



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

23 CFR Part 172

[FHWA Docket No. FHWA-2012-0043]

RIN 2125-AF44

Procurement, Management, and Administration of Engineering and Design Related Services

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This rule updates the regulations governing the procurement, management, and administration of engineering and design related services directly related to a highway construction project and reimbursed with Federal-aid highway program (FAHP) funding. In issuing the final rule, FHWA revises the regulations to conform to changes in legislation and other applicable regulations [including the DOT's recent adoption of the revised "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards," and removal of outdated references] and addresses certain findings and recommendations for the oversight of consultant services contained in national review and audit reports.

DATES: This final rule is effective [Insert date 30 days after date of publication in the Federal Register].

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SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document, the notice of proposed rulemaking (NPRM), and all comments received may be viewed online through the Federal eRulemaking portal at: <http://www.regulations.gov>. The Web site is available 24 hours each day, 365 days each year. Please follow the instructions. An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: <http://www.archives.gov/federal-register/>, or the Government Printing Office's Web page at: <http://www.gpo.gov/fdsys>.

Background

This rulemaking modifies existing regulations for the administration of engineering and design related service contracts to ensure consistency and conformance to changes in authorizing legislation codified in 23 United States Code (U.S.C.) 112(b)(2) and changes in other applicable Federal regulations. These revisions also address certain findings contained in a 2008 U.S. Government Accountability Office (GAO) review report (<http://www.gao.gov/products/GAO-08-198>) regarding increased reliance on consulting firms by State transportation agencies (STAs) and a 2009 DOT Office of

Inspector General (OIG) audit report (<http://www.oig.dot.gov/library-item/30274>) regarding oversight of engineering consulting firms' indirect costs claimed on Federal-aid projects or activities related to construction.

The primary authority for the procurement, management, and administration of engineering and design related services directly related to a highway construction project and reimbursed with FAHP funding is codified in 23 U.S.C. 112(b)(2). On November 30, 2005, the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006 (Pub. L. 109-115, 119 Stat. 2396, HR 3058), commonly referred to as the "2006 Appropriations Act," was signed into law. Section 174 of this Act amended 23 U.S.C. 112(b)(2) by removing the provisions that permitted States to use "alternative" or "equivalent" State qualifications-based selection procedures and other procedures for acceptance and application of consultant indirect cost rates that were enacted into State law prior to June 9, 1998.

Effective on the date of enactment of the "2006 Appropriations Act," States and local public agencies could no longer use alternative or equivalent procedures. States and local public agencies are required to procure engineering and design related services in accordance with the qualifications-based selection procedures prescribed in the Brooks Act (40 U.S.C. 1101 *et seq.*) and to accept and apply consultant indirect cost rates established by a cognizant Federal or State agency in accordance with the Federal Acquisition Regulation (FAR) cost principles (48 CFR part 31) as required by 23 U.S.C. 112(b)(2). To comply with the amendments to 23 U.S.C. 112(b)(2), this rulemaking removes all references to alternative or equivalent procedures.

In addition, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council published a final rule in the Federal Register of August 30, 2010, (75 FR 53129), and effective on October 1, 2010, raising the Federal simplified acquisition threshold established in 48 CFR 2.101 of the FAR cost principles from \$100,000 to \$150,000 to account for inflation using the Consumer Price Index as required in statute. This rulemaking revises the small purchase procurement method to reflect this increase in the Federal threshold.

This rulemaking also addresses certain findings and recommendations contained in the aforementioned GAO review and OIG audit reports, clarifies existing requirements to enhance consistency and compliance with Federal laws and regulations, and addresses evolutions in industry practices regarding the procurement, management, and administration of consultant services.

Summary Discussion of Comments Received in Response to the NPRM

On September 4, 2012, FHWA published an NPRM in the Federal Register at 77 FR 53802 soliciting public comments on its proposal to update the existing regulations. The following presents an overview of the comments received to the NPRM. Comments were submitted by STAs, local government agencies, industry organizations, and individuals. The docket contained comments from 31 different parties, including 18 STAs, 1 regional association of local government agencies, 8 industry organizations, and 4 individuals.

The majority of the comments received related to clarification or interpretation of various provisions within the proposed regulatory text. Many commenters supported the proposed rule and its alignment with current policies, guidance, and industry best

practices. Several STA commenters asserted that the provisions proposed within the NPRM would impose burdens on STAs, requiring additional staff and resources. However, the majority of these specific comments related to existing requirements imposed by statute and other applicable regulations which were clarified within the text of this part for consistency and to assure compliance with all applicable requirements for the procurement, management, and administration of engineering and design related consultant services.

The FHWA appreciates the feedback the commenters provided and has carefully reviewed and analyzed all the comments that were submitted and made revisions to the NPRM to incorporate suggestions where necessary. For example, some of the more significant revisions made in the Final Rule include:

- Adding, removing, or revising several definitions or phrases such as the terms “subconsultant,” “fixed fee,” “management support role,” and others;
- Revising § 172.7(a)(1)(iv)(C) regarding discussion requirements following submission and evaluation of proposals to require STA’s to specify within a Request for Proposals (RFP) what type of additional discussions, if any, will take place;
- Adding clarifying language in § 172.9(a)(3)(iv)(B)(1) to indicate that the process of issuing a task order under an indefinite delivery/indefinite quantity (IDIQ) contract, may include, but does not require a second, formal RFP, and;
- Revising the term “performance report” to “performance evaluation” in § 172.9(d)(2) to allow States discretion as to the structure of the evaluation.

A discussion of the substantive comments received is provided in the following section.

Comments Directed at Specific Sections of the Proposed Revisions to 23 CFR Part 172

The California DOT suggested changing the title of the part to “Procurement, Management, and Administration of Architectural, Engineering and Related Services” for consistency with the terminology of the Brooks Act (40 U.S.C. 1101 *et seq.*).

While the Brooks Act establishes the qualifications-based selection procurement procedures, the title proposed was selected to correlate to the terminology contained within 23 U.S.C. 112(b)(2), an authorizing statute for this part. No change was made to the regulation.

§ 172.3 – Definitions

The Virginia DOT and California DOT proposed that definitions of “grantee,” “subgrantee” and “other direct grantee” be added.

After these comments were received, the Office of Management and Budget revised and published 2 CFR part 200, the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. That regulation, adopted by DOT by issuance of 2 CFR part 1201, effective December 26, 2014¹, no longer uses the terms “grantee,” “subgrantee,” or “other direct grantee.” New terms to describe Federal assistance include: “recipients” (2 CFR 200.86) and “subrecipients” (2 CFR 200.93). Given the terms discussed above are defined in 2 CFR part 200, FHWA has decided not to redefine the terms. The term “direct grantee” was modified to “recipient” to conform to these changes.

¹ <https://www.federalregister.gov/articles/2014/12/19/2014-28697/federal-awarding-agency-regulatory-implementation-of-office-of-management-and-budgets-uniform>

The California DOT proposed that a definition of “subconsultant” be added to the regulation.

The FHWA agrees with the comment and the regulation was modified accordingly.

The Oregon DOT proposed that a definition of “assurance” be added as this is a specific audit term. Oregon DOT recommends reference to the American Institute of Certified Public Accountants (AICPA) standards where “assurance” is defined.

The context in which the “assurance” term is used in the regulation is one of providing assurance of compliance with the cost principles, similar to that used in 2 CFR 200.300(b) requiring non-Federal recipients of Federal financial assistance to be responsible for compliance with Federal requirements; and not, in the AICPA standards context. No change was made to the regulation.

The Oregon DOT proposed that a definition of “acceptance” be added, as it could be interpreted as either “approved” or “audited,” when used in the context of “acceptance of indirect cost rates.”

Within the context of “acceptance of indirect cost rates,” contracting agencies must accept cognizant agency approved rates established in accordance with the FAR cost principles (48 CFR part 31). The FHWA considered the recommendation but believes that the term “acceptance” could not be interpreted as “approved” or “audited” in this context. No change was made to the regulation.

The Professional Engineers in California Government (PECG) proposed that a definition of “fair and reasonable” be added which would include an analysis of the cost

using internal contracting agency staff to determine whether it is more cost effective to perform the services in-house or to contract the services out to consultants.

Section 302(a) of Title 23, U.S.C. permits the State to use private engineering firms to the extent necessary or desirable, provided the contracting agency is suitably equipped and organized to discharge to the satisfaction of the Secretary, the duties required by Title 23. No change was made to the regulation.

A comment from Collins Engineers, Inc. recommended that the definition of “engineering and design related services” be expanded to include bridge inspection, rating, and evaluation services.

“Engineering and design related services” contracts are described in 23 U.S.C. 112(b)(2)(A) and “bridge inspection, rating, and evaluation services” are not specifically addressed. 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)). As such, bridge inspection, rating, and evaluation services may be considered engineering services under State law and regulation, and dependent upon the specific details of the scope of work being provided and its nexus with construction, these engineering services would be subject to these requirements. No change was made to the regulation.

The South Dakota DOT recommended that activities such as “research, planning, and feasibility studies” be explicitly excluded from the definition of “engineering and design related services.”

“Engineering and design related services” contracts are described in 23 U.S.C. 112(b)(2)(A) and include “feasibility studies.” However, each contract subject to and being procured under 23 U.S.C. 112(b)(2) must have a construction nexus (related in some way to highway construction) to be subject to these requirements. The proposed definition was expanded to include other services included within the definition of engineering under State law as specified within the Brooks Act. As such, service contracts for research or planning cannot be excluded as these contracts may require engineering expertise under State law and regulation. For those contracts to be subject to 23 U.S.C. 112(b)(2), however, they must be related to highway construction as specified in 23 U.S.C. 112(b)(2)(A), which cross-references section 112(a) of Title 23. No change was made to the regulation.

The Connecticut DOT requested that additional detail as to what is included in “construction management” be provided.

“Engineering and design related services” “ contracts are described in 23 U.S.C. 112(b)(2)(A) and includes “construction management.” Construction management is a common term within the industry. However, it is difficult to quantify the extent of services included within construction management by every STA. The proposed definition of engineering and design related services was expanded to include other services included within the definition of engineering under State law as specified within the Brooks Act. As such, State law will determine whether construction related services would be considered engineering and design related for the purposes of applying part 172 requirements. No change was made to the regulation.

The California DOT suggested expanding the second part of the proposed definition of engineering and design related from “Professional services of an architectural or engineering nature...” to “Professional services of an architectural or engineering nature including support services as defined by State law...”

The proposed definition is consistent with the Brooks Act. State law already determines what is included in the “related services” term. No change was made to the regulation.

The Indiana DOT believes the definition for “cognizant agency” imposes a requirement on the STA to determine the location of a consultant’s accounting and financial records.

The definition of “cognizant agency” is consistent with the American Association of State Highway and Transportation Officials (AASHTO) Uniform Audit & Accounting Guide² and state of the practice. Consultants are responsible for disclosing and properly representing their financial information. No change was made to the regulation.

Gannett Fleming, Inc. proposed revisions to recognize consultants working under contract to Federal agencies as a cognizant Federal agency, ranking above a State agency in a hierarchy.

The NPRM definition is consistent with the AASHTO Uniform Audit & Accounting Guide and state of the practice. The referenced Federal statutory provisions

² Per https://bookstore.transportation.org/item_details.aspx?ID=2048, “This concept was developed to assign primary responsibility for an audit to a single entity (the “cognizant agency”) to avoid the duplication of audit work performed in accordance with Government Auditing Standards to obtain reasonable assurance that claimed costs are accordance with the FAR Subpart 31.2 cost principles. Such audit work may be performed by home-State auditors, a Federal audit agency, a CPA firm, or a non-home State auditor designated by the home-State auditor.”

apply to direct Federal contracting and are not incorporated for application to the Federal Aid Highway Program. No change was made to the regulation.

The American Council of Engineering Companies (ACEC) commented on the definition of the “federal cost principles,” indicating that the term Federal Acquisition Regulation is a singular term and the “s” should be removed.

The FHWA agrees with the comment and the regulation was modified accordingly.

To ensure consistency with terminology used throughout the regulation and AASHTO publications, the Indiana DOT recommended changing the word “overhead,” found in the definition for “fixed fee,” to “indirect cost.”

The FHWA agrees with the comment and the regulation was modified accordingly.

To provide a more accurate definition for “fixed fee,” the ACEC recommends replacing “not allocable to overhead” with “not allowable or otherwise included in overhead.”

The FHWA agrees with the comment and a change was made in the regulation; however, the word “overhead” was replaced with “indirect cost” to be consistent with terminology used throughout the regulation and AASHTO publications.

The Massachusetts DOT stated that their department pays “net fees” on task order contracts whereby fees are paid on a net basis based on the amount of salary expended for each assignment, although a maximum fee is budgeted similar to “fixed fee” as defined. Massachusetts DOT is concerned that the proposed definition of “fixed fee” would prohibit use of the “net fee” approach on task order contracts.

The use of “net fee” is similar to a cost plus percentage of cost payment method which is prohibited from use under 23 CFR 172.9(b)(2) (previously 23 CFR 172.5(c)) on engineering and design related services funded with FAHP funding. No change was made to the regulation.

The American Society of Civil Engineers (ASCE) requested clarification of the engineer’s management role.

The range of management services provided by a consultant will vary based on the organizational structure and capacity of the contracting agency. While the definition in § 172.3 is more general, 23 CFR 172.7(b)(5) provides additional parameters and examples of management roles. No change was made to the regulation.

§ 172.5 – Program management and oversight

§ 172.5(a) – STA responsibilities

The North Dakota DOT asserts that oversight of subgrantee (subrecipient) consultant services programs will be cumbersome for the DOT and require significant additional staff time and resources.

The STA (or other recipient) responsibility for subrecipient oversight is an existing requirement specified in 23 U.S.C. 106(g)(4) and 23 CFR 172.9(a), and 2 CFR 200.331. No change was made in the regulation.

The PECG recommended adding a requirement for grantees (recipients) and subgrantees (subrecipients) to perform a cost comparison analysis, in which the cost of using a private engineering consultant is compared with the cost of using engineers employed by a public agency, to determine if using a private engineering firm is in the public interest and an efficient use of public funds.

Section 302(a) of Title 23, U.S.C. permits a suitably equipped and organized STA to use consultants to the extent necessary or desirable. No change was made in the regulation.

The ACEC strongly opposed the recommendations made by PECG and others related to the placement of restrictions on the flexibility of STAs to “contract out” for engineering and design services.

Section 302(a) of Title 23, U.S.C. permits a suitably equipped and organized STA to use consultants to the extent necessary or desirable. No change was made in the regulation.

The Virginia DOT and AASHTO requested clarification on expectations for the compliance with “develop and sustain organizational capacity.” They assert that the responsibilities listed in § 172.5(a)(1)-(4) are new requirements, burdensome, and contrary to FHWA’s intent noted in the Background section.

The existing 23 U.S.C. 302(a) requires STA’s to have adequate powers and be suitably equipped and organized to receive FAHP funds. In meeting the provisions of 23 U.S.C. 302(a), a STA may engage the services of private engineering firms.

