

# A & E Oversight Training

## Webinar

### 1. How do you determine if a consultant is acting in a management role?

**Answer:** REF 23 CFR 172.5

When a consultant performs engineering services or perform roles, responsibilities and duties typically perform by a local agency official can be described as acting in management support role. Roles and responsibility typically performed by the contracting agency are

- City or County Engineer
- Program or project administration,
- Managing or providing oversight of a project, series of projects, or the work of other consultants and contractors.

Consultants acting in a management support role are subject to review and oversight by local agency official referred to as a responsible charge. Key question to consider is the consultant acting on ***behalf*** of the agency.

### 2. If an agency contracted with a consultant for city engineering services, would the consultant be considered acting in a management support role?

**Answer:** 23 CFR 172.7(b)(5)

If the consultant is acting in a management advisory role acting on the local agency's behalf to perform engineering management services or other services that are typically performed by the local agency as defined by 23 CFR 172.7(b)(5) such as providing oversight of a program element 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 the local agency then the consultant is acting in a management support role.

### 3. We are a consultant that works mainly on local agency federally funded projects. They routinely tell us they want Lump Sum fixed fee contracts but then ask us to provide invoices that support all of our billings so this is really a T&M Not to Exceed type contract. If we finish our contract let's say \$10,000 below our lump sum fee amount can we still bill for this additional amount without being able to support it with employee hours.

**Answer:** The remaining savings on a lump sum payment method is viewed as profit. It is best practice to provide supporting documents that show where the savings were incurred. It is advisable for consultants to review its contract with the local agency regarding deliverables and review records policy.

Three types of payment in Lump Sum contract:

- One time pay-off with the set forth amount in the contract
- Progress pays by milestones

- Progress pays by month or a time frame set forth in the contract – the supporting documents are the records showing time spend on and material used for the project. This is similar to the T&M payment method with a NTE ceiling amount

The time and material contract will pay the contractor/consultants with the time spent on and material used for the project. It can be a progress pay or on-time pay off as well.

Whether or not you can get the remaining portion of the lump sum contract cost depends on the contract terms and is treated case by case.

**4. Do the cost samples (Bottom Up) need (required) to have the name of the individual or is the type of classification sufficient?**

**Answer:** Bottom up is one of the cost estimating methods. Independent cost estimates do not require the name of the individual but need the labor classification. Typically bottom up cost estimates includes hours, classifications, and costs proposed for each task. The agency would not know the name of the individuals at the cost estimate phase. The cost proposal on the other hand requires both the name of the key persons and their professional classifications. The experience of the individual becomes a factor in the evaluation and the individuals listed on the approved cost proposal are used for reimbursement.

**5. When did the CMSR approval process requirements come into place? What year?**

**Answer:** Federal Register Vol 80, No. 99, cited May 22, 2015.

The final rule went into effect in June 22, 2015.

**6. Is soliciting via email to interested firms sufficient?**

**Answer:** 23 CFR 172.7(a)(1)(i)

No. As stated in the 23 CFR 172.7(a)(1)(i), solicitation process shall be by public announcement, public advertisement, or any other public forum or method that assures qualified in-State and out-of-State consultants are given a fair opportunity to be considered for award of the contract

Soliciting solely via e-mail does not guarantee or assure that consultants in-State and out-of State consultant will be reach and given fair consideration. Email solicitations are biased to only those individuals receiving the email. However, email solicitations can be done in addition to open public advertisement.

**7. Trina mentioned "If using Federal Highway Funds," however, this applies to State only funds as well -such as ATP grant projects with State only funds.**

**Answer:** All solicitations require public announcement and public advertisement regardless of the funding. Please note that State funded projects are required to follow the Brooks Act as well.

**8. When can the rates for an A&E procurement be released to the Project Team?**

**Answer:** 23 CFR 172.7(a)(1)(i)(F); 23 CFR 172.7(a) (1)(iii)(B)

Rates are contained in the cost proposal and should only be released and open during negotiation with the highest rank consultant. Since price shall not be used as a factor in evaluation, ranking and selection, rates are to be kept confidential. Once a successful negotiation is reached, rates can then be released to the Project Team.

**9. Did Trina say that we should use Specific Rates of Compensation for on-call contracts, but that for mini-RFPs we should use Cost + fixed fee?"**

**Answer:** 23 CFR 172.9(b)(1)

You do not have to use specific rates of compensation for your contract, you have other choices. Most agencies use specific rate of compensation for on-call contracts because the cost and work cannot be estimated before signing the contract. But once the cost and/or work can be estimated (such as project specific tasks), other types of payment methods need to be used. A single contract may contain different method based on suitability. The on-call master contract can be executed based on specific rates but the task orders can be based on cost plus fixed fee. Any method(s) anticipated or used should be listed in the solicitation and agreement.

