of certified and qualified DBE consultant firms as an evaluation criterion of no

more than ten (10) percent of the total evaluation criteria in assessing the qualifications of firms/teams to perform the solicited services.

In awarding points for a DBE participation criterion in the evaluation and selection of the most highly qualified consulting firm/team, evaluation/selection officials must consider the prime consultant's good faith efforts (as specified in 49 CFR 26 Appendix A) to engage DBEs, as demonstrated in the firm's response to the solicitation. Consulting firms which have demonstrated good faith efforts to engage DBE firms in the delivery of the solicited services shall be considered to have satisfied the DBE evaluation criterion (as specified in 49 CFR 26.53 and Appendix A).

If, during the negotiation phase of the procurement process, work proposed to be performed by DBEs in the response to the solicitation is decreased or eliminated through negotiation of the scope of services, the prime consultant must use good faith efforts in revision of its proposal to provide for the participation of DBEs at the level indicated in its response to the solicitation (as specified in 49 CFR 26.53 and Appendix A). These good faith efforts should consider the use of DBEs to perform services in other areas of the project in order to obtain the level of DBE participation originally proposed. Failure of the most highly qualified (top-ranked) firm to make adequate good faith efforts during negotiation to provide for the proposed level of DBE participation permits the contracting agency to terminate negotiations and initiate negotiations with the number two-ranked firm (as specified in 49 CFR 26.53 and Appendix A). This is based on the fact that DBE participation was utilized as an evaluation criterion to rank the qualified firms/teams.

To maintain the integrity of a competitive negotiation/qualifications based selection procurement, the total of all allowable non-qualifications based evaluation criterion (local presence and/or DBE participation) shall not exceed ten (10) percent of the total evaluation criteria. ([See Competitive Negotiation Question & Answer No. 9](#) regarding local office presence as an evaluation criterion) The ten (10) percent limitation applies only to non-qualifications based evaluation criterion and should not be considered as a limitation for specific DBE contract goals established by a contracting agency in accordance with its approved DBE program. ([See DBE Considerations Question & Answer Nos. 1 and 3](#))

3. May a contracting agency set goals for DBE participation on engineering and design related services contracts? (Updated 08.01.2016)

Yes, a contract DBE participation goal may be established on engineering and design related services contracts that have sub-consulting opportunities (as specified in 49 CFR 26.51). The establishment and implementation of a contract DBE participation goal must comply with

Federal laws and regulations (as specified in 49 CFR 26) and be consistent with the agency's FHWA approved DBE program. ([See DBE Considerations Question & Answer No. 1](#))

If a contracting agency establishes a DBE participation goal on a consultant services contract, the agency cannot disqualify a consultant for failing to meet the contract goal provided the consultant made good faith efforts to meet the participation goal (as specified in 49 CFR 26.53 and Appendix A). A contracting agency may place in the advertisement or solicitation for engineering and design related services that the prime consultant must meet the established contract DBE participation goal or demonstrate good faith efforts to meet it. The most highly qualified (top-ranked) firm would be required to demonstrate how the firm would meet the contract goal at the negotiation phase of the procurement process (as specified in 49 CFR 26.53 and Appendix A).

If, during the negotiation phase of the procurement process, work proposed to be performed by DBEs in the response to the solicitation is decreased or eliminated through negotiation of the scope of services, the prime consultant must use good faith efforts in revision of its proposal to provide for the participation of DBEs to meet the established contract goal (as specified in 49 CFR 26.53 and Appendix A). The fact that the prime consultant could perform the work with its own forces does not relieve it from making good faith efforts to meet the DBE goal. If the top-ranked firm does not meet the goal or demonstrate a good faith effort, the contracting agency may terminate negotiations and initiate negotiations with the number two-ranked firm.

4. May a contracting agency advertise or solicit engineering and design related services with set-asides exclusive for DBE consulting firms? (Updated 08.01.2016)

No, as the use of DBE set-aside contracting which restricts competition for specified contracts to DBE firms is prohibited by Federal regulations (as specified in 49 CFR 26.43). ([See DBE Considerations Question & Answer No. 1](#) and the Preamble to 49 CFR Part 26 in 64 FR 5097 for a discussion of set-asides, quotas, and goals)

However, a race-neutral small business set-aside program which restricts competition to only small businesses, regardless of the socially and economically disadvantaged status of their owners, may be permitted for prime contracts (as specified in 49 CFR 26.39 (76 FR 5097)) procured under small purchase procedures (as specified in 23 CFR 172.7(a)(2)) ([See Other Procurement Procedures Question & Answer No. 2](#)), subject to State and local laws, regulations, policies, and procedures and FHWA approval.