Subparagraphs (a)(1)-(4) help clarify the responsibilities of the STA in demonstrating its ability to procure, manage, and administer those services. No change was made in the regulation.

§ 172.5(a)(2)

The Indiana DOT, Virginia DOT, and AASHTO assert that staffing and resource estimates for consultant services are labor intensive and difficult for contracting agencies.

Additionally, Virginia DOT requests clarification on “staffing and resource estimates” and asserts it is too restrictive and would impact subgrantees (subrecipients).

The staffing and resource estimate is for STA oversight of consultant services needed as well as for any services to be provided by the STA. The estimated STA costs (staffing and resources) combined with estimated consultant costs would then be used to support the project authorization submitted to FHWA. These resource estimates also ensure the STA is suitably equipped and organized to discharge the duties required of the STA under Title 23, including its use of engineering consultants [23 U.S.C. 302(a)]. The provision was reworded to clearly indicate the STA is responsible for establishing a procedure for estimating the costs of “...agency staffing and resources for management and oversight in support of project authorization requests ...”

The South Dakota DOT requested clarification whether the submittal is for each project or is it a procedure applied by the agency to all projects. South Dakota DOT recommends that this provision should only apply when engineering services are anticipated to exceed \$150,000.

As this provision is located under the “Program management and oversight” section, the procedure is intended to be an agency procedure for estimation of consultant costs and agency oversight in support of individual project authorizations. The procedures developed by STAs for estimation may vary based on estimated size of engineering services contracts needed. No change was made to the regulation.

§ 172.5(a)(4)

The Tennessee DOT recommended indicating that STAs may accept work performed by subgrantees (subrecipients) via certification acceptance.

“Certification acceptance,” formerly authorized under 23 U.S.C. 117, permitted the Secretary to discharge the responsibilities under Title 23 by accepting a certification of the STA, applicable to projects not on the Interstate System, that the STA would accomplish consistent with the policy, objectives, and standards of Title 23. This provision was struck by section 1601(a) of Public Law 105-178 (112 Stat. 255). An STA may use a variety of methods in providing oversight of a Local Public Agency (LPA), including use of certifications from the LPA. Regardless of the method used, the STA is not relieved of oversight responsibility and subrecipient monitoring and management in accordance with 23 U.S.C. 106, and 2 CFR 200.331. No change was made to the regulation.

The California DOT recommended adding (or other direct grantee) following STA for consistency.

The FHWA agrees with the recommendation of consistency and the regulation was modified to read (or other recipient). This reflects the recent change in nomenclature adopted by 2 CFR part 200.

§ 172.5(b) Subrecipient responsibilities.

The Indiana DOT asserted that requiring LPAs to develop detailed hourly estimates places a severe undue burden on LPAs.

The development of an independent agency estimate to use as a basis for negotiation with the selected consultant is a fundamental element of Qualification Based Selection (QBS) in accordance with the Brooks Act. No change was made in the regulation.

§ 172.5(b)(1)

The Virginia DOT interpreted the requirements of § 172.5(b)(1) to require a resolution by subgrantees (subrecipients) to adopt the STA's policy and recommends this be a "may" condition.

The provision requires subrecipients to adopt the STA's policy or to develop its own for review and approval by the STA. The subrecipient must do one or the other and the awarding STA may require use of the STA's policy. As the regulation does not limit the STA to require subrecipients to adopt the STA's policy, no change was made in the regulation.

The California DOT recommends using the word "administering" instead of "awarding."

The word "awarding" is consistent with 2 CFR part 200 terminology. No change was made in the regulation.

§ 172.5(c) Written policies and procedures.

The New York State DOT expressed a concern with FHWA requiring approval of minor changes as the New York State DOT often issues Consultant Instructions containing guidance on various and sometimes minute aspects of its consultant program without prior FHWA approval.

The FHWA approval of written policies and procedures (often in the form of a Consultant Manual) is an existing requirement under § 172.9(a) and will continue under proposed § 172.5(c). The FHWA approved written policies and procedures should define minor changes/clarifications that may be adopted without additional FHWA review. No change was made in the regulation.

The Wyoming DOT asserted the addition of items to be addressed within written procedures such as conflicts of interest, penalty assessment, and dispute resolution are overly burdensome and would be more appropriate as guidance.

These are fundamental contract administration functions incorporated to address compliance concerns and internal controls, and address recommendations from national audits/reviews. The regulations do not address how to implement these procedures and thus allow STAs flexibility in addressing these elements within their written policies and procedures. No change was made in the regulation.

The PECG recommended that FHWA should approve subgrantee (subrecipient) written policies and procedures instead of the STA.

Subrecipient oversight is a primary responsibility of the STA in accordance with 23 U.S.C. 106(g)(4). No change was made in the regulation.

The Oregon DOT requested clarification regarding how and when “approval by FHWA” would occur.

The FHWA approval must occur whenever changes to the consultant manual are necessary or desired (or in accordance with the STA and FHWA stewardship and oversight agreement) and the approval will come from the FHWA Division Office. This is an existing requirement under § 172.9(a). No change was made in the regulation.

The Virginia DOT, Idaho Transportation Department, and AASHTO asserted that the requirement for STA review and approval of subgrantee (subrecipient) written policies and procedures will be an extreme burden for Virginia DOT and the LPAs.

Subrecipient oversight is a responsibility of the STA in accordance with 23 U.S.C. 106(g)(4) and STA review and approval of subrecipient written policies and

procedures is an existing requirement under § 172.9(a). No change was made in the regulation.

The California DOT suggested noting that subgrantees (subrecipients) may adopt the STA procedures and do not necessarily have to prepare their own procedures.

In accordance with the requirements in § 172.5(b)(1), a subrecipient may only prepare written procedures when not prescribed by the awarding STA. No change was made in the regulation.

§ 172.5(c)(2)

The California DOT suggested that the “Soliciting proposals from prospective consultants” phrase be revised to “Soliciting proposals/qualifications from prospective consultants.”

The FHWA agrees, as the procedures should address evaluation of prequalification information, statements of qualifications, and proposals. The regulation was modified accordingly.

§ 172.5(c)(5)

The California DOT suggested that the “Evaluating proposals and the ranking/selection of a consultant” phrase be revised to “Evaluating proposals/qualifications and the ranking/selection of a consultant.”

The FHWA agrees, as the procedures should address evaluation of prequalification information, statements of qualifications, and proposals. The regulation was modified accordingly.

§ 172.5(c)(6) [re-designated § 172.5(c)(7)]

The California DOT suggested that the “Preparing an independent agency

estimate for use in negotiation with the selected consultant” phrase be revised to “Preparing an independent agency cost estimate for use in negotiation with the highest ranked consultant.”

The independent agency estimate is more than a cost estimate and includes a breakdown of tasks, hours, etc. The existing regulation and the Brooks Act use the term “selected.” The term “selected” is used over “higher ranked” since negotiations could be terminated with the highest ranked consultant and negotiations initiated with the next highest ranked consultant. No change was made in the regulation.

§ 172.5(c)(7) [re-designated § 172.5(c)(8)]

The California DOT suggested that subparagraph (c)(7) [re-designated subparagraph (c)(8)] should have a higher precedence and should be moved to follow subparagraph (c)(1).

After review and consideration, FHWA deemed no change was necessary. No change was made in the regulation.

§ 172.5(c)(8) [re-designated § 172.5(c)(9)]

The California DOT suggested that the “Negotiating a contract with the selected consultant” phrase be revised to “Negotiating a contract with the highest ranked consultant.”

The existing regulation and the Brooks Act use the term “selected.” The term “selected” is used over “highest ranked” since negotiations could be terminated with the highest ranked consultant and negotiations initiated with the next highest ranked. No change was made in the regulation.

§ 172.5(c)(9) [re-designated § 172.5(c)(10)]

The Montana and Virginia DOTs, and AASHTO expressed concern with the language “assuring consultant compliance” since the definition of assure is “to make certain.” The Montana DOT asserted that the meaning “assuring” makes it too burdensome. Montana DOT and AASHTO recommended allowing the STAs to use a risk-based approach with periodic reviews of the consultant for compliance.

The provision states “...assuring consultant compliance with the Federal cost principles in accordance with § 172.11.” The expectation for providing this “assurance” is provided in § 172.11 which includes a risk-based approach. Additionally, the determination of cost allowance in accordance with the Federal cost principles is an existing requirement of the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards (2 CFR 200.401(a)). No change was made in the regulation.

§ 172.5(c)(10) [re-designated § 172.5(c)(11)]

The Montana DOT expressed a concern with the language “assuring consultant compliance” since the definition of assure is “to make certain.” Montana DOT asserted that “assuring” is too burdensome. Montana DOT recommended allowing STAs to use a risk-based approach with periodic reviews of the consultant for compliance.

Determination of cost allowance in accordance with the Federal cost principles in part 31 of the FAR cost principles is an existing requirement of 23 U.S.C. 112(b)(2)(B). A risk-based approach to provide reasonable assurance of consultant compliance with Federal cost principles is allowed in § 172.11. No change was made in the regulation.

The Indiana DOT asserted that assuring consultant costs billed are allowable in accordance with the Federal cost principles is a new requirement which will require additional training for project managers.

Determination of cost allowance in accordance with the Federal cost principles in part 31 of the FAR cost principles is an existing requirement of 23 U.S.C. 112(b)(2)(B). No change was made in the regulation.

§ 172.5(c)(12) [re-designated § 172.5(c)(13)]

The Colorado DOT supports the consideration of performance evaluations in the evaluation and selection phase, but asked what happens if a few consultants being considered do not have available performance evaluation results.

Many STAs include “past performance” as an evaluation criteria which considers the consultant’s previous work on similar projects and may also include any available performance evaluation data. If a consultant has not performed work for the STA previously, references from other clients of the consultant should be considered. No change was made in the regulation.

§ 172.5(c)(15) [re-designated § 172.5(c)(16)] and 172.9(c)(12) [re-designated § 172.5(c)(13)]

The ACEC requested FHWA to include a provision under “policies and procedures” and under “contract provisions” which prohibits “unreasonable indemnification and liability provisions imposed by contracting agencies.”

This would introduce a new provision not included within the NPRM and would be difficult to define/enforce “unreasonable” indemnification and liability provisions. The proposed provisions clearly state that liability is based upon errors and omissions in

the work furnished under the consultant's contract (e.g., negligence). No change was made in the regulation.

§ 172.5(c)(16) [re-designated § 172.5(c)(17)]

The Nebraska Department of Roads (DOR) asked whether the failure to meet the project schedule is considered a violation or breach of contract.

The answer depends on the specific terms of the contract and the materiality of the delay in relation to the project consistent with State law. No change was made in the regulation.

§ 172.5(c)(17) [re-designated § 172.5(c)(18)]

The California DOT suggested adding language to § 172.5(c)(17) [re-designated § 172.5(c)(18)] so it would read: “Resolving disputes in the procurement, management, and administration of engineering and design related consultant services *in accordance with the contract.*”

The FHWA asserts a dispute could occur at any time in the procurement process regardless of whether a contract had yet been established. The intention of the section is to establish a dispute resolution process that could be invoked regardless of contract status. No change was made in the regulation.

§ 172.5(e)

The North Dakota DOT, Virginia DOT, Wyoming DOT, and AASHTO expressed concerns about this section. The North Dakota DOT requested that the time frame to update written procedures be extended to 18 months and that it include compliance with the final rule provisions and not simply just update of written procedures. Virginia DOT requested a time period of 18 to 24 months to ensure changes are made to policies and

procedures of the STA and LPAs. Wyoming DOT expressed concern with reviewing and approving LPA policies and procedures within the 12 months proposed. The AASHTO noted that some STAs may need changes in legislation to meet the requirements of the rule.

The updated regulations provide clarifications of existing requirements and as such, a 12-month period is adequate for an update of the written procedures. An extension may be granted to a contracting agency by FHWA where unique or extenuating circumstances exist. No change was made in the regulation.

§ 172.7 – Procurement methods and procedures

The South Dakota DOT recommended that activities funded by State Planning and Research or Metropolitan Planning funds be excluded from the requirement of this section.

The application of 23 CFR 172.7 depends on whether the engineering and design related services as defined in 23 CFR 172.3 are connected to highway construction and is not dependent on the category of FAHP funding being used to fund the services. No change was made in the regulation.

The Virginia DOT and AASHTO asserted that this section is detailed beyond the intent of the Brooks Act and should be re-issued as guidance.

The proposed rule provides clarification and promotes uniformity of procurement requirements based upon the Brooks Act and other applicable regulations to ensure a compliant and transparent procurement process. No change was made in the regulation.

§ 172.7(a) Procurement methods

The Massachusetts DOT believes the procurement methods under this regulation should apply consistently to all Federal-aid architectural and engineering procurements, not just those related to construction projects. The Massachusetts DOT recommended striking “and directly related to a highway construction project subject to the provision of” and replacing it with “under” to allow these regulations to apply to all engineering related procurements whether leading to a construction project or not (e.g., bridge inspection, bridge load rating, etc.).

The application of these requirements is based on the authority provided within 23 U.S.C. 112(b)(2)(A) and requires the engineering services in question to be related to a highway construction project. The Brooks Act 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)). As such, bridge inspection, rating, and evaluation services may be considered engineering services under State law and regulation, and dependent upon the specific details of the scope of work being provided, and its nexus with construction, these engineering services would be subject to these requirements. Accordingly, STAs must apply 23 CFR part 172 to all Title 23 eligible engineering and design related services procurements that have a construction nexus. For those architectural or engineering contracts unrelated to construction, States must follow their procurement procedures for those contracts consistent with 2 CFR 200.317. No change was made in the regulation.

§ 172.7(a)(1)(i)

Tennessee DOT disagrees with the use of the Request for Qualifications (RFQ) and Request for Proposals (RFP) terminology. Tennessee DOT requests “Letters of Interest” and shortlisted firms are asked to provide “Contract Specific Qualifications” (using the Federal SF 330).

The FHWA believes that the NPRM terminology is consistent with the AASHTO Guide for Consultant Contracting³, which has widespread acceptance and use by the States. No change was made in the regulation.

The Texas DOT uses a multitiered approach to selecting the most qualified provider which includes a prequalification process, evaluation of statements of qualifications or letters of interest, and then conducting interviews of the highest qualified providers (3 or more). The requirements for an RFP impose an additional requirement upon the STA and provider beyond the requirements stated in 40 U.S.C. 1103. Texas DOT requests the use of proposals remain optional.

The Brooks Act requires an evaluation of qualified firms for each proposed procurement or project. An RFP specific to the project, task, or service is required for evaluation of a consultant’s specific technical approach and qualifications. No change was made in the regulation.

The California DOT asserted that the rule will increase costs to both the consultant industry and public agencies by requiring an RFQ followed by an RFP. California DOT typically issues an RFQ followed by an interview of shortlisted firms to evaluate the technical approach of the firms.