**10. Are we allowed to amend the contract amount before the 5 years has elapsed?**

**Answer:** 23 CFR 172.9(b)(4), 23 CFR 172.9(e)

Yes. Local Agencies are expected to assign projects that can be completed within the contract term and contract amount. However, due to unexpected scope changes, on-call contracts may be amended to add time or funds needed to complete previous assignments. The scope changes and maximum contract shall be within the limits of the advertised solicitation. Federally funded on-call contracts cannot be extended to exceed five (5) years or exceed the maximum contract amount.

**11. CSMR City Engineer Consultants allowed to submit proposals for design and construction management work in the City's they are City Engineer's for?**

**Answer:** 23 CFR 172.7(b)5(iii)

This practice is not prohibited per 23 CFR 172.7(b)(5)(iii). The regulation indicated that consultants **"may"** be precluded from providing additional services due to potential conflict of interest. If the agency elects to this practice, local agency must have the necessary controls in place for oversight and prevention of conflicts of interest. The consultant would not have participated in the creation, advertisement, evaluation, or selection of the consultants.

**12. What happens if a sub consultant grows out of its DBE status? Do they need to be replaced or tracked differently? Does it need to be noted somewhere?**

**Answer:** 49 CFR 26 Subpart C

Yes. Local agency should track changes in the DBE. Project completion and close-out process requires submittal of Exhibit 17-F Final Report-Utilization of Disadvantaged Business Enterprises (DBE).

**13. 17-F required for design & environmental consultants as well as the construction contractor?**

**Answer:** LAPM Chapter 17 Project Completion

Yes. Exhibit 17-F is required for all phases of work (PE, R/W, or CON). Exhibit 17-F is required at the contract close-out (including the on-call contract) and as part of the contract completion report for consultants as well as contractors.

If the design and environmental is a task order under an on-call contract, the DBE utilization for each task needs to be recorded in Exhibit 10-G to close that task order. The 10-G's on the on-call contract are used as supporting documents for Exhibit 17-F.

- 14. It is a suggestion to use CPFF payment method for task orders, because task orders you can estimate just as you perform project specific estimates.**

**Answer:** 23 CFR 172.9(b)(1)

Local agency can use any method payment they prefer that meets the requirements listed in 23 CFR 172. Each method of payment has its advantage and disadvantage depending on the type of project (project specific or on-call). Specific rates of compensation shall only be used when it not possible to estimate extent or duration of work, should be limited to specialized support services, and the consultant's level of effort and employee classifications shall be managed appropriately.

- 15. What is OGO?**

**Answer:** Office of Guidance and Oversight.

- 16. If we can self-perform all of the work ourselves do we still have to incorporate DBE's to meet the DBE goal?**

**Answer:** 49 CFR 26.39

If the agency performs all the work, no DBE commitment is required for federally funded projects.

If the local agency selects consultants to perform the work for the federally funded projects, then yes, a DBE goal is required on each contract. 48 CFR part 26 Appendix A (IV)(B) includes, when appropriate, breaking out contract work to facilitate DBE participation even when the prime might otherwise perform the work. Prime consultants are expected to comply with the DBE requirement. 49 CFR 26.39(a) specifies the procedures for fostering small business participation.

- 17. Should we set a DBE goal for an entire project (all phases) or set the goal by each phase? Or are we allowed to combine phases, i.e., PE & ROW?**

**Answer:**

DBE goal is set per contract.

- 18. What if a local agency only documented one panel member as part of the evaluation and selection process?**

**Answer:**

Although not prohibited, one member isn't generally considered a panel. The main purpose for having three (odd number of members in the event of a tie) or more panel members is to reduce the risk of being challenged on the basis of the one person being biased.

- 19. If a local agency received only two proposals, then had to disqualify one firm because the firm failed the requirements, then awarded the contract to the only firm left, would this be considered sole source?**

**Answer:** 23 CFR 172.7(a)(3)(vii)(C)

Yes. This would be considered sole source since at least three consultants were not evaluated. The local agency needs to document and prepare a Public Interest Finding (PIF) for the DLAE's signature.

- 20. Is it an issue if a consultant had a DBE consultant that originally gave them an estimated fee of like \$40,000 to do work but at the end of the contract it only took them \$20,000 to do the work? DBE goals will be lower on forms after contract completion. Is this an issue?**

**Answer:** No, this will not be an issue. Document the change in Exhibit 17-F (Final DBE Utilization Goal) or Exhibit 10-G if it is a task order.

- 21. Why not use weighted averages for the scores instead of sum of the scores (know you should not use sum of the raw score totals).**

**Answer:** You can use weighted averages. Our best practice method is to rank each consultant after the raw scores are calculated. Document your method.