VIII. Conflicts of Interest

1. [What are the conflict of interest related laws and regulations applicable to engineering and design related consultant services funded with FAHP funding?](#) *(Updated 08.01.2016)*
2. [May a contract be awarded to a single consulting engineering firm to provide both preliminary design and final design engineering services on a single FAHP funded project?](#) *(Updated 08.01.2016)*
3. [May a contract be awarded to a single consulting engineering firm for the preparation of relevant environmental documents and associated analyses as well as both the preliminary and final design engineering services on a single FAHP funded project?](#) *(Updated 08.01.2016)*
4. [May a contract be awarded for final design services to a consulting engineering firm, prime or sub-consultant, which provided services during the environmental review and preliminary design engineering phase of the project?](#) *(Updated 08.01.2016)*
5. [May a consulting engineering firm that performed design services on a FAHP funded project be procured to perform subsequent construction engineering/management and/or inspection services on the project?](#) *(Updated 08.01.2016)*
6. [What are the controls necessary to mitigate the potential for conflicts of interest with consultants providing services on subsequent phases of a project or serving in management roles?](#) *(Updated 08.01.2016)*

1. What are the conflict of interest related laws and regulations applicable to engineering and design related consultant services funded with FAHP funding? *(Updated 08.01.2016)*

In satisfying the requirements for the delivery and administration of the FAHP, State DOTs and their subgrantees may engage the services of consulting firms to the extent necessary or desirable. However, State DOTs and their subgrantees must have adequate powers and be suitably equipped and organized to fulfill the requirements of the FAHP (as specified in 23 U.S.C. 302(a) and 23 U.S.C. 106(g)(4)). This includes providing and maintaining: adequate staffing accountable and responsible for projects, adequate delivery and administration systems for projects, and sufficient accounting controls to properly manage Federal funds to protect the public's interest against fraud, waste, and abuse of taxpayer resources.

It is important to understand that conflicts of interest may be direct or indirect (e.g., as result of a personal or business relationship). Additionally, the appearance of a conflict of interest should be avoided as an apparent conflict may undermine public trust if not sufficiently mitigated.

Conflict of interest requirements include:

- The requirement that no contracting agency employee who participates in the procurement, management, or administration of FAHP funded contracts or subcontracts shall have, directly or indirectly, any financial or other personal interest in connection with such contract or subcontract (as specified in 23 CFR 1.33);
- The requirement that no person or entity performing services for a contracting agency in connection with a FAHP funded project shall have, directly or indirectly, any financial or other personal interest, other than employment or retention by the contracting agency, in any contract or subcontract in connection with such project (as specified in 23 CFR 1.33);
- The requirement that no person or entity performing services for a contracting agency in connection with a FAHP funded project shall have, directly or indirectly, any financial or other personal interest in any real property acquired for the project (as specified in 23 CFR 1.33);
- The requirement for non-State direct grantees and subgrantees of these direct grantees to develop and maintain a written code of conduct governing the performance of its employees engaged in the award and administration of FAHP contracts (as specified in 2 CFR 200.318(c)(1)); and
- The requirement for organizational conflicts of interest provisions which address allowable roles and responsibilities associated with the procurement, management, and administration of design-build contracts (as specified in 23 CFR 636.116 and 636.117).

Additional conflict of interest considerations include:

- The requirement for written procurement procedures which shall address monitoring a consultant's work for quality and compliance with applicable standards and specifications, and determining the extent to which a consultant may be liable for design errors and omissions (as specified in 23 CFR 172.5(c)) (See [NCHRP Project 20-7, Task 225 Final Report: Best Practices in the Management of Design Errors and Omissions \(March 2009\)](#));

- The requirement for FHWA approval, unless an alternate approval procedure has been approved, prior to procuring a consultant to act in a management support role on behalf of the contracting agency (as specified in 23 CFR 172.7(b)(5)) ([See Other Considerations Question & Answer No. 3](#)); and
- The requirement for a full-time contracting agency employee to serve in responsible charge of a Federal-aid construction project (as specified in 23 CFR 635.105). (See [FHWA Memo: Responsible Charge \(08/04/11\)](#))

2. May a contract be awarded to a single consulting engineering firm to provide both preliminary design and final design engineering services on a single FAHP funded project? (Updated 08.01.2016)

Yes, provided appropriate provisions are included in the solicitation and contract to indicate that the contracting agency is not obligated to proceed with final design for any alternative, that all reasonable alternatives will be evaluated and given appropriate consideration, and that the firm may not proceed with final design until the relevant NEPA decision documents have been issued (e.g., CE, FONSI, or ROD).