³ This item is available for purchase through AASHTO at:
https://bookstore.transportation.org/item_details.aspx?ID=1196

Oral technical proposals may be permitted in response to an RFP under a multiphase process following an RFQ; however, for the purpose of transparency, the requirements for an RFP would remain as stated in the proposed regulation. No change was made in the regulation.

The Montana DOT, ACEC-Montana, and Wyoming DOT expressed some concerns with this section. The Montana DOT and ACEC-Montana opposed the provision that an RFP specific to a project is required. Both organizations asserted that this requirement will increase time and consultant costs and will eliminate the ability to procure consultants using only a prequalification process for routine services or time sensitive projects. The ACEC-Montana recommended allowing the use of a comprehensive prequalification process such as that of Montana's DOT for procurement of consultants to provide a specific and narrow range of services. The Wyoming DOT asserted that RFPs are not appropriate for all engineering and design related services, and that requiring a RFP will eliminate current streamlined processes, increasing cost and time.

The FHWA contends that a prequalification process alone does not satisfy qualifications based selection requirements. The Brooks Act provides that for each proposed procurement or project, the agency shall evaluate qualifications and conduct discussions with at least three consultants to consider concepts and compare alternative methods for furnishing services. Simplified acquisition procedures for work that fall within the simplified acquisition threshold provide a more streamlined process for those procurements meeting the simplified acquisition threshold. For procurements that fall outside the simplified acquisition threshold, the RFP facilitates this discussion of

concepts, alternatives, and methods specific to each project. No change was made in the regulation.

The ACEC requested clarification on whether an RFP is required for task orders under an IDIQ contract. The ACEC asserted that issuance of a “full-blown” RFP for every task order under an IDIQ would be burdensome. The ACEC recommends deleting “task, or service” from the provision or to provide some other clarification. Additionally, AASHTO and California DOT asserted that an RFP is not a feasible process in evaluating consultants for on-call contracts which are not project specific.

“Project, task, or service” is language in existing regulation and is necessary as an RFP may not relate to a specific project, but may be to provide a service or perform a task on multiple projects which may be unknown at the time of RFP issuance. The IDIQ is a type of contract and award of task orders to selected engineering consulting firms is focused on contract administration after the selection of the most qualified consultant firm(s). In instances where multiple consultants are selected and awarded IDIQ contracts under a single RFP, the procedures in § 172.9(a)(3)(iv) would be followed. To clarify expectations, the following language was added to § 172.9(a)(3)(iv)(B)(1), “which may include, but does not require a formal RFP in accordance with § 172.7(a)(1)(ii).”

The Tennessee DOT, Massachusetts DOT, South Dakota DOT, Wyoming DOT, and AASHTO commented on prequalification periods. The Tennessee DOT recommended that a 24 or 26 month prequalification process be permitted rather than an annual basis. Massachusetts DOT currently employs a biannual prequalification process and recommended allowing prequalification at “regular intervals not to exceed 2 years.”

South Dakota DOT recommended evaluation of consultant qualification on a 2-year basis. Wyoming DOT currently utilizes a 2 year cycle and finds it sufficient.

The STAs (or other recipients) may opt to use a prequalification process to assess minimum qualifications of consultants to perform services under general work categories. The Brooks Act requires the STA to encourage firms to submit annual statements of qualifications and performance data. The regulation was revised to better align with the requirements of the Brooks Act because 23 U.S.C. 112(b)(2)(A) requires that engineering service contracts subject to 23 U.S.C. 112(a) be awarded in the same manner as the Brooks Act.

The California DOT requested clarification on what constitutes proper notice to consultants and asked if posting on a Web site was adequate.

Specific examples of public notice are more appropriate for guidance versus regulation. As noted within the regulation, any method which provides both in-State and out-of-State consultants an equal and fair opportunity to be considered is adequate. No change was made in the regulation.

§ 172.7(a)(1)(ii)(A)

The South Dakota DOT and Connecticut DOT made recommendations pertaining to competitive negotiations. The South Dakota DOT recommended that providing a general description of the work and requiring the consultant to provide a more detailed description and scope of work be allowed, as it is helpful in selecting the consultant based on their understanding of the work needed. The Connecticut DOT recommended eliminating the language “clear, accurate, and detailed description of the.” The Connecticut DOT asserted that a comprehensive understanding of the details are

sometimes unknown early in a project's development and may create an administrative burden to make modifications later.

The information provided for the scope of work should address the items specified within the provision at a minimum, but the level of detail is subject to the level of project planning, range of services desired, etc. The Brooks Act requires that "all requirements" be advertised such that interested and qualified consultants all have an equal opportunity to compete. No change was made in the regulation.

The Tennessee DOT indicated that the level of detail proposed for an RFP is not obtained until negotiations under Tennessee DOT's current multiphase process.

The RFP contents proposed are consistent with AASHTO Guide for Consultant Contracting (March 2008) and industry practice. The Brooks Act requires "all requirements" be advertised and the basic contents proposed are necessary to determine the most qualified consultant to provide the necessary services. The FHWA acknowledges that for some projects/services, the level of detail suggested in the provision may not be available. To clarify expectations, the regulation was changed by adding the phrase "To the extent practicable" to the beginning of the second sentence of § 172.7(a)(1)(ii)(A).

§ 172.7(a)(1)(ii)(B) and (iv)(C)-(E)

The Indiana DOT, South Dakota DOT, California DOT, Nebraska DOR, and AASHTO had comments related to the competitive negotiation requirement to identify at least three of the most qualified firms responding to a solicitation. The Indiana DOT asserted that the requirement for a minimum of three consultants in the discussion process and final ranking is new. Indiana DOT, as well as AASHTO, also recommended

that agencies should have flexibility to evaluate two sources if advertised and competition is found to be limited. The South Dakota DOT recommended language requiring three responses be removed, provided that a procedure to verify a good faith effort to solicit responses is in place. The California DOT requested clarification and the Nebraska DOR asked what options are available if less than three firms submit proposals.

To clarify expectations, the regulation was changed to address instances where only two qualified consultants respond to the solicitation, which, as described in § 172.7(a)(1)(iv)(D), would permit the contracting agency to proceed provided competition was not arbitrarily limited. In addition, in unique circumstances, a contracting agency may pursue procurement following the noncompetitive method when competition is inadequate and it is not feasible or practical to re-compete under a new solicitation.

§ 172.7(a)(1)(ii)(C)

The Tennessee DOT and Connecticut DOT provided comments in relation to evaluation factors and their relative weight. Tennessee DOT disagrees that evaluation factors with relative weight of importance be provided in an RFP. Tennessee DOT indicates that providing weights implies a rigid formula and eliminates STA discretion to select between firms with similar qualifications. Connecticut DOT recommends removing the requirement to identify the weight of importance as it is unclear of the benefit to the selection process.

The FHWA believes that providing relative weights for evaluation factors is consistent with Federal procurement practices under the Brooks Act, provides consultants

a better understanding of what to focus their proposal on, and is essential for transparency of the selection process. No change was made in the regulation.

§ 172.7(a)(1)(ii)(D)

The New York State DOT and the Connecticut DOT expressed concern in relation to contract types and method(s) of payment. Connecticut DOT recommends removal of (D) as the decision on contract type and payment method is often determined in negotiations with the selected firm and questions if specifying up front would preclude the STA from changing the type later if necessary. New York State DOT expressed a similar concern.

The contract type and payment method are a function of how well the scope of work is defined, the type and complexity of the work, the period of performance, etc. These items should generally be known in advance, when the need for consultant services is identified. Where appropriate, deviations from the advertised contract type and payment method may be warranted, such as for subcontracts, contract modifications, etc. To clarify expectations, the regulation was revised to read: “Specify the contract type and method(s) of payment anticipated to contract for the solicited services in accordance with §172.9.”

§ 172.7(a)(1)(ii)(E)

The Connecticut DOT-Local Roads requested clarification on what special provisions or contract requirements are required.

This provision requires inclusion of any “special” provisions or contract requirements associated with the solicited services that are not included within the standard contract template/documents used by the contracting agency. This would

include provisions unique to the services being solicited or contracted. No change was made in the regulation.

§ 172.7(a)(1)(ii)(F) and 172.7(a)(1)(v)(C)

The ACEC and Connecticut DOT-Local Roads expressed concern in relation to consultant cost information. The ACEC requested that the submittal of concealed cost proposals not be permitted, as the accuracy of the scope of work and cost proposal at the RFP stage is limited. The Connecticut DOT-Local Roads recommended not permitting submittal of consultant cost information until later in the selection process to guard against improper use of that information.

Many contracting agencies currently require concealed cost proposals. This practice was recognized within the regulations provided that the specified controls are included. The FHWA agrees that the scope of work and accuracy of the cost proposal at the RFP stage is limited on some projects, but submittal of cost proposals with the RFP may prove more efficient on more routine and straightforward projects/services. As such, the flexibility should be provided to STAs. No change was made in the regulation.

§ 172.7(a)(1)(ii)(G)

Connecticut DOT recommends removal of the language “key dates.” Connecticut DOT asserts that aside from the submittal deadline for responses to the RFP, the selection timeline may vary depending on the number of responses received and other procurement steps. The Virginia DOT suggested removing the provision.

To provide transparency in the procurement process, a schedule of estimated dates for interviews and selection of the most qualified consultant shall be provided to interested consultants. A 14-calendar day minimum advertisement period is required to

ensure fair and open competition. Based on the comments received, the regulation was revised to require an “estimated schedule” rather than a “schedule of key dates”.

The AASHTO agreed that a consultant should be provided sufficient time to prepare a proposal, but recommended against mandating a 14-day requirement.

The 14-day period is provided as the minimum length of time for advertisement of an RFP. No change was made in the regulation.

§ 172.7(a)(1)(iii)(B)

The South Dakota DOT recommended that price/cost of engineering services be permitted as an evaluation criteria.

Consideration of price or cost in the evaluation and selection of engineering consultant services is prohibited in (23 U.S.C. 112(b)(2)(A) and 40 U.S.C. 1103). No change was made in the regulation.

§ 172.7(a)(1)(iii)(C)

The Nebraska DOR requested clarification on “local preference” and whether it simply means that the consultant must have an in-state professional engineering (PE) license.

Requirements at 2 CFR 200.319(b) prohibits the use of in-state or local geographic preferences in the evaluation of bids or proposals except where Federal statute mandates or encourages the use of such preferences⁴. However, a State may

⁴ For example, 23 U.S.C. 140(d) authorizes the preferential employment of Indians living on or near a reservation on projects and contracts on Indian reservations roads under the Federal-aid Highway Program.

require that the consultant have the necessary PE license per State law or regulation. No change was made in the regulation.

The South Dakota DOT, Connecticut DOT, and Connecticut DOT-Local Roads expressed a need for clarification between § 172.7(a)(1)(iii)(C) and (D) feeling that the provisions in (a)(1)(iii)(C) and (a)(1)(iii)(D) contradict one another.

The provisions in (a)(1)(iii)(C) and (a)(1)(iii)(D) are intended to address separate elements; subparagraph (a)(1)(iii)(C) addresses the prohibition of “local preference” while subparagraph (a)(1)(iii)(D) makes allowance for evaluation criteria that is related to services performance, which may include an agency’s desire for a “local office presence” or use of Disadvantage Business Enterprise (DBE) subconsultants. No change was made in the regulation.

§ 172.7(a)(1)(iii)(D)

The Tennessee DOT and Massachusetts DOT recommended that the “non-qualifications” based criteria not be permitted since such criteria are inconsistent with the Brooks Act.

A local office presence criterion is used by many States and while not specifically qualifications oriented, a local office presence criterion recognizes that providing a local office presence may provide value to the quality and efficiency of a project. The use of DBE participation as an evaluation criterion is practiced by many STAs and harmonizes Brooks Act requirements with DBE regulations as specified in 49 CFR part 26. By addressing and providing a limitation on the use of these criteria, the integrity of a QBS process is maintained. No change was made in the regulation.

§ 172.7(a)(1)(iii)(D)(1)

The Tennessee DOT asserted that a local presence criterion may add value at times and that it should be merged with (a)(1)(iii)(C) regarding the prohibition on in-State and local preference.

The provisions in (a)(1)(iii)(C) and (a)(1)(iii)(D) are intended to address separate elements; (a)(1)(iii)(C) addresses the prohibition of “local preference” while (a)(1)(iii)(D) makes allowance for other evaluation criteria that have historically been used on a limited basis to promote efficient project delivery and other FAHP goals. No change was made in the regulation.

The North Dakota DOT asserted that the proposed revision is too restrictive and believes that location is a valid criterion that adds value to the quality and efficiency of a project, under certain circumstances.

Evaluation criteria such as knowledge of a locality and familiarity of the general geographic area are qualifications that a consultant may need to demonstrate to compete for a project and may be included along with technical criteria. A consultant could demonstrate knowledge of a locality and project site without having a physical local office and thus the need for a limitation on evaluation of a “local presence” as local presence is unrelated to the technical expertise of the firm. No change was made in the regulation.

§ 172.7(a)(1)(iii)(D)(2)

The Connecticut DOT-Local Roads questioned the benefit gained by awarding points in the evaluation process for use of DBEs when meeting a DBE goal is a requirement of the project contract.

The allowance of an evaluation criterion for participation of qualified and certified DBEs is to harmonize Federal requirements for qualifications based selection and for consideration of DBEs in the procurement of engineering and design related services. No change was made in the regulation.

§ 172.7(a)(1)(iv)

The ACEC recommended that a provision be inserted to provide an opportunity for non-selected firms to review evaluation, ranking and selection information with the agency, if requested (e.g., debriefing).

The FHWA encourages agencies to provide for debriefings to maintain transparency in the procurement process; however, this does not relate to statutory requirements. No change was made in the regulation.

§ 172.7(a)(1)(iv)(A)

The Texas DOT recommended that “public solicitation” be replaced with “RFP.”

While the “solicitation” is effectively the RFP as defined within § 172.7(a)(1)(i), solicitation is used generally throughout the proposed part 172. Reference to solicitation is key to reinforce the requirements for public advertisement and consideration of both in-State and out-of-State consultants. No change was made in the regulation.

§ 172.7(a)(1)(iv)(C)

The ACEC, Alaska DOT, Nebraska DOR, South Dakota DOT, and Texas DOT expressed similar opinions in reference to § 172.7(a)(1)(iv)(C). The ACEC recommended that “shall” conduct interviews or other types of discussions be changed to “may” so as to not conflict with the final sentence of the provision which allows for no discussions if proposal information is sufficient. The ACEC recognized that discussions

are not necessary in some situations. The Alaska DOT and South Dakota DOT made the same recommendations, while the Nebraska DOR and Texas DOT requested some clarification.

The FHWA agrees the wording was confusing and the regulation was revised to require the STA to establish criteria and a written policy, [as specified in § 172.5(c)(6)] under which additional discussions would be take place following RFP submission and evaluation. The RFP shall state what type of discussions, if any, will take place following submission and evaluation of proposals.

The Connecticut DOT-Local Roads asserted that not requiring discussions following proposal submission will remove structure from the selection process and make it difficult to document decision criteria.