- 22. Is a cultural study expert consultant considered an A&E?**

**Answer:** If a culture study is needed for NEPA and/or CEQA permits, yes, it will be considered as an A&E. If the cultural study report needs to be prepared or signed off by a licensed /certified professional, yes, it is an A&E. Other cases, it is not an A&E type of task.

- 23. Can we get some feedback regarding using FCCM for Federal eligible contracts?**

**Answer:** 48 CFR Part 31.205-10

Facilities Capital Cost of Money (FCCM) is cost intended to compensate consultants for their investment in fixed assets and facilities. These costs are billed to a project as a percentage of direct labor. The FCCM percentage rate must be developed in accordance with the principles and procedures contained in 48 CFR Part 31.205-10.

Consultants are not required to include FCCM in their cost proposals or project invoices. However, if a consultant chooses to bill FCCM, it must be specifically identified in the cost proposal under which the cost is to be billed. If FCCM is not included in the negotiated cost proposal, the consultant waives any right to claim it on its actual cost billings.

- 24. When was Exhibit 10-G implemented?**

**Answer:** Exhibit 10-G was implement on January 2019 under LPP 18-01.

- 25. Can you please explain what Lump Sum (fixed fee) is and how it works in a contract?**

**Answer:** LAPM January 2019, Page 12 of 72, 23 CFR 172.9(b)(3)

Lump Sum is a method of payment that is based on the services agreed upon by the consultant and local agency for an agreed amount. The compensation is not subject to any adjustment due to cost changes the consultant encounters in performance of the work. The consultant assumes full responsibility in the form of profits or losses. This type of payment method requires a minimum administrative burden on both the consultant and the local agency. This method should only be used when the estimate, duration of effort and project scope is defined to the extent that fair and reasonable compensation can be determined.

- 26. Can we use the Form 10-G for non-A&E Consultant Services on call agreements?**

**Answer:** We leave the option to the local agencies to use and modify the LAPM forms available as its suits their needs for non-A&E contracts. Please be cognizant that some forms due to regulation language cannot be modified.

- 27. Do task orders on a master on-call contract require a 9-D besides the 10-02?**

**Answer:** A 9-D is not required to be submitted for Task Orders. Exhibit 9-D establishes your DBE goal on the master contract. However, DBE participation needs to be tracked for task orders.

**28. Can you please list all of the Exhibits required for soliciting an on-call RFP using Federal dollars? Are all of the exhibits required for State-only allocations as well?**

**Answer:** Please see link for LAPM Chapter 10 required forms. Although the federal forms are not required for state-only allocations, documentation of following the Brook's Act and CA Government Code 4525-4529.5 are required. Exhibit 10-C and Exhibit 10-A are both required for state-only contracts.

<https://dot.ca.gov/programs/local-assistance/forms/local-assistance-procedures-manual-forms>

**29. Is Exhibit 10-C form execution now required for State-only funded projects? Previous guidelines (Oct. 2017) established Exhibit 10-C submittal to A&E Oversight for review for Federal procurements; and we want to ensure we know any updates to this process.**

**Answer:** Yes, Exhibit 10-C has always been required for A&E contracts. We started reviewing Exhibit 10-C for state and federally funded projects in 2017 (DLA-OB-17-02: *A&E Consultant Contract Review*). You can subscribe to the following to stay up-to-date with any changes.

Blog: <http://www.localassistanceblog.com>

E-mail list: <https://dot.ca.gov/programs/local-assistance/other-important-issues/subscribe-to-dla-email-list>

Link to other important issues: <https://dot.ca.gov/programs/local-assistance/other-important-issues>

**30. Do contract amendments have to be submitted to DLAE for approval?**

**Answer:** Local agencies are required to submit Exhibit 10-C to amend the contract if there is a change in scope, contract cost and contract end date. Please note the overall contract cost and maximum 5-year time frame for on-call contracts CANNOT be amended.

**31. Firms are still allowed to use the 110% safe harbor rate in place of ICR correct?**

**Answer:** Yes. Please see link for Independent Office of Audits and Investigation (IOAI).

<https://ig.dot.ca.gov/resources>

**32. Please confirm, the prime consultant cannot include markup for sub consultants correct?**

**Answer:** Yes, no mark-ups for the subconsultants in the cost proposals. Costs are based on the negotiated cost proposal that was deemed fair and reasonable by the consultant and local agency.

**33. Sub consultants need to submit Ex. 10-H as their cost proposal, correct?**

**Answer:** Yes, subconsultants are required to submit their proposals in the same format to the primary consultants to be included in the whole cost proposal package.

**34. For your consultant and sub-consultant independent cost estimate prepared by the agency. If you obtain information regarding current fees/rates from consultants/sub-consultants, can these same consultants/sub-consultants provide a proposal during advertisement?**

**Answer:** Not understanding this question. Rates and fees are part of cost proposal that is confidential and should only be disclosed during the negotiation process.