3. May a contract be awarded to a single consulting engineering firm for the preparation of relevant environmental documents and associated analyses as well as both the preliminary and final design engineering services on a single FAHP funded project? (Updated 08.01.2016)

Yes, provided appropriate provisions are included in the solicitation and contract to indicate that the contracting agency is not obligated to proceed with final design for any alternative, that all reasonable alternatives will be evaluated and given appropriate consideration, and that the firm may not proceed with final design until the relevant NEPA decision documents have been issued (e.g., CE, FONSI, or ROD).

A contracting agency may procure, under a single contract, the services of a consulting firm to prepare any environmental impact assessments or analyses required for a project as well as subsequent engineering and design work on the project provided the contracting agency assesses the objectivity of the environmental documentation prior to its submission to FHWA (as specified in 23 U.S.C. 112(f)).

4. May a contract be awarded for final design services to a consulting engineering firm, prime or sub-consultant, which provided services during the environmental review and preliminary design engineering phase of the project? (Updated 08.01.2016)

Yes, provided a NEPA decision document has been issued or if the NEPA process is still underway, appropriate provisions are included in the solicitation and contract to indicate that the contracting agency is not obligated to proceed with final design for any alternative, that all reasonable alternatives will be evaluated and given appropriate consideration, and that the firm may not proceed with final design until the relevant NEPA decision documents have been issued (e.g., CE, FONSI, or ROD).

If the final design services are to be accomplished through a design-build contract, the conflict of interest provisions as specified in 23 CFR 636.116 and 636.117 would apply.

5. May a consulting engineering firm that performed design services on a FAHP funded project be procured to perform subsequent construction engineering/management and/or inspection services on the project? (Updated 08.01.2016)

Yes, Federal requirements and FHWA policies do not expressly prohibit the same consulting firm from providing services on subsequent phases (e.g., design and construction engineering/management and/or inspection) of a project that utilizes FAHP funding. This may be permissible provided contracting agencies have established the necessary controls and provide sufficient oversight to ensure that a conflict of interest does not exist or have approved procedures to mitigate any conflict or potential for a conflict. While not expressly prohibited under Federal requirements, this practice may be prohibited under State law or contracting agency policies and procedures. Prior to allowing a firm to provide services on multiple phases of a project, contracting agencies need to evaluate and demonstrate that their policies, procedures, and practices associated with the procurement, management, and administration of engineering consultant services comply with Federal and State laws and FHWA requirements. ([See Conflicts of Interest Question & Answer Nos. 1 and 6](#))

A firm performing construction engineering/management and/or inspection services on the same project on which the firm also performed design services provides the firm an opportunity to influence or affect project decisions on scope changes, design changes, construction revisions, contract change orders, and other related issues. This can result in project delivery efficiencies, as the firm that designed the project is well-suited to verify that the project is being constructed in accordance with the design and can resolve issues related to the design on behalf of the contracting agency. However, this scenario may also pose a potential conflict of interest if the firm has a vested financial interest in failing to disclose deficiencies in its design work product and seeks to insulate itself from pecuniary liability in

subsequent phases of the project, such as minimizing or ignoring design errors and omissions, rather than serving the best interests of the contracting agency and the public. Procuring a different firm from the design firm to provide the necessary construction engineering/management and/or inspection services provides another level of review and reduces the risk of, or potential for, a conflict of interest.

Contracting agencies are responsible for ensuring the public interest is maintained throughout the life of a project and that a conflict of interest, direct or indirect, does not occur or is sufficiently mitigated by appropriate public agency controls. Contract documentation which clearly defines each contracting party's roles, responsibilities, and duties for a project is essential to the protection of the interest of all stakeholders. Prior to allowing a consulting firm to provide services on subsequent phases of the same project, the contracting agency must establish appropriate compensating controls in the form of policies, procedures, practices, and other safeguards to ensure a conflict of interest does not occur in the procurement, management, and administration of consultant services (as specified in 23 CFR 172.7(b)(4)). In general, qualified agency staff serving in responsible charge of a project, coupled with comprehensive policies, procedures, and contract documentation, will mitigate the potential for conflicts. ([See Conflicts of Interest Question & Answer No. 6](#))

Provided the necessary contracting agency controls and oversight practices are established, a consultant may be procured to provide both design and construction phase services for a project under a single solicitation. However, consideration should be given to the project scope and complexity, estimated duration of the preconstruction phase, objectivity of environmental analyses if also included within the scope of services (as specified in 23 U.S.C. 112(f)), and the need to provide fair and open competition.