Historically, many contracting agencies relied on the information contained within consultant proposals and did not conduct subsequent discussions/interviews. This is an acceptable practice based upon State procedures under a risk-based framework and consistent with the comments received on this NPRM provided the proposals contain sufficient information for evaluation of technical approach and qualifications. The contracting agency must maintain documentation to support the evaluation and selection of a consultant based on the advertised evaluation criteria. No change was made in the regulation.

§ 172.7(a)(1)(iv)(C) through (E)

The New York State DOT indicated that it does not always conduct additional discussions and that when shortlisting firms for additional discussions, and the rankings are not provided.

Section 172.7(a)(1)(iv)(C), modified to require the STA to establish a written policy under which additional discussion are needed, will not mandate additional discussion of proposals that contain sufficient information for evaluation of technical approach and qualifications. Section 172.7(a)(1)(iv)(E) does not require initial rankings to be provided when short-listing firms, only the final rankings must be provided. No change was made to § 172.7(a)(1)(iv)(E) of the regulation.

§ 172.7(a)(1)(iv)(D)

The South Dakota DOT recommended language requiring “three responses” be removed provided a procedure to verify a good faith effort to solicit responses is in place. The South Dakota DOT recommended adding the following language, “When an RFP does not result in three responses, the agency may proceed with the evaluation of the responses obtained.”

To clarify expectations, the regulation was changed to address instances where only two qualified consultants respond to the solicitation, which, as described in § 172.7(a)(1)(iv)(D), would permit the contracting agency to proceed provided competition was not arbitrarily limited. In addition, in unique circumstances, a contracting agency may pursue procurement following the noncompetitive method when competition is inadequate and it is not feasible or practical to re-compete under a new solicitation.

§ 172.7(a)(1)(iv)(E)

The Tennessee DOT, South Dakota DOT, Connecticut DOT-Local Roads, Montana DOT, Nebraska DOR, and Wyoming DOT expressed similar opinions. Tennessee DOT recommended deleting § 172.7(a)(1)(iv)(E), since it objects to providing notification of the “final ranking” of the three most highly qualified. The South Dakota DOT also recommended removing the requirement for notification of ranking because all participating consultants are notified of the consultant selected and are provided a brief explanation of why they were not selected. The Connecticut DOT-Local Roads questioned the benefit of providing the final ranking information to responding consultants. The Montana DOT asserted that compliance with this provision will require additional staff time to prepare notifications to each respondent. The Nebraska DOR recommended that the term “ranking” be replaced with the term “selection.” The Wyoming DOT asserted that the proposed section changes the notification procedures by adding additional unnecessary requirements.

The Brooks Act requires the evaluation of at least three of the most highly qualified firms based upon established and published criteria. The contracting agency must enter into negotiations with the highest ranked firm and negotiate a contract for compensation that is fair and reasonable to the Federal Government. If the contracting agency is unable to negotiate a satisfactory contract with the highest ranked firm, the contracting agency must undertake negotiations with the next highest ranked firm, continuing the process until a contract agreement for fair and reasonable compensation is reached. Section 172.7(a)(1)(iv)(E) promotes transparency in the selection process and notification can be as simple as posting the final ranking on a Web site. No change was made in the regulation.

§ 172.7(a)(1)(v)

The Idaho Transportation Department and AASHTO suggest ensuring reasonable wage rates for specific labor classifications, in addition to employee classifications, labor hours by classification, fixed fees and other direct costs contribute to the overall reasonableness of the agreement.

The FHWA agrees. Section 172.7(a)(1)(v)(B) references § 172.11 for establishment of the direct salary rates, which includes an assessment of reasonableness in accordance with the Federal cost principles. For clarification, proposed § 172.7(a)(1)(v)(B), under the re-designated § 172.7(a)(1)(v)(C) was revised to indicate that the use of the independent estimate and determination of cost allowance in accordance with § 172.11 shall ensure the consultant services are obtained at a fair and reasonable cost.

The Oregon DOT recommended a section regarding “order of negotiation” [40 U.S.C. 1104(b)] from the Brooks Act be included so it is not misinterpreted that this section does not apply.

Although the “order of negotiation” section [40 U.S.C. 1104(b)] of the Brooks Act applies as specified in § 172.7(a)(1), for clarification purposes, specific language was added to § 172.7(a)(1)(v) as new paragraph § 172.7(a)(1)(v)(A).

§ 172.7(a)(1)(v)(A)

The North Dakota DOT, Indiana DOT, Wyoming DOT, AASHTO, and the Illinois Association of County Engineers (IACE) expressed concerns with the requirement to develop a detailed independent cost estimate. The North Dakota DOT asserted that the independent estimate is a new requirement that would require additional

STA resources (time and staff). The Indiana DOT asserted that STAs and LPAs do not all have the ability to prepare detailed labor estimates (independent estimate) as the basis for negotiation with a consultant and that detailed labor estimates may not be the best way to estimate the cost of consultant services in all instances. The Wyoming DOT asserted that other procedures are equally appropriate and effective for obtaining independent estimates, and that the proposed method is too prescriptive. The AASHTO asserted that smaller contracting agencies, especially local agencies, may not have the expertise to prepare a detailed independent estimate with a breakdown of labor hours, direct and indirect costs, fixed fees, etc. In this situation, contracting agencies should be allowed to use typical percentages of construction costs to prepare their independent estimate for purposes of negotiation. The IACE asserted that development of independent cost estimates with an appropriate breakdown of the labor hours and classifications could add considerable staff time for STAs and LPAs, as most of the current IACE members rely on previous experience with projects of similar scope, magnitude, and construction cost to determine an estimate or anticipated range of consultant costs prior to negotiation. The IACE recommends that the description of independent agency estimate be broadened to include less rigorous estimating methods and guidelines.

The regulation is consistent with 2 CFR 200.323, which requires recipients to perform a cost or price analysis in connection with every procurement action in excess of the simplified acquisition threshold (as defined in 48 CFR 2.101) and with the Brooks Act (40 U.S.C. 1104) which requires the agency head to consider the scope, complexity, professional nature, and estimated value of the services to be rendered. The method and

degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, contracting agencies must make independent estimates before receiving bids or proposals. The proposed provision notes “an appropriate breakdown” of the various cost elements which provides flexibility in the degree of analysis subject to the scope and complexity of the services. No change was made to the regulation.

§ 172.7(a)(1)(v)(C) [re-designated § 172.7(a)(1)(v)(D)]

The Alaska DOT recommended changing “consultants with which negotiations are not initiated” to “unsuccessful consultants” as price proposals are not returned until negotiations are concluded and the cost proposal of the 2nd ranked firm will be needed should negotiations fail with the highest ranked firm.

The FHWA agrees the revision to “unsuccessful consultants” streamlines the provision while the first sentence of subparagraph (a)(1)(v)(C) [re-designated subparagraph (a)(1)(v)(D)] provides the requirement to only open the proposal of a consultant when entering negotiations and to only consider that consultant’s proposal. The regulation was modified accordingly.

The Alaska DOT and New York State DOT provided comments on concealed cost proposals. The Alaska DOT recommended changing “should be returned” to “may be returned if requested by the consultant” as this places a burden on STAs to return the documents to consultants in lieu of destroying along with unsuccessful proposals. The New York State DOT asserted that returning cost proposals is not necessary. Cost proposals are often electronic and would simply be discarded, or if hard copies are provided, the hard copies would be shredded unopened.

The FHWA agrees to the revision [re-designated § 172.7(a)(1)(v)(D)] changing “should” to a “may” condition where the contracting agency establishes written policies and procedures [in accordance with § 172.5(c)] for disposal of unopened cost proposals. The regulation was modified accordingly.

The California DOT recommended replacing the word “concealed” with “sealed.”

Many contracting agencies currently require concealed cost proposals though not all proposals are in hard copy form. The FHWA considered the recommendation and determined that using the term “sealed” would imply erroneously that a hard copy sealed envelope would be required. No change was made to the regulation.

§ 172.7(a)(2)

The Connecticut DOT-Local Roads asserted that the subject provisions are in conflict since (a)(2) indicates a lower State threshold must be used and (b)(1)(ii) indicates that Federal requirements prevail when a conflict with State or local requirements exist.

The provisions do not conflict. A State small purchase threshold that is lower than the Federal threshold would not violate Federal requirements, as the Federal requirement would still be satisfied. However, a State threshold above the Federal threshold would not be permitted as this would violate Federal requirements. No change was made to the regulation.

The Indiana DOT did not support the requirement for discussion/review of a minimum of three sources (consultants) when using small purchase procedures. Existing regulations indicate “adequate number of qualified sources.”

Section 172.7(a)(2)(ii) established that a minimum of three consultants be reviewed to promote adequate competition. The regulation was revised to include requirements to address circumstances where there are less than three respondents.

The Wyoming DOT asserted that requiring STAs to use a lessor STA threshold for small purchase procedures is too restrictive.

Both 23 CFR 1.9 and 2 CFR 200.317 require compliance with State laws where not inconsistent with applicable Federal law and regulation. As such, a lessor State threshold for use of small purchase procedures is more restrictive than Federal requirements and thus must be complied with. No change was made to the regulation.

The Alaska DOT recommended allowing procurements less than \$10,000 to be accomplished without competition and not require three quotes as with small purchase procurement procedures.

The small purchase procedures permitted mirror direct Federal acquisition requirements which do not provide a similar threshold where competition is not necessary. No change was made to the regulation.

§ 172.7(a)(2)(ii)

The Oregon DOT requested clarification on what is meant by “review of at least three qualified sources.” South Dakota DOT recommended language requiring “three responses” be removed and replaced with a provision for agencies to provide a procedure to verify a good faith effort to solicit responses. South Dakota DOT recommends adding the following language, “When an RFP does not result in three responses, the agency may proceed with the evaluation of the responses obtained.”

The level of review (request for proposals, discussions, etc.) shall be in accordance with State procedures, but a minimum of three consultants must be considered. Although small purchases are a permitted exception to compliance with the Brooks Act, review of three sources is a simplified means to promote competition among qualified firms. Section 172.7(a)(2)(ii), was revised to address instances where less than three consultants respond to the solicitation.

§ 172.7(a)(2)(iv)

The Nebraska DOR and AASHTO requested clarification as to whether only the amount above the simplified acquisition threshold is ineligible or the entire contract is ineligible. The AASHTO asserted that “The full amount of any contract modification or amendment that would cause the total contract amount to exceed the established simplified acquisition threshold would be ineligible for Federal-aid funding” is penalty enough and that FHWA needed to establish circumstances that warranted the extreme action of withdrawal of all Federal funding from the contract.

As specified within the proposed regulation, the full amount of any contract modification or amendment which causes a contract to exceed the threshold would be ineligible. The FHWA has the discretion to withdraw all Federal-aid funding from the contract if it determines that the small purchase procurement was used to circumvent competitive negotiation procurement procedures. No change was made to the regulation.

The Connecticut DOT asserted that this provision may be difficult to monitor and administer.

This provision is intended to prevent abuse of the use of small purchase procedures to circumvent qualifications based selection procurement requirements. A

simple check or audit of contracts procured under small purchase procedures to verify the appropriate threshold was not exceeded is all that would be necessary to verify compliance. No change was made to the regulation.

§ 172.7(a)(3)

The AASHTO requests clarification as to whether FHWA is approving each contract or approving a STA's noncompetitive procedures. The AASHTO recommends approval of procedures.

The specific scenarios for use of noncompetitive procedures should be addressed within the STA's written procedures. While FHWA approval on a contract basis is indicated within § 172.7(a)(3)(ii), a STA's procedures allow programmatic approval under specified circumstances. No change was made to the regulation.

The California DOT requested clarification as to whether this applies if less than three qualified consultants submit proposals in response to a RFQ.

Yes, noncompetitive procedures would apply under § 172.7(a)(3)(iii)(C). Revisions to the regulation, § 172.7(a)(iv)(D), address instances where less than three consultants respond to the solicitation. No change was made to the regulation.

§ 172.7(a)(3)(iii)

The San Diego Association of Governments (SANDAG) requested that proposed language be modified to clarify that approval from FHWA is one method for authorizing a sole source, but not the only method.

Use of noncompetitive procedures requires FHWA approval as specified within the existing and proposed regulations. An agency's written procedures approved by the FHWA Division Office may define situations whereby FHWA approval is granted on a

programmatic basis. No change was made to the regulation.

§ 172.7(b)(1)(i)

The Nebraska DOR finds the phrase, "...procedures which are not addressed by or in conflict with applicable Federal laws..." confusing when compared to § 172.7(b)(1)(ii) which states "When State and local procurement laws, regulations, policies, or procedures are in conflict with applicable Federal laws and regulations..."

For clarity, § 172.7(b)(1)(i) was revised to read, "...procedures which are not addressed by or are not in conflict with applicable Federal laws and regulations..."

§ 172.7(b)(2)(i)

The AASHTO recommends revising "shall" to "may" as DBE requirements are met through construction contracts.

Participation by DBE firms in FAHP projects is a requirement of 49 CFR 26. A contracting agency might meet most of its approved DBE participation goals through construction contracts; however, in accordance with the STA's DBE program approved by FHWA, consultant work accomplished by consultants/subconsultants that are on the STA's approved DBE list could count toward satisfying DBE goals. No change was made to the regulation.

The California DOT requested additional clarification regarding the utilization of DBE goals or evaluation criteria for DBE participation.

The proposed rule is consistent with existing FHWA policy and guidance. A contracting agency might meet most of its approved DBE participation goals through construction contracts; however, in accordance with the STA's DBE program approved by FHWA, consultant work accomplished by consultants/subconsultants that are on the

STA's approved DBE list could count toward DBE goal accomplishment. No change was made to the regulation.

The Virginia DOT and AASHTO asserted that this provision is in conflict with the Federal DBE Small Business Enterprise Program, and interpreted this provision as requiring STAs to have set-asides for Small Business.

The proposed rule is consistent with existing FHWA policy and guidance, and it is not in conflict with 49 CFR 26.43, which explicitly prohibits set-asides or quotas for DBEs. No change was made to the regulation.

§ 172.7(b)(3)

The AASHTO recommended allowing consultant self-certification for no suspension or debarment actions rather than requiring STAs to verify eligibility on a contract by contract basis. The Wyoming DOT also suggested self-certification by consultants and subconsultants.

The requirements for verification of suspension and debarment actions and consultant eligibility status are specified within 2 CFR part 180. Use of a contract-based self-certification is currently permitted. No change was made to the regulation.

§ 172.7(b)(4)

The Wyoming DOT asserted that this section is unclear and potentially far reaching.

The proposed provision addresses basic Conflict of Interest (COI) scenarios and is an existing requirement of the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards (2 CFR 200.112). No change was made to the regulation.

The California DOT recommended including COI provisions for various types of services (design and construction engineering, design and environmental services, etc.).

The regulations provide the basis for STAs to develop more specific COI policies based on the specific risks and range of controls a STA may have. No change was made to the regulation.

§ 172.7(b)(5)(i)

The PECG recommended that STAs be precluded from awarding management contracts as it is inappropriate for a consultant to perform an inherently governmental function.