- 35. If an agency provided 4 weeks for proposal and then extended the timeframe to 6 weeks but still manage to only obtain 2 proposals, can the agency move forward to interviews to determine the most qualified firm?**

**Answer:** 23 172.7(a)(1)(iv)(D)

Yes. Local agency would document the process.

- 36. If you increase the scope on a Cost-plus-fixed fee method, does the fixed fee increase (because of the scope increase)? If the hours of the original scope increase, then the fixed fee obviously stays the same and cannot be increased.**

**Answer:** Cost plus fixed fee is a payment method based on actual costs on a project, plus paid a specific fixed fee for performing the work. Fixed fee does not vary even though the actual cost will vary (assuming there is no change in the scope of services). If a substantial change occurs to the scope of work or duration of services, the fixed fee may be adjusted in a contract modification subject to approval and justification provided.

- 37. If we have multiple on-call contracts and we have to implement a mini RFP process, do we need to have 3 people review each proposal for the specific task order?**

**Answer:** No. But keep in mind the perception of biased evaluation.

- 38. Do we need a Public Interest finding for on-call contracts if we only get 1 proposal? And what if we get 2?**

**Answer:** 23 172.7(a)(1)(iv)(D)

Yes, a Public Interest Finding (PIF) is required for one proposal. A justification is required for two proposals.

- 39. LAPM Chap 10 states that the Consultant cost proposal is to be submitted only by the top ranked consultant and no others until negotiations are terminated with the top ranked. Please clarify?**

**Answer:** Best practice is to request the cost proposal from the top consultant. It may be listed in the solicitation to receive a cost proposal in a separately sealed envelope from all firms, but the time and cost to create a cost proposal can be immense and prohibit competition.

If the local agency requests or receives a proposal from ALL the top ranked consultants, only the proposal of the first ranked consultant is opened. If the negotiation is successful, then the remaining cost proposals need to be returned unopened or destroyed in accordance with the agency's approved procedures. If the first ranked firm fails the negotiation, their proposal will be destroyed per the policy. In the meantime, local agency will open the second ranked firm's cost proposal and negotiate with the second ranked firm. This process will continue until the negotiation settled. An agency cannot go back to a previously terminated firm and reopen negotiations.

- 40. Can A&E proposal fees be considered when selecting a consultant if the contract amount is under \$150,000?**

**Answer:** No. All A&E contracts regardless of amount shall be Qualification Based.

- 41. For contracts estimated to be over \$150K that require A&E review, this training says that once the top firm is selected, the required forms must be submitted to A&I for review/approval and**

**then the cost negotiation phase starts. After cost negotiation phase is finished, does the new cost need to be sent to A&I again prior to moving on to the next step?**

**Answer:** No. Actually, Exhibit 10-A and associated documents are sent to A&I after the firm is selected but prior to execution. Any final changes in the ICR are recorded in the cost proposal and kept by the agency in your file.

- 42. If an agency is pursuing a 5-yr on call contract with a short list of firms, and the efforts are estimated at \$150,000 per project which ends up being 1 project per year, would the total cost assessment be \$150k, or \$750,000? This changes some requirements because of the \$500k threshold.**

**Answer:** The total cost would be the cumulative of the 5-year contract. Total contract cost affects DBE requirements and ICR submittal requirements.

- 43. The presentation indicated that certain services like ROW are not A/E services. Are there specific guidelines as to how ROW services are acquired as a subcontractor to the A/E consultant?**

**Answer:** If the ROW services are on an A&E contract, the entire contract is considered an A&E contract. Right of Way engineering that defines the project limits can be acquired as a subcontractor to the A&E consultant. ROW acquisition or other non-A&E services on an A&E contract are acquired by the prime which is not regulated by our office.

- 44. Is it appropriate for an agency to ask from the consultant in their proposal for the hours needed to complete each task?**

**Answer:** There do not appear to be any regulations saying that this is inappropriate. However, 23 USC 112(b)(1) states that "No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications."

- 45. Is consensus scoring of bidders allowed?**

**Answer:** There do not appear to any rules forbidding this, but agencies should be wary of bidding processes that can allow or appear irregular/unfair. If three raters independently rate, then an honest result appears more likely. This is a best practice issue.

- 46. Are non-A&E consultants shown on Exhibit 10-A?**

**Answer:** Yes, all subconsultants are shown on Exhibit 10-A. All subconsultants need to fill out a cost proposal. The participation amount needs to add up to the listed subconsultants. Identify N/A for the category and Caltrans ICR acceptance ID #.

- 47. Can there be a range in the cost plus fixed fee cost proposal?**

**Answer:** The CPFF cost proposal does not use a range. These contracts are based on actual costs so any updated labor rates are charged according to the calculated and approved new rates. The salary increases/escalations are included in the overall calculated amount.