When design and construction phase services are procured under a single solicitation, the selection of the consulting firm must be based on the overall qualifications to provide both design and construction phase services, which require different skill sets, experience, and resources (as specified in 23 CFR 172.5(a)(1)(ii)). Procuring these services under different solicitations may result in selection of a more qualified firm to perform services in each phase, as the most qualified firm to perform design phase services may not be the most qualified firm to provide construction phase services. Similarly, the qualifications and capacity of a firm may change over time. As such, it may not be appropriate to contract with a consulting firm to provide construction phase services at the outset of a design phase, knowing that these services may not be needed for an extended period of time until the preconstruction phase of the project is complete and construction funding authorized.

The contract with a consulting firm providing design phase services on a project may not be amended to include construction phase services unless the desired construction phase services were included within the original advertised scope of services and evaluation criteria of the solicitation from which a qualifications based selection was conducted. ([See Competitive Negotiation Question & Answer No. 11](#))

6. What are the controls necessary to mitigate the potential for conflicts of interest with consultants providing services on subsequent phases of a project or serving in management roles? (Updated 08.01.2016)

Examples of the controls necessary to consider allowing a consulting firm to provide services on subsequent phases of a project or in serving in management roles ([See Other Considerations Question & Answer No. 3](#)) for a contracting agency on projects utilizing FAHP funding include, but are not limited to:

- Consultant Services Procurement Procedures Manual (developed and approved as specified in 23 CFR 172.5(c)) which includes/addresses:
 - Conflict of interest guidance, policies, or procedures for consulting firms serving in roles as prime or sub-consultant on projects/contracts and associated impacts to a firm's ability to participate in other roles, project phases, or contracts;
 - Conflict of interest identification, disclosure, and mitigation plans and procedures for both contracting agency and consultant staff throughout all stages of project development and delivery;
 - Consultant errors and omissions policies and procedures (See [NCHRP Project 20-7, Task 225 Final Report: Best Practices in the Management of Design Errors and Omissions \(March 2009\)](#));
 - Policies and procedures (provided statutory framework permits) for a contracting agency to pursue a range of civil actions and penalties including fines, suspension, or debarment associated with fraud, waste, abuse, and identified conflicts of interest which were not disclosed; and
 - Provision for Hotline Complaints to the U.S. DOT Office of Inspector General (OIG).
- Contract documentation which clearly defines each contracting party's roles, responsibilities, and duties for a project.

- Providing necessary resources and guidance to support management and oversight of conflict of interest concerns at a program and project level, such as providing a full-time contracting agency employee to serve in responsible charge of a Federal-aid construction project (as specified in 23 CFR 635.105). (See [FHWA Memo: Responsible Charge \(08/04/11\)](#))
- Monitoring, evaluation, and reporting on compliance with Federal and State laws and regulations and approved policies and procedures with respect to conflicts of interest. To ensure overall compliance and no conflicts of interest exist, this oversight and quality assurance should include regular sampling and evaluation of contracts and be documented by reports which identify any remedial actions to address findings.
- Training requirements/programs for contracting agency and consultant staff on contract management, ethics, conflicts of interest, laws and regulations, and approved policies and procedures.
- Periodic review and discussion of contracting agency conflict of interest policies with representatives of the consultant engineering industry.

Additionally, FHWA, or a State DOT providing oversight of a subgrantee, may identify a project as a high risk project, warranting special oversight and additional approval actions, as appropriate based on cost and risk thresholds (as specified in 2 CFR 200.207).