Use of consultants in a program management role is permitted under existing requirements in 23 U.S.C. 112(b)(2)(A). Section 302(a) of Title 23, U.S.C. allows the use of consultants to the extent necessary or desirable provided the contracting agency is suitably equipped and organized. Use of consultants in a management role warrants additional conflicts of interest controls as prescribed to mitigate concerns with performance of inherently governmental functions. No change was made to the regulation.

§ 172.7(b)(5)(ii)

The California DOT recommended that project management services to manage scope, cost, and schedule of a project be excluded.

In order to show that the STA has adequate powers and is suitably equipped and organized to discharge the duties required by this title, § 172.9(d)(1) requires a public agency employee to perform these functions and serve in responsible charge of the project. No change was made to the regulation.

§ 172.7(b)(5)(iii)

Guy Engineering Services, Inc. interpreted the provision to prohibit a consultant from providing construction management services for projects for which the consultant provided design services.

A “management support role,” as defined in § 172.3 and as intended in § 172.5(b), relates to a program or project administration type role on behalf of the contracting agency where a consultant may manage or oversee the work of other consultants or contractors. The scenario described by the commenter does not involve a consultant overseeing its own work. No change was made to the regulation.

The ACEC and the American Road and Transportation Builders Association recommended the removal of the last sentence, “A consultant serving in a management role shall be precluded from providing services on projects, activities, or contracts under its oversight.” The ACEC is concerned the sentence is broad and will limit various technical services that firms in program management roles routinely provide to their clients.

The FHWA agrees that the sentence could be interpreted and applied in a manner more restrictive than intended. The regulation was modified to read that consultants “may” be precluded from providing additional services due to potential conflicts of interest.

The Alaska DOT expressed a concern that this provision would preclude a consultant from providing construction management services for projects in which they provided design services. Alaska recommends the provision be amended to specifically

allow consultants to provide construction management services for projects in which they provided design services.

Consistent with current FHWA policy and guidance, necessary controls must be in place for oversight and prevention of conflicts of interest to permit a consultant to provide services in the design and construction phase of the same project. As such, a specific blanket approval via regulation would not be appropriate. Additionally, the proposed provision notes that the consultant in a management support role would be precluded from providing services on projects under its oversight. No change was made to the regulation.

The PECG agrees with the provision to preclude a consultant serving in a management role from also providing services on projects, activities, or contracts under its oversight.

The PECG's position was noted. No change was made to the regulation.

§ 172.9(a)(2)

The California DOT and AASHTO requested clarification on whether negotiation includes both scope and costs on a phase by phase basis under a multiphase contract.

Negotiation always includes detailed elements of the scope of work and associated costs. However, the type of services and work negotiated must be included within the overall scope of services of the original solicitation from which a qualifications-based selection was made. The regulation was modified to include clarification language.

§ 172.9(a)(3)(i)

The Indiana DOT, New York State DOT, California DOT, SANDAG, Massachusetts DOT, Virginia DOT, South Dakota DOT, Texas DOT, and AASHTO expressed concerns with the maximum 5 years limitation specified in the regulation. The Indiana DOT recommended that exceptions to the on-call contract timeframe be provided where a consultant may have largely completed a project design and it would be unreasonable to contract with another firm to complete the design. The New York State DOT noted that 5 years may not be sufficient where it is desired to retain the consultant to provide ongoing construction support services. The California DOT asserted that it is sometimes required to have a contract last longer than 5 years due to the complexity of the projects and its length of construction, and that this section should include language to allow exceptions. The SANDAG requested that FHWA consider recommending the 5 year contract term, but allow contract terms in excess of 5 years when justified by grantee (recipient) documentation. Massachusetts DOT recommended removal of the 5 year limitation on contracts. Virginia DOT questioned the need for a 5 year limitation for on-call contracts. South Dakota DOT and Texas DOT recommended removal of the 5 year limitation on contracts.

The 5 year maximum contract length only applies to IDIQ contracts. The IDIQ contracts are intended for smaller projects or for performance of routine or specialized services on a number of projects. As such, only services which fall within the advertised scope, funding, and schedule limitations of the established IDIQ contract may be awarded to the consultant. Should the scope or complexity of a project warrant a more flexible schedule, a project specific solicitation should be utilized over a task order under an IDIQ contract. No change was made to the regulation.

§ 172.9(a)(3)(ii)

The South Dakota DOT asserted this provision is misplaced and should be moved to project specific contracts rather than IDIQ contracts.

The thresholds provided for IDIQ contracts are essential to ensuring that an unlimited amount of work over an unlimited period of time is not awarded to a single consultant. While project specific contracts will also generally define a maximum total contract dollar amount, these contracts are subject to contract modification as appropriate which may increase the amount. No change was made to the regulation.

§ 172.9(a)(3)(iv)

The California DOT requested clarification on the process for awarding multiple consultants on-call contracts under a single solicitation.

If the STA wishes to award contracts to three consultants, then the top three ranked firms may be awarded contracts under a single solicitation when advertised accordingly. Additional information may be provided in implementing guidance, but is not appropriate for inclusion within the regulatory language. No change was made to the regulation.

§ 172.9(a)(3)(iv)(A)

The Tennessee DOT recommended deleting the provision to specify the number of consultants that may be selected under the IDIQ solicitation as providing this information is unnecessary and provides little useful information to interested firms. The Massachusetts DOT and South Dakota DOT also recommended similar revisions.

The provision is to indicate the number of consultants/contracts that “may” be awarded through the specific IDIQ solicitation. When advertising, an STA should know

how many contracts it may need based on an estimated workload of needed services. This allows interested consultants to know how many contracts “may” be awarded and provides transparency to the process. Additionally, since “may” is used, this does not lock the STA into awarding the number of contracts shown on the solicitation and contract provision, if an adequate number of qualified consultants do not submit a proposal. No change was made to the regulation.

§ 172.9(a)(3)(iv)(B)

The Tennessee DOT, Massachusetts DOT, Texas DOT, Montana DOT, Connecticut DOT, Wyoming DOT, and AASHTO expressed concerns about the additional QBS process specified in this provision. The Tennessee DOT recommended deleting this section based on their concern that requiring an additional QBS process to award task orders among multiple firms is contrary to the purpose of an IDIQ contract to accelerate the selection process of small or short duration type projects. Massachusetts DOT recommended deleting this section based on their opinion that requiring an additional QBS process or regional method to award task orders among multiple firms is contrary to the purpose of an IDIQ contract to accelerate the selection process and it limits the flexibility of the STA. Texas made similar recommendations and offered that a third option for award of task orders on a rotational basis be provided. Montana DOT and Connecticut DOT expressed concerns with additional time and cost associated with a secondary qualification based process. The Connecticut DOT recommended revising the provision to simply state “the contracting agency shall ensure it has an equitable method to distribute the work between the selected qualified consultants and it shall be approved by FHWA in advance.” Wyoming DOT expressed similar concerns of additional time

and resources. The AASHTO expressed a concern with the requirements of the provision and asked that if a “full” competitive negotiation procedure was not what was meant by the secondary “qualifications-based selection,” that the provision be revised for clarification or that the requirement for a secondary qualifications-based selection be removed.

If multiple consultants are awarded IDIQ contracts under a QBS procedure, a methodology which considers consultant qualifications must be used to award individual task orders among the firms. A Department of Homeland Security Office of Inspector General audit has criticized practices of Federal agencies awarding task orders on a rotational basis (equitable funding distribution) as a potential violation of the Brooks Act.⁵ A fair and transparent methodology is necessary. The “second” QBS process to award task orders may be abbreviated and not require additional submittals by firms under contract. The regulation was modified to include clarification language.

The South Dakota DOT recommended that the contracting agency be permitted to award task orders on the basis of qualifications and price/cost. The South Dakota DOT proposed the following language, “Task or work orders shall not be competed and awarded among the selected, and qualified consultants on the sole basis of costs...”

If multiple consultants are awarded IDIQ contracts under a QBS procedure, a methodology which considers consultant qualifications must be used to award individual task orders among the firms. A Department of Homeland Security Office of Inspector General audit has criticized practices of Federal agencies awarding task orders on a

⁵ http://www.oig.dhs.gov/assets/Mgmt/OIG_11-02_Oct10.pdf

rotational basis (equitable funding distribution) as a potential violation of the Brooks Act.⁵ A fair and transparent methodology is necessary and competing on the basis of costs is not permitted. No change was made to the regulation.

§ 172.9(a)(3)(iv)(B)(1)

The Ohio DOT recommended that an additional QBS procedure to award task orders under an IDIQ contract should apply only to specific tasks which exceed the simplified acquisition threshold.

The provision only applies to task orders on IDIQ contracts procured under competitive negotiation. Adding a caveat to only apply to task orders over \$150,000 is mixing competitive negotiation and simplified acquisition procurement procedures. The regulation was modified to include clarification language concerning the QBS procedure.

The ACEC recommended clarifying that a “full-blown” RFP is not required to compete every task order under an IDIQ with multiple consultants under contract.

The “second” QBS process to award task orders may be abbreviated and not require additional submittals by firms under contract. The regulation was modified to include clarification language.

§ 172.9(a)(3)(iv)(B)(2)

The Texas DOT requested clarification on assigning work if consultants are selected to provide work in a particular region.

Under a regional basis, a single consultant would be selected to provide the desired services on an on-call basis within a designated region. Any specified services within that region could then be assigned via task order to the selected consultant. No

change was made to the regulation.

§ 172.9(b)(1)

The Connecticut DOT questioned why payment method must be included in the original solicitation.

The payment method is a function of how well the scope of work is defined, the type and complexity of the work, the period of performance, etc. This should generally be known up front when the need for consultant services is identified. Where appropriate, deviations from the advertised payment method may be warranted, such as for subcontracts, contract modifications, etc. It is noted within the provision that different payment methods may be warranted for different elements of the work. No change was made to the regulation.

§ 172.9(b)(5)

The California DOT recommended providing additional information regarding the specific rates of compensation payment method and any limitations to auditing the indirect cost rate or in providing oversight on contracts where the indirect cost rate is fixed for the term of a multiyear contract.

The specific rates of compensation payment method does not impose any special requirements related to indirect cost rate different from other payment methods other than the indirect cost is included within a loaded hourly rate. No change was made to the regulation.

§ 172.9(b)(6) and (c)(10)

The ACEC strongly supported the § 172.9(b)(6) and (c)(10) provisions regarding retainage and prompt pay.

The ACEC's position was noted. No change was made to the regulation.

§ 172.9(c)

Wyoming DOT questioned the value of the proposed section of contract requirements and recommends lengthening the compliance period to allow STAs time to consult with State Attorney General's office to determine appropriate contract language.

Many of the contract provisions noted reference a requirement contained within other applicable regulations. Other general provisions reflect similar requirements contained within the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards (2 CFR 200.326/appendix II of 2 CFR part 200). No change was made in the regulation.

The Virginia DOT and AASHTO asserted that not all provisions seem applicable to subcontracts; specifically the provisions for Title VI assurance, DBE assurance, error and omissions, and conflicts of interest.

The extension of the assurances for Title VI and DBE to subcontracts is a requirement of the referenced order or regulation. The errors and omissions and conflicts of interest provisions must be incorporated into subcontracts as well, since these issues reach beyond the consultant and subconsultant. No change was made to the regulation.

The New York State DOT asserted that many of the provisions are too lengthy to include in each individual contract and the regulations should allow incorporation by reference.

The FHWA agrees that some contract provisions may permit incorporation by reference. However, other provisions specified in other applicable statutes and

regulations require physical incorporation of the language into each contract. The regulation was modified to allow incorporation by reference where applicable.

§ 172.9(c)(6)

The ACEC requested clarification on to whom the records retention requirements apply and what is meant by “all other pending matters are closed.”

The provision is consistent with 2 CFR 200.333 and was incorporated to 23 CFR 172 to avoid any misinterpretations of its application to consultant contracts under the FAHP. As a consultant contract provision, it applies to consultants under contract with a contracting agency. “All other pending matters” could include claims, lawsuits, etc. No change was made to the regulation.

§ 172.9(d)(1)

The PECG expressed concerns that the provisions permit a public employee to serve in responsible charge of multiple projects and that contracting agencies may use multiple employees to fulfill monitoring responsibilities. The PECG recommended requiring STAs to employ sufficient staff to carry out a highway program in a manner that maximizes public safety and promotes efficient use of public funds.

Clarification is provided that responsible charge is not intended to correspond to its usage in State laws regarding PE licensure. The provision is intended to articulate the minimum requirements for contract administration and oversight. No change was made to the regulation.

The Virginia DOT and AASHTO asserted that this provision appears to be a job description instead of a regulation and should be removed.

The provision sets the requirements for oversight of consultants under contract to provide engineering and design related services funded with FAHP funds. The monitoring requirements specified within the regulation are fundamental to administration of the FAHP as specified in 23 U.S.C. 302(a). Providing a full-time agency employee in responsible charge is also addressed within 23 CFR 635.105(b). No change was made to the regulation.

The PECG expressed concerns that “responsible charge” is a recognized term within the profession of engineering. The ACEC expressed concerns with the use of the term “responsible charge” for public agency employee functions since the term has legal connotations within the engineering profession.

The “responsible charge” term is used in 23 CFR 635.105 for construction project oversight and has been a common term within the Federal-aid highway program for years. It is intended to be applied only in the context defined within the regulation. It may or may not correspond to its usage in State laws regulating licensure of professional engineers. Language to clarify the intentions of the “responsible charge” term was added to the regulation.

The North Dakota DOT, Montana DOT, Wyoming DOT, and AASHTO expressed concerns that the monitoring requirements would require additional staff. The Montana DOT expressed a particular concern with the responsible charge individual having to ensure that consultant costs billed are allowable in accordance with the Federal cost principles and consistent with the contract terms as well as the acceptability and progress of the consultant's work. The AASHTO expressed the concern that the requirement to provide a “Full-Time” employee to monitor and administer the contracts

can be extremely burdensome on LPAs and pointed out that many use “Part-Time” employees to oversee contracts.

The monitoring requirements specified within the regulation are fundamental to administration of the FAHP as specified in 23 U.S.C. 302(a). The provision allows for a full-time public employee to serve in responsible charge of multiple projects, and contracting agencies may use multiple public employees to fulfill monitoring responsibilities. Providing a full-time agency employee in responsible charge is also addressed within 23 CFR 635.105(b). No change was made to the regulation.

§ 172.9(d)(1)(i)

The PECG asserted that construction inspection is an inherently governmental function that must be performed by public agency employees.

Section 302(a) of Title 23 U.S.C. permits the use of consultants to the extent necessary or desirable provided the contracting agency is suitably equipped and organized. Use of consultants in management support roles, including construction management is permitted under existing regulations. No change was made to the regulation.

§ 172.9(d)(2)

The Tennessee DOT recommends deleting reference to “report” and to simply note a performance evaluation to allow the STA discretion as to the structure of the evaluation.

The FHWA agrees with the recommendation and the regulation was modified accordingly.

The Alaska DOT interprets the existing § 172.9(a)(5) for the conduct of consultant performance evaluations as optional per STA developed written procedures and requests that the proposed regulations not make consultant performance evaluations mandatory. Wyoming DOT also asserts that conducting performance evaluations is a new requirement.

The requirement to establish a written procedure to monitor a consultant's work and to prepare a consultant's performance evaluation at project completion is an existing regulatory requirement found in § 172.9(a)(5) and is a component of a sound oversight program required by 23 U.S.C. 106(g). The proposed regulations do not impose a new requirement. However, the regulation was revised to require a "performance evaluation" rather than an "evaluation report" to maintain the STA's discretion as to the structure of the evaluation.

The Nebraska DOR requested clarification and asserted that there is a current "low threshold contract value of \$30,000" whereby contracts under that threshold do not require a performance evaluation.

The FAR cost principles set contracting procedures when the Federal Government acts as the contracting agency. Section 42.1502(f) of the FAR cost principles states that "past performance evaluations shall be prepared for each architect-engineer services contract of \$30,000 or more..." In the case of the FAHP, the STA is recognized as the contracting agency. The FHWA regulations and policy do not currently provide a "contract threshold" for the requirement to conduct performance evaluations.

Section 172.5(c) allows the STA to create performance evaluation materials, forms, and

procedures that are commensurate with the scope, complexity and size of a contract. No change was made to the regulation.

§ 172.9(e)

The California DOT recommended adding a provision which states that a contract cannot be amended after the term of the contract has ended/expired.

This is a fundamental contract law issue for the States and not necessary for inclusion within the regulation. No change was made to the regulation.

§ 172.9(e)(4)

The IACE and the Wyoming DOT expressed concerns with the proposed regulation limiting the type of services and work allowed to be added to a contract. The IACE recommended that the provision be clarified to allow contractual supplements or additional necessary work items so long as they are germane to the contract and receive an appropriate level of review/approval by the public agency. The Wyoming DOT recommended eliminating this requirement to provide flexibility to STAs for unforeseen circumstances.

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 172.5(a)(1). No change was made to the regulation.

§ 172.9(f)

The AASHTO requests clarification of the intent of this section.

Section 172.9(f) is redundant and addressed in 23 CFR 140(e). The regulation was revised to delete this section in its entirety.

§ 172.11

The ASCE asserted that the proposed section attempts to establish the allowable costs that are reimbursable by FHWA to the STA for architectural and/or engineering nature services that are not directly connected to a project's actual construction and thus may conflict with the allocability requirements of 48 CFR 31.2.

The rule establishes that allowable costs shall be determined in accordance with the Federal cost principles in 48 CFR part 31. For consultants serving in a management support role which benefits more than a single Federal-aid project, the allocability of the consultant costs must be distributed consistent with the cost principles applicable to the contracting agency. The STAs with indirect cost allocation plans will be able to seek reimbursement of these indirect costs when properly allocated to all benefiting cost objectives. No change was made to the regulation.

The California DOT recommended referencing the 2012 AASHTO Audit Guide within the regulation.

The AASHTO Audit Guide is a guidance document based on statutory and regulatory requirements. Incorporation of the AASHTO Audit Guide within the regulation is not necessary and may create unintended consequences relating to guidance material contained within the Guide. No change was made to the regulation.

The SANDAG requested clarification that it may continue to perform post award audits in lieu of pre-award audits.

Section 172.11(b)(1)(iii)(C) permits contracting agencies to establish a provisional indirect cost rate for the specific contract and adjusting contract costs based upon an audited final audit at the completion of the contract. No change was made to the regulation.

§ 172.11(b)(1)

The Texas DOT asserted that this section requires an STA to accept indirect cost rates generated by a private entity and not actually reviewed or approved by any cognizant State or Federal agency in violation of Federal statute.

The proposed revision complies with Federal statute and requires the STA (or other grantee) to perform an evaluation to establish or accept an indirect cost rate to provide assurance of compliance with the Federal cost principles. No change was made to the regulation.

The New York State DOT stated that it believes negotiation of indirect cost rates should be permitted.

Section 112(b)(2) of Title 23, U.S.C. requires acceptance of consultant indirect cost rates established in accordance with the Federal cost principles for the applicable 1-year accounting period of the consultant. No change was made to the regulation.

Gannett Fleming, Inc. proposed incorporation of procedures found in 48 CFR 42.7 into 23 CFR 172.11 because consultants can also act in a Federal role on FAHP funded projects. Gannett Fleming also asserted that the proposed options for establishment of a consultant indirect cost rate when a cognizant audit is not available conflicts with the single cognizant agency concept discussed in 48 CFR 72.703.

The recommended Federal statutory provisions apply to direct Federal contracting and have not been incorporated for application to the FAHP. No change was made to the regulation.

§ 172.11(b)(1)(i)

The Wyoming DOT stated that it does not believe an annual update of indirect cost rates is necessary, especially in instances where a consultant is not being considered for a new contract.

Section 112(b)(2)(C) of Title 23, U.S.C. requires establishment of consultant indirect cost rates in accordance with the Federal cost principles for the applicable 1-year accounting period of the consultant. As such, establishment on an annual basis is required. However, if it is mutually agreed to utilize the established indirect cost rate for the duration of a contract and a consultant is not being considered for work in subsequent years, the establishment of a new rate in subsequent years would not be necessary. No change was made to the regulation.

§ 172.11(b)(1)(ii)

The California DOT requested the regulation address circumstances where an established indirect cost rate is above an independent analysis of what is fair and reasonable and when negotiations can then proceed with the second highest ranked firm.

Reasonableness of the indirect cost rate is determined during the audit or other evaluation of the indirect cost rate. Under 23 U.S.C. 112(b)(2)(C), a rate developed in accordance with the Federal cost principles is not subject to negotiation. No change was made to the regulation.

The AASHTO asserted that requiring subconsultants to have an audited indirect cost rate puts an additional burden on both the subconsultant and the STA.

An audit is not required, but the contracting agency must perform an evaluation of a subconsultant's indirect cost rate when that cost rate has not been established by a cognizant agency. The evaluation provides assurance of consultant compliance with the Federal cost principles under part 31 of the FAR cost principles as required by 23 U.S.C. 112(b)(2)(B). No change was made to the regulation.

§ 172.11(b)(1)(iii)

The Ohio DOT recommended providing an exemption on establishing a FAR cost principles compliant indirect cost rate for firms providing non-engineering related support services or for small firms (e.g., less than 20 employees).

Under 23 U.S.C. 112(b)(2)(B), use of the FAR cost principles for determination of allowable costs of "for-profit" entities is required. A cost analysis of individual elements of costs is still necessary for non-engineering services when price competition is lacking and the firm submits the cost breakdown of proposed services. No change was made to the regulation.

The North Dakota DOT and Montana DOT expressed concerns with the indirect cost rate requirements extending to subconsultants. The North Dakota DOT asserted that including subconsultants within the indirect cost rate requirements would require additional STA resources (time and staff) to evaluate subconsultant rates. The Montana DOT has established a minimum contract amount for requiring subconsultant audited rates. Montana DOT asserts that reviewing all subconsultant rates would require additional staff and may be difficult for small firms to pay for an audit.

While cognizant audit requirements were not previously prescribed for subconsultants, subconsultant costs must still comply with the Federal cost principles and reasonable assurance of compliance must be provided via some level of evaluation. The level of evaluation may be subject to a STAs risk based analysis in accordance with 23 CFR 172.11(c)(2). Additionally, subconsultants can perform a significant percentage of the work on a contract and may have a cognizant approved or otherwise accepted indirect cost rate. As such, it would not be prudent to limit or otherwise not apply the accepted rate based solely on the role as a subconsultant. No change was made to the regulation.

§ 172.11(b)(1)(iii)(A)

The Montana DOT recommended that generally accepted auditing standards other than generally accepted government auditing standards (GAGAS) be permitted for use in conducting audits of consultants. Montana DOT asserted that some STAs internal audit staff conduct audits of consultants and follow International Professional Practices Fieldwork Standards of Internal Auditing Standards.

Per accepted practice in the AASHTO Uniform Audit and Accounting Guide, AASHTO and ACEC agree that for an audit to be cognizant, it must be performed to test compliance with the Federal cost principle in accordance with GAGAS (Yellow Book). Additionally, 23 CFR 140.803 requires that project related audits must be performed in accordance with GAGAS for the agency audit related costs to be reimbursable under the FAHP. An audit performed by an STA not following GAGAS may still provide reasonable assurance of consultant compliance with the Federal cost principles in accordance with an STAs risk-based oversight process as specified in

§ 172.11(b)(1)(iii)(D) and (c)(2), but the audit could not be considered as cognizant and the associated agency audit costs would not be eligible for Federal reimbursement. No change was made to the regulation.

§ 172.11(b)(1)(iii)(B)

The ACEC requested that paragraph (b)(1)(iii)(B) be moved to precede paragraph (b)(1)(iii)(A) to provide some deference to FAR cost principles compliant CPA audits to encourage firms to obtain CPA audits and to discourage agencies from performing additional and unnecessary work. If paragraph (b)(1)(iii)(A) is then listed second, provide the following introductory clause, “If another audit has not already been performed...”

Section 172.11(b)(1)(iii)(A) - (D) are not a hierarchy; they do not have to be taken in order. Subpart A through subpart D are options for the STA to consider when evaluating an indirect cost rate that has not been established by a cognizant agency. Using any single or combination of options would satisfy the provision. No change was made to the regulation.

§ 172.11(b)(1)(iii)(C)

The AASHTO asserted that this paragraph is too restrictive and recommended removal.

Use of a provisional indirect cost rate with adjusted final audit is an option for STA use. The STA is able to follow other evaluations in accordance with paragraph (b)(1)(iii)(D). No change was made to the regulation.

The California DOT suggested adding a clarification that the contract can be executed and work may commence with adjustment of the indirect cost rates at a later date as necessary.

Subject to a successful negotiation and acceptance of an indirect cost rate (including a provisional rate) any contract may be executed. No change was made to the regulation.

The California DOT requested clarification of the definition of “final” indirect cost rate and questioned whether the rate be “reviewed” rather than “audited.”

The regulation states an audited final rate, but adding “at the completion of the contract” will clarify that this means an audit of the incurred indirect cost at the completion of the contract. The regulation was modified accordingly.

§ 172.11(b)(1)(iv)

The ACEC requested that the provision for acceptance of an indirect cost rate offered “voluntarily” by a consultant be deleted, as ACEC believes the existing provision is used by STAs and LPAs to pressure firms to negotiate lower overhead rates.

This is a provision in existing regulations that was substantiated in the 2002 Final Rule. The 2002 Final Rule noted there are many reasons an indirect cost rate of a firm may be unusually high for a short period of time and that a firm should be permitted to offer a lower rate. No change was made to the regulation.

§ 172.11(b)(1)(v)

The AASHTO asserted that requiring use of the actual indirect cost rate in negotiations and contract estimations makes the independent estimate less independent and assumes the rate is reasonable.

This is an existing statutory and regulatory requirement. Reasonableness of the indirect cost rate is determined by the evaluation of the rate in accordance with the Federal cost principles. No change was made to the regulation.

The ACEC requests clarification as to whether a rate “accepted” by an agency requires acceptance by all other agencies whether a cognizant audit or letter of concurrence is provided or not. The ACEC supports the interpretation that once accepted by an agency, the rate must also be accepted by other agencies.

The provision in question requires agencies to apply the rate free of an administrative or de facto ceiling. Subparagraphs (b)(1)(ii)-(iv) establish the process for acceptance of a consultant’s indirect cost rate. Only rates established by a cognizant agency must be accepted for use and application by other agencies. No change was made to the regulation.

§ 172.11(b)(1)(vii)

The Oregon DOT asserted that STAs do not have staff to support disputes on cognizant rates and request clarification as to what level within the STA should a dispute resolution process be located.

The “disputed rates” section is an existing section to permit agencies the ability to not accept a cognizant rate if in dispute among the parties involved in performing the indirect cost rate audit. Procedures under § 172.5(c) require an agency to provide a general dispute resolution process for resolving disputes among the STA and consultants within the procurement, management, and administration process. There is no requirement for a full-time independent employee to handle disputes, and STAs are free

to develop a process that fits with their organizational structure, as appropriate. No change was made to the regulation.

§ 172.11(b)(2)(ii)

The Virginia DOT, Idaho Transportation Department, and AASHTO requested clarification and details of what is acceptable and expected to establish salary benchmarks.

The reasonableness provisions of the FAR cost principles (as specified in 48 CFR 31.201-3 and 31.205-6(b)(2)) establish the expectations. No change was made to the regulation.

The Wyoming DOT asserted that while this would allow STAs the ability to negotiate direct salary rates based on an assessment of reasonableness, the process is likely too cumbersome for agency programs.

The STAs may limit or benchmark consulting firm direct salaries and wages if an assessment of reasonableness is performed in accordance with FAR cost principles (as specified in 48 CFR 31.201-3 and 31.205-6(b)(2)). If an assessment of reasonableness has not been performed, contracting agencies must use and apply the consulting firm's actual direct salary rates when negotiating or administering contracts or contract amendments. No change was made to the regulation.

§ 172.11(b)(2)(iii)

The Montana DOT and AASHTO opposed this provision and asserted that STAs would lose the ability to evaluate the reasonableness of the total cost of the proposed work since a consultant's actual indirect cost rate and actual direct salary rates would be utilized for estimation and negotiation.

In accordance with § 172.11(b)(2)(i)-(ii), the STA is to evaluate the reasonableness of the consultant's proposed direct salary rates in accordance with the reasonableness provisions of the FAR cost principles. In the absence of a reasonableness assessment to benchmark or limit rates, a consultant's actual rates must be used. 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) and 40 U.S.C. 1104(a), 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)]. No change was made to the regulation.

§ 172.11(b)(3)

The California DOT recommends specifying a range for fixed fee and incorporating the following Federal statutory provisions: 10 U.S.C. 2306(d) and 41 U.S.C. 254(b).

The recommended Federal statutory provisions apply to direct Federal contracting and have not been incorporated for application to the FAHP. No change was made to the regulation.

§ 172.11(b)(3)(ii)

The SANDAG requests clarification as to whether a grantee (recipient) may establish a fixed fee at the contract level in addition to the project or task order level.

A fixed fee may be established at the contract level. The regulation was modified to include clarification language.

§ 172.11(c)(2)

The Virginia DOT, Idaho Transportation Department, Wyoming DOT, and AASHTO expressed concerns with the requirements of this section. Virginia DOT asserted that the provisions for risk-based analysis are too prescriptive and burdensome. Idaho Transportation Department recommended using the phrase “To the extent applicable, a risk-based oversight process shall...” rather than “A risk-based oversight process shall...” which would require all of the listed items be included in a risk-based approach. Wyoming DOT asserted that requiring specific factors removes flexibility for STAs. The AASHTO asserted that the term “shall” is very prescriptive and does not allow the contracting agency any flexibility in developing the risk-based analysis.