IX. Other Considerations

1. [If a State or local public agency does not use FAHP funding for an engineering and design related services contract and uses its own procurement procedures, is the related construction project\(s\) still eligible for FAHP funding? \(Updated 08.01.2016\)](#)
 2. [May a contracting agency incorporate other parts of the FAR outside of the cost principles \(as specified in 48 CFR 31\) into their procurement, audit, and contract administration policies and procedures for FAHP funded engineering and design related services contracts? \(Updated 08.01.2016\)](#)
 3. [What is the definition of "management role" as it pertains to the requirement for FHWA approval prior to procuring a consultant to act in a management role for the contracting agency \(as specified in 23 CFR 172.9\(d\)\)? \(Updated 08.01.2016\)](#)
 4. [Can a contracting agency accept donations of engineering and design related services from third parties? \(Updated 08.01.2016\)](#)
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1. If a State or local public agency does not use FAHP funding for an engineering and design related services contract and uses its own procurement procedures, is the related construction project(s) still eligible for FAHP funding? (Updated 08.01.2016)

Yes, a physical construction authorization is a separate Federal action which carries its own eligibility requirements (as specified in 23 CFR 635 Subpart C).

Federal laws and regulations for procuring, managing, and administering engineering and design related services contracts are specific to the use of FAHP funding for the engineering and design related services. Federal requirements do not apply to activities, phases, or projects that are funded with State or local funds, except as otherwise specified in law (e.g. Buy America requirements; 23 U.S.C. 313) However, as with other project expenditures that do not comply with Federal requirements, the costs of consultant service contracts that utilize only State or local funding which were not procured, negotiated, or administered in accordance with applicable Federal and State laws and regulations would not subsequently be available to meet the non-Federal share of costs for subsequent phases (e.g., construction) of a FAHP funded project (as specified in 23 CFR 1.9(a)). More information on non-Federal match requirements may be found at:

<https://www.fhwa.dot.gov/legsregs/directives/policy/memonfmr20091229.htm>.

2. May a contracting agency incorporate other parts of the FAR outside of the cost principles (as specified in 48 CFR 31) into their procurement, audit, and contract administration policies and procedures for FAHP funded engineering and design related services contracts? (Updated 08.01.2016)

Yes, a contracting agency may formally adopt, by statute or within approved written policies and procedures (as specified in 23 CFR 172.5(c)), any direct Federal contracting provision as long as it is not in conflict with the requirements, principles, or intent of the Federal laws and regulations applicable to the procurement of engineering and design related services contracts utilizing FAHP funding.

Generally, in order for a non-Federal contracting agency to apply Federal contracting provisions, either the Federal grant program or State requirements must incorporate by reference the particular Federal statute or regulation the contracting agency applies. Alternatively, a contracting agency may formally adopt the direct Federal contracting requirement provided it is not in conflict with the Federal grant program requirements. This is consistent with the Uniform administrative requirements, cost principles, and audit requirements for Federal awards (2 CFR 200) which authorizes a contracting agency to procure consistent with its own policies and procedures, except when an applicable Federal law or regulation conflicts with those procedures (as specified in 2 CFR 200.101 and 2 CFR 200.317). When the State or local policies and procedures are in conflict with Federal requirements, the Federal requirements prevail where use of Federal funds is involved.

3. What is the definition of "management support role" as it pertains to the requirement for FHWA approval prior to procuring a consultant to act in a management support role for the contracting agency (as specified in 23 CFR 172.7(b)(5))? (Updated 08.01.2016)

A consultant acting in a management advisory role may be defined as a consulting firm or individual representative of a firm acting on the contracting agency's behalf to perform engineering management services or other services which are subject to review and oversight by agency officials, such as a program or project administration role typically performed by the contracting agency and necessary to fulfill the duties imposed by title 23 U.S.C., other Federal and State laws, and applicable regulations. This could include providing oversight of a program element on behalf of the contracting agency or serving as a general engineering consultant (GEC) to manage and provide oversight of a major project, series of projects, and/or the work of other consultants and contractors on behalf of a contracting agency. FHWA Division Office and State DOT stewardship and oversight agreements may further define a management support role and specific responsibilities within each State.

4. Can a contracting agency accept donations of engineering and design related services from third parties? (Updated 08.01.2016)

Yes. A contracting agency may accept donations of engineering and design related services by a third party if incurred after the date of Federal-aid authorization for the project if the services satisfy FAHP eligibility and program requirements.

The value of third party in-kind contributions, incurred during the grant period, is allowed to be applied toward the non-Federal share of a Federal-aid project (as specified in 2 CFR 200.306). The fair market value of such services may be eligible for credit against the contracting agency's share of the participating costs of the project provided the services and associated fair market value costs satisfy FAHP eligibility and program requirements for engineering and design related services.

More information on non-Federal match requirements may be found at:

<https://www.fhwa.dot.gov/legsregs/directives/policy/memonfmr20091229.htm>