Each of the factors proposed address a different area of risk and are consistent with the AASHTO Uniform Audit & Accounting Guide and state of the practice. A STA’s use of a risk-based oversight process is optional, but shall address the factors specified at a minimum. No change was made to the regulation.

§ 172.11(c)(2)(i)

The Indiana DOT, Idaho Transportation Department, and AASHTO expressed concerns about this section. Indiana DOT recommended that risk assessment factors (A)-(K) are listed for consideration and not be required for every consultant, every year.

Idaho Transportation Department and AASHTO asserted that conducting an “annual” risk assessment of all consultants (and subconsultants) is burdensome and not reasonable.

Each of the factors proposed address a different area of risk and are consistent with the AASHTO Uniform Audit & Accounting Guide and state of the practice. An STA’s use of a risk-based oversight process is optional, but shall address the factors specified at a minimum. Indirect costs are established for consultants on an annual basis and thus an annual assessment of risk is warranted. Only the consultants doing business with the STA (contracting) would need to have a risk assessment performed. No change was made to the regulation.

The Idaho Transportation Department and AASHTO asserted that the risk-based analysis process would not produce favorable responses for small and/or new firms and thus not allow the STAs to gain any efficiency.

Consultant contract volume is one of the identified factors for consideration. Small and/or new firms typically have a smaller volume of contracts and are generally lower dollar contracts. Additionally, the risk-based process will allow the STA to reduce time spent on larger, more established consultants with which the STA has familiarity in order to focus on other firms of higher risk. No change was made to the regulation.

§ 172.11(c)(2)(i)(B)

The AASHTO and Idaho Transportation Department asserted that a specific STA will not be concerned with the volume of work a consultant has in another State.

This factor is consistent with the AASHTO Uniform Audit & Accounting Guide. To reduce the duplication of effort in reviewing a consultant's compliance with the Federal cost principles, STAs should be aware of a consultant’s workload in other States

and can accept the review or evaluation performed by the other STAs. No change was made to the regulation.

§ 172.11(c)(2)(ii)(C)

The Oregon DOT requests clarification and examples of “desk reviews” or “other analytical procedures.”

The level of analysis and evaluation performed by STAs under a “desk review” varies and has not been defined within the AASHTO Uniform Audit & Accounting Guide. As such, “(C) Desk reviews;” was removed from the provision. The evaluation and analysis performed by STAs under the label of “desk review” could be captured under “Other analytical procedures.” Additional information for “other analytical procedures” will be provided with implementing guidance, but an STA may define these procedures within its written policies and procedures for FHWA review and approval. The regulation was modified accordingly.

§ 172.11(c)(2)(ii)(F) [re-designated § 172.11(c)(2)(ii)(E)]

The Indiana DOT requested clarification on whether the “Training on the Federal cost principles” is directed to STA staff or consultant staff.

To provide reasonable assurance of consultant compliance with the Federal cost principles, a risk mitigation strategy could be to provide additional training to consultants and CPAs. The regulation was modified accordingly.

§ 172.11(c)(3)

The Wyoming DOT supported the addition of the Consultant Cost Certification requirement.

The Wyoming DOT’s position is noted. No change was made to the regulation.

The Connecticut DOT is concerned that indirect cost rate certification is required with each response to an RFP or with each negotiation. The Connecticut DOT recommended that STAs be given the option of requiring consultant certification of final indirect costs either during the proposal preparation phase or once yearly through an audit.

The “proposal” referred to in the certification language is referring to the consultant’s indirect cost rate proposal which is assumed to be provided to the STA once yearly as a part of an audit process and not necessarily with each response to a RFP or with each negotiation. No change was made to the regulation.

The Virginia DOT, Idaho Transportation Department, and AASHTO recommended that STAs be provided the flexibility to incorporate items important to that State within the Contractor Cost Certification.

In an effort to promote consistency and STA acceptance of audits conducted or reviewed by other STAs, it is essential a standard contractor cost certification be utilized. The STAs are free to require an additional STA specific certification to address areas of concern to the STA. No change was made to the regulation.

§ 172.11(c)(3)(i)

Gannett Fleming, Inc. asserted that the requirement is redundant for consultants that are Federal contractors. Gannett Fleming, Inc. proposed that the provision note inclusion of the cost certification with the indirect cost rate proposal submitted to the consultant’s cognizant agency and reference 48 CFR 42.703-2, 10 U.S.C. 2324(h), and 41 U.S.C. 256(a).

The recommended Federal statutory provisions apply to direct Federal contracting

and have not been incorporated for application to the FAHP. Additionally, a consultant cost certification is warranted even when a consultant's indirect cost rate proposal is not being audited or reviewed for cognizant approval or acceptance. No change was made to the regulation.

The ACEC requested that the certification be required on an annual basis rather than submit a certification for every project submission.

The FHWA agrees that only one certification submittal is necessary at the time the consultant's indirect cost rate proposal for its applicable 1-year accounting period is submitted for acceptance. Subparagraph (i) indicates that the certification requirement applies to all indirect cost rate proposals submitted for acceptance. Assuming the rate is submitted on an annual basis to the STA for acceptance, only one certification for that rate is necessary. No change was made to the regulation.

§ 172.11(c)(3)(i) and (ii)

The ACEC requested that an additional provision be added to clarify that a firm can only certify their own rate and is not responsible for or required to certify the rate of another firm (subconsultant).

The FHWA agrees with the comment. The regulation was modified to include clarification language.

§ 172.11(c)(4)

The Indiana DOT requested clarification on requirements for sanctions and penalties to include within written policies and contract documents.

The extent of sanctions and penalties are a matter of State laws, regulations, policies, and procedures. Although false claims, false statement, and suspension and

debarment actions may be imposed at the Federal level, FHWA is not a party to the contract with the consultant and as such, any contract sanctions and penalties, except for those prosecutions brought under the False Claims Act are a matter for the STA. These provisions address incorporation of any sanctions and penalties within policies and contract documents, as appropriate. No change was made to the regulation.

The Wyoming DOT asserted that these requirements are very specific and entail additional work with limited benefit to the contracting agency.

Sanctions and penalties are fundamental contract administration functions and address recommendations from national audits/reviews. These regulations do not prescribe how sanctions and penalties are assessed and thus allow STAs flexibility in addressing these elements within their written policies and procedures. No change was made to the regulation.

One individual interpreted § 172.11(c)(4)(i) as a requirement for STAs to pursue sanctions and penalties against consultants who knowingly charge unallowable costs and asserts this would be a hardship on STA resources. The language “as may be appropriate” is of concern and needs clarification.

“As may be appropriate” is a determination of the contracting agency and the range of sanction or penalties are a function of State law, regulation, policies, and procedures. The actions pursued by a contracting agency will be defined in agency written procedures as noted in §§ 172.11(c)(4), 172.5(c), and 172.9(c). No change was made to the regulation.

General Comments:

The ACEC requested that current FHWA question and answer guidance regarding field indirect cost rates be incorporated into the regulation update.

Provisions regarding FHWA guidance on field indirect cost rates were not included within the NPRM, as the guidance is based on the Federal cost principles. The FHWA's guidance and interpretation of the Federal cost principles as it relates to home and field based indirect cost rates is still valid, but was not included as the Federal cost principles are subject to change. No change was made to the regulation.

The Nebraska DOR asked if "testing services" are considered engineering and design related services.

The FHWA question and answer guidance addresses this, but the answer depends on the specifics of the services in question and definition of engineering services in State law and regulation and their relationship to highway construction. No change was made to the regulation.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The FHWA determined that this rule does not constitute a significant regulatory action within the meaning of Executive Order 12866 or within the meaning of DOT regulatory policies and procedures. The amendments clarify and revise requirements for the procurement, management, and administration of engineering and design related services using FAHP funding and directly related to a construction project. Additionally, this action complies with the principles of Executive Order 13563. The changes to part

172 provide additional clarification, guidance, and flexibility to stakeholders implementing these regulations. This rule is not anticipated to adversely affect, in any material way, any sector of the economy. In addition, these changes will not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. After evaluating the costs and benefits of these amendments, FHWA anticipates that the economic impact of this rule will be minimal; therefore, a full regulatory evaluation is not necessary.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Public Law 96-354, 5 U.S.C. 601-612), FHWA evaluated the effects of this rule on small entities, such as local governments and businesses. The FHWA determined that this action would not have a significant economic impact on a substantial number of small entities. The amendments clarify and revise requirements for the procurement, management, and administration of engineering and design related services using FAHP funding and directly related to a construction project. After evaluating the cost of these proposed amendments, as required by changes in authorizing legislation, other applicable regulations, and industry practices, FHWA has determined the projected impact upon small entities which utilize FAHP funding for consultant engineering and design related services would be negligible. Therefore, FHWA certifies that the rule would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This final rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Public Law 104-4, March 22, 1995, 109 Stat. 48).

Furthermore, in compliance with the Unfunded Mandates Reform Act of 1995, FHWA evaluated this rule to assess the effects on State, local, and tribal governments and the private sector. This rule does not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$143.1 million or more in any one year (2 U.S.C. 1532). Additionally, the definition of “Federal Mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The FAHP permits this type of flexibility.

Executive Order 13132 (Federalism Assessment)

This rule was analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and it was determined that this rule does not have a substantial direct effect or sufficient federalism implications on States that would limit the policymaking discretion of the States. Nothing in this rule directly preempts any State law or regulation or affects the States’ ability to discharge traditional State governmental functions.

Paperwork Reduction Act

Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. This rule does not contain a collection of information requirement for the purpose of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

National Environmental Policy Act

The FHWA analyzed this rule for the purpose of the National Environmental

Policy Act (42 U.S.C. 4321 *et seq.*) and determined that this action would not have any effect on the quality of the human and natural environment. This rule establishes the requirements for the procurement, management, and administration of engineering and design related services using FAHP funding and directly related to a construction project.

Executive Order 13175 (Tribal Consultation)

The FHWA analyzed this rule under Executive Order 13175, dated November 6, 2000, and believes that this proposed action would not have substantial direct effects on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal law. This rule establishes the requirements for the procurement, management, and administration of engineering and design related services using FAHP funding and directly related to a construction project. As such, this rule would not impose any direct compliance requirements on Indian tribal governments nor would it have any economic or other impacts on the viability of Indian tribes. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. We determined that this proposed action would not be a significant energy action under that order because any action contemplated would not be likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, FHWA certifies that a Statement of Energy Effects under Executive Order 13211 is not required.

Executive Order 12630 (Taking of Private Property)

The FHWA analyzed this rule and determined that this proposed action would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

The FHWA analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, and certifies that this proposed action would not cause an environmental risk to health or safety that may disproportionately affect children.

Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 172

Government procurement, Grant programs-transportation, Highways and roads.

Issued on: May 13, 2015.

Gregory G. Nadeau,
Deputy Administrator.

In consideration of the foregoing, FHWA revises part 172 of title 23, Code of Federal Regulations, to read as follows:

**PART 172-PROCUREMENT, MANAGEMENT, AND ADMINISTRATION OF
ENGINEERING AND DESIGN RELATED SERVICES**

Sec.

- 172.1 Purpose and applicability.
- 172.3 Definitions.
- 172.5 Program management and oversight.
- 172.7 Procurement methods and procedures.
- 172.9 Contracts and administration.
- 172.11 Allowable costs and oversight.

Authority: 23 U.S.C. 106, 112, 114(a), 302, 315, and 402; 40 U.S.C. 1101 *et seq.*; 48 CFR part 31; 49 CFR 1.48(b); and 2 CFR part 200.

§ 172.1 Purpose and applicability.

This part prescribes the requirements for the procurement, management, and administration of engineering and design related services under 23 U.S.C. 112 and as supplemented by the Uniform Administrative Requirements For Federal Awards rule. The Uniform Administrative Requirements, Cost Principles and Audit Requirements For Federal Awards rule (2 CFR part 200) shall apply except where inconsistent with the

requirements of this part and other laws and regulations applicable to the Federal-aid highway program (FAHP). The requirements herein apply to federally funded contracts for engineering and design related services for projects subject to the provisions of 23 U.S.C. 112(a) (related to construction) and are issued to ensure that a qualified consultant is obtained through an equitable qualifications-based selection procurement process, that prescribed work is properly accomplished in a timely manner, and at fair and reasonable cost. State transportation agencies (STA) (or other recipients) shall ensure that subrecipients comply with the requirements of this part and the Uniform Administrative Requirements, Cost Principles and Audit Requirements For Federal Awards rule. Federally funded contracts for services not defined as engineering and design related, or for services not in furtherance of a highway construction project or activity subject to the provisions of 23 U.S.C. 112(a), are not subject to the requirements of this part and shall be procured and administered under the requirements of the Uniform Administrative Requirements, Cost Principles and Audit Requirements For Federal Awards rule and procedures applicable to such activities.

§ 172.3 Definitions.

As used in this part:

Audit means a formal examination, in accordance with professional standards, of a consultant's accounting systems, incurred cost records, and other cost presentations to test the reasonableness, allowability, and allocability of costs in accordance with the Federal cost principles (as specified in 48 CFR part 31).

Cognizant agency means any governmental agency that has performed an audit in accordance with generally accepted government auditing standards to test compliance

with the requirements of the Federal cost principles (as specified in 48 CFR part 31) and issued an audit report of the consultant's indirect cost rate, or any described agency that has conducted a review of an audit report and related workpapers prepared by a certified public accountant and issued a letter of concurrence with the audited indirect cost rate(s).

A cognizant agency may be any of the following:

(1) A Federal agency;

(2) A State transportation agency of the State where the consultant'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 paragraph (2) of this definition.

Competitive negotiation means qualifications-based selection procurement procedures complying with 40 U.S.C. 1101-1104, commonly referred to as the Brooks Act.

Consultant means the individual or firm providing engineering and design related services as a party to a contract with a recipient or subrecipient of Federal assistance (as defined in 2 CFR 200.86 or 2 CFR 200.93, respectively).

Contract means a written procurement contract or agreement between a contracting agency and consultant reimbursed under a FAHP grant or subgrant and includes any procurement subcontract under a contract.

Contracting agencies means a State transportation agency or a procuring agency of the State acting in conjunction with and at the direction of the State transportation

agency, other recipients, and all subrecipients that are responsible for the procurement, management, and administration of engineering and design related services.

Contract modification means an agreement modifying the terms or conditions of an original or existing contract.

Engineering and design related services means:

(1) Program management, construction management, feasibility studies, preliminary engineering, design engineering, surveying, mapping, or architectural related services with respect to a highway construction project subject to 23 U.S.C. 112(a) as defined in 23 U.S.C. 112(b)(2)(A); and

(2) Professional services of an architectural or engineering nature, as defined by State law, which are required to or may logically or justifiably be performed or approved by a person licensed, registered, or certified to provide the services with respect to a highway construction project subject to 23 U.S.C. 112(a) and as defined in 40 U.S.C. 1102(2).

Federal cost principles means the cost principles contained in 48 CFR part 31 of the Federal Acquisition Regulation for determination of allowable costs of commercial, for-profit entities.

Fixed fee means a sum expressed in U.S. dollars established to cover the consultant's profit and other business expenses not allowable or otherwise included as a direct or indirect cost.

Management support role means performing engineering management services or other services acting on the contracting agency's behalf, 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 of the United States Code, other Federal and State laws, and applicable regulations.

Noncompetitive means the method of procurement of engineering and design related services when it is not feasible to award the contract using competitive negotiation or small purchase procurement methods.

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

Scope of work means all services, work activities, and actions required of the consultant by the obligations of the contract.

Small purchases means the method of procurement of engineering and design related services where an adequate number of qualified sources are reviewed and the total contract costs do not exceed an established simplified acquisition threshold.

State transportation agency (STA) means that department or agency maintained in conformity with 23 U.S.C. 302 and charged under State law with the responsibility for highway construction (as defined in 23 U.S.C. 101); and that is authorized by the laws of the State to make final decisions in all matters relating to, and to enter into, all contracts and agreements for projects and activities to fulfill the duties imposed by title 23 United States Code, title 23 Code of Federal Regulations, and other applicable Federal laws and regulations.

Subconsultant means the individual or firm contracted by a consultant to provide engineering and design related or other types of services that are part of the services which the consultant is under contract to provide to a recipient (as defined in 23 CFR 200.86) or subrecipient (as defined in 2 CFR 200.93) of Federal assistance.

§ 172.5 Program management and oversight.

(a) STA responsibilities. STAs or other recipients shall develop and sustain organizational capacity and provide the resources necessary for the procurement, management, and administration of engineering and design related consultant services, reimbursed in whole or in part with FAHP funding, as specified in 23 U.S.C. 302(a). Responsibilities shall include the following:

(1) Preparing and maintaining written policies and procedures for the procurement, management, and administration of engineering and design related consultant services in accordance with paragraph (c) of this section;

(2) Establishing a procedure for estimating the level of effort, schedule, and costs of needed consultant services and associated agency staffing and resources for management and oversight in support of project authorization requests submitted to FHWA for approval, as specified in 23 CFR 630.106;

(3) Procuring, managing, and administering engineering and design related consultant services in accordance with applicable Federal and State laws, regulations, and approved policies and procedures, as specified in 23 CFR 1.9(a); and

(4) Administering subawards in accordance with State laws and procedures as specified in 2 CFR part 1201, and the requirements of 23 U.S.C. 106(g)(4), and 2 CFR 200.331. Administering subawards includes providing oversight of the procurement, management, and administration of engineering and design related consultant services by subrecipients to ensure compliance with applicable Federal and State laws and regulations. Nothing in this part shall be taken as relieving the STA (or other recipient) of its responsibility under laws and regulations applicable to the FAHP

for the work performed under any consultant agreement or contract entered into by a subrecipient.

(b) Subrecipient responsibilities. Subrecipients shall develop and sustain organizational capacity and provide the resources necessary for the procurement, management, and administration of engineering and design related consultant services, reimbursed in whole or in part with FAHP funding as specified in 23 U.S.C. 106(g)(4)(A). Responsibilities shall include the following:

(1) Adopting written policies and procedures prescribed by the awarding STA or other recipient for the procurement, management, and administration of engineering and design related consultant services in accordance with applicable Federal and State laws and regulations; or when not prescribed, shall include:

(i) Preparing and maintaining its own written policies and procedures in accordance with paragraph (c) of this section; or

(ii) Submitting documentation associated with each procurement and subsequent contract to the awarding STA or other grantee for review to assess compliance with applicable Federal and State laws, regulations, and the requirements of this part;

(2) Procuring, managing, and administering engineering and design related consultant services in accordance with applicable Federal and State laws, regulations, and approved policies and procedures, as specified in 23 CFR 1.9(a).

(c) Written policies and procedures. The contracting agency shall prepare and maintain written policies and procedures for the procurement, management, and administration of engineering and design related consultant services. The FHWA shall approve the written policies and procedures, including all revisions to such policies and

procedures, of the STA or recipient to assess compliance with applicable requirements. The STA or other recipient shall approve the written policies and procedures, including all revisions to such policies and procedures, of a subrecipient to assess compliance with applicable requirements. These policies and procedures shall address, as appropriate for each method of procurement a contracting agency proposes to use, the following items to ensure compliance with Federal and State laws, regulations, and the requirements of this part:

(1) Preparing a scope of work and evaluation factors for the ranking/selection of a consultant;

(2) Soliciting interests, qualifications, or proposals from prospective consultants;

(3) Preventing, identifying, and mitigating conflicts of interest for employees of both the contracting agency and consultants and promptly disclosing in writing any potential conflict to the STA and FHWA, as specified in 2 CFR 200.112 and 23 CFR 1.33, and the requirements of this part.

(4) Verifying suspension and debarment actions and eligibility of consultants, as specified in 2 CFR part 1200 and 2 CFR part 180;

(5) Evaluating interests, qualifications, or proposals and the ranking/selection of a consultant;

(6) Determining, based upon State procedures and the size and complexity of a project, the need for additional discussions following RFP submission and evaluation;

(7) Preparing an independent agency estimate for use in negotiation with the selected consultant;

(8) Selecting appropriate contract type, payment method, and terms and incorporating required contract provisions, assurances, and certifications in accordance with §172.9;

(9) Negotiating a contract with the selected consultant including instructions for proper disposal of concealed cost proposals of unsuccessful bidders;

(10) Establishing elements of contract costs, accepting indirect cost rate(s) for application to contracts, and assuring consultant compliance with the Federal cost principles in accordance with §172.11;

(11) Ensuring consultant costs billed are allowable in accordance with the Federal cost principles and consistent with the contract terms as well as the acceptability and progress of the consultant's work;

(12) Monitoring the consultant's work and compliance with the terms, conditions, and specifications of the contract;

(13) Preparing a consultant's performance evaluation when services are completed and using such performance data in future evaluation and ranking of consultant to provide similar services;

(14) Closing-out a contract;

(15) Retaining supporting programmatic and contract records, as specified in 2 CFR 200.333 and the requirements of this part;

(16) Determining the extent to which the consultant, which is responsible for the professional quality, technical accuracy, and coordination of services, may be reasonably liable for costs resulting from errors and omissions in the work furnished under its contract;

(17) Assessing administrative, contractual, or legal remedies in instances where consultants violate or breach contract terms and conditions, and providing for such sanctions and penalties as may be appropriate; and

(18) Resolving disputes in the procurement, management, and administration of engineering and design related consultant services.

(d) A contracting agency may formally adopt, by statute or within approved written policies and procedures as specified in paragraph (c) of this section, any direct Federal Government or other contracting regulation, standard, or procedure provided its application does not conflict with the provisions of 23 U.S.C. 112, the requirements of this part, and other laws and regulations applicable to the FAHP.

(e) Notwithstanding paragraph (d) of this section, a contracting agency shall have a reasonable period of time, not to exceed 12 months from the effective date of this rule unless an extension is granted for unique or extenuating circumstances, to issue or update current written policies and procedures for review and approval in accordance with paragraph (c) of this section and consistent with the requirements of this part.

§ 172.7 Procurement methods and procedures.

(a) Procurement methods. The procurement of engineering and design related services funded by FAHP funds and related to a highway construction project subject to the provisions of 23 U.S.C. 112(a) shall be conducted in accordance with one of three methods: competitive negotiation (qualifications-based selection) procurement, small purchases procurement for small dollar value contracts, and noncompetitive procurement where specific conditions exist allowing solicitation and negotiation to take place with a single consultant.

(1) Competitive negotiation (qualifications-based selection). Except as provided in paragraphs (a)(2) and (3) of this section, contracting agencies shall use the competitive negotiation method for the procurement of engineering and design related services when FAHP funds are involved in the contract, as specified in 23 U.S.C. 112(b)(2)(A). The solicitation, evaluation, ranking, selection, and negotiation shall comply with the qualifications-based selection procurement procedures for architectural and engineering services codified under 40 U.S.C. 1101-1104, commonly referred to as the Brooks Act. In accordance with the requirements of the Brooks Act, the following procedures shall apply to the competitive negotiation procurement method:

(i) Solicitation. The 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. Procurement procedures may involve a single step process with issuance of a request for proposal (RFP) to all interested consultants or a multiphase process with issuance of a request for statements or letters of interest or qualifications (RFQ) whereby responding consultants are ranked based on qualifications and a RFP is then provided to three or more of the most highly qualified consultants. Minimum qualifications of consultants to perform services under general work categories or areas of expertise may also be assessed through a prequalification process whereby annual statements of qualifications and performance data are encouraged. Regardless of any process utilized for prequalification of consultants or for an initial assessment of a consultant's qualifications under a RFQ, a RFP specific to the project, task, or service is required for evaluation of a consultant's specific technical approach and qualifications.

(ii) Request for proposal (RFP). The RFP shall provide all information and requirements necessary for interested consultants to provide a response to the RFP and compete for the solicited services. The RFP shall:

(A) Provide a clear, accurate, and detailed description of the scope of work, technical requirements, and qualifications of consultants necessary for the services to be rendered. To the extent practicable, the scope of work should detail the purpose and description of the project, services to be performed, deliverables to be provided, estimated schedule for performance of the work, and applicable standards, specifications, and policies;

(B) Identify the requirements for any discussions that may be conducted with three or more of the most highly qualified consultants following submission and evaluation of proposals;

(C) Identify evaluation factors including their relative weight of importance in accordance with paragraph (a)(1)(iii) of this section;

(D) Specify the contract type and method(s) of payment anticipated to contract for the solicited services in accordance with §172.9;

(E) Identify any special provisions or contract requirements associated with the solicited services;

(F) Require that submission of any requested cost proposals or elements of cost be in a concealed format and separate from technical/qualifications proposals, since these shall not be considered in the evaluation, ranking, and selection phase; and

(G) Provide an estimated schedule for the procurement process and establish a submittal deadline for responses to the RFP that provides sufficient time for interested

consultants to receive notice, prepare, and submit a proposal, which except in unusual circumstances shall be not less than 14 calendar days from the date of issuance of the RFP.

(iii) Evaluation factors. (A) Criteria used for evaluation, ranking, and selection of consultants to perform engineering and design related services must assess the demonstrated competence and qualifications for the type of professional services solicited. These qualifications-based factors may include, but are not limited to, technical approach (e.g., project understanding, innovative concepts or alternatives, quality control procedures), work experience, specialized expertise, professional licensure, staff capabilities, workload capacity, and past performance.

(B) Price shall not be used as a factor in the evaluation, ranking, and selection phase. All price or cost related items which include, but are not limited to, cost proposals, direct salaries/wage rates, indirect cost rates, and other direct costs are prohibited from being used as evaluation criteria.

(C) In-State or local preference shall not be used as a factor in the evaluation, ranking, and selection phase. State licensing laws are not preempted by this provision and professional licensure within a jurisdiction may be established as a requirement for the minimum qualifications and competence of a consultant to perform the solicited services.

(D) The following nonqualifications-based evaluation criteria are permitted under the specified conditions and provided the combined total of these criteria do not exceed a nominal value of 10 percent of the total evaluation criteria to maintain the integrity of a qualifications-based selection:

(1) A local presence may be used as a nominal evaluation factor where appropriate. This criteria shall not be based on political or jurisdictional boundaries and may be applied on a project-by-project basis for contracts where a need has been established for a consultant to provide a local presence, a local presence will add value to the quality and efficiency of the project, and application of this criteria leaves an appropriate number of qualified consultants, given the nature and size of the project. If a consultant from outside of the locality area indicates as part of a proposal that it will satisfy the criteria in some manner, such as establishing a local project office, that commitment shall be considered to have satisfied the local presence criteria.

(2) The participation of qualified and certified Disadvantaged Business Enterprise (DBE) subconsultants may be used as a nominal evaluation criterion where appropriate in accordance with 49 CFR part 26 and a contracting agency's FHWA-approved DBE program.

(iv) Evaluation, ranking, and selection. (A) The contracting agency shall evaluate consultant proposals based on the criteria established and published within the public solicitation.

(B) Although the contract will be with the consultant, proposal evaluations shall consider the qualifications of the consultant and any subconsultants identified within the proposal with respect to the scope of work and established criteria.

(C) The contracting agency shall specify in the RFP discussion requirements that shall follow submission and evaluation of proposals and based on the size and complexity of the project or as defined in contracting agency written policies and procedures, as specified in § 172.5(c). Discussions, as required by the RFP, may be written, by

telephone, video conference, or by oral presentation/interview and shall be with at least three of the most highly qualified consultants to clarify the technical approach, qualifications, and capabilities provided in response to the RFP.

(D) From the proposal evaluation and any subsequent discussions which may have been conducted, the contracting agency shall rank, in order of preference, at least three consultants determined most highly qualified to perform the solicited services based on the established and published criteria. In instances where only two qualified consultants respond to the solicitation, the contracting agency may proceed with evaluation and selection if it is determined that the solicitation did not contain conditions or requirements that arbitrarily limited competition. Alternatively, a contracting agency may pursue procurement following the noncompetitive method when competition is determined to be inadequate and it is determined to not be feasible or practical to re-compete under a new solicitation as specified in paragraph (a)(3)(iii)(C) of this section.

(E) Notification must be provided to responding consultants of the final ranking of the three most highly qualified consultants.

(F) The contracting agency shall retain supporting documentation of the solicitation, proposal, evaluation, and selection of the consultant in accordance with this section and the provisions of 2 CFR 200.333.

(v) Negotiation. (A) The process for negotiation of the contract shall comply with the requirements codified in 40 U.S.C. 1104(b) for the order of negotiation.

(B) Independent estimate. Prior to receipt or review of the most highly qualified consultant's cost proposal, the contracting agency shall prepare a detailed independent estimate with 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. The independent estimate shall serve as the basis for negotiation.

(C) The contracting agency shall establish elements of contract costs (e.g., indirect cost rates, direct salary or wage rates, fixed fee, and other direct costs) separately in accordance with §172.11. The use of the independent estimate and determination of cost allowance in accordance with §172.11 shall ensure contracts for the consultant services are obtained at a fair and reasonable cost, as specified in 40 U.S.C. 1104(a).

(D) If concealed cost proposals were submitted in conjunction with technical/qualifications proposals, the contracting agency may consider only the cost proposal of the consultant with which negotiations are initiated. Due to the confidential nature of this data, as specified in 23 U.S.C. 112(b)(2)(E), concealed cost proposals of unsuccessful consultants may be disposed of in accordance with written policies and procedures established under § 172.5(c).

(E) The contracting agency shall retain documentation of negotiation activities and resources used in the analysis of costs to establish elements of the contract in accordance with the provisions of 2 CFR 200.333. This documentation shall include the consultant cost certification and documentation supporting the acceptance of the indirect cost rate to be applied to the contract, as specified in §172.11(c).

(2) Small purchases. The contracting agency may use the State's small purchase procedures that reflect applicable State laws and regulations for the procurement of engineering and design related services provided the total contract costs do not exceed the Federal simplified acquisition threshold (as defined in 48 CFR 2.101). When a lower threshold for use of small purchase procedures is established in State law, regulation, or

policy, the lower threshold shall apply to the use of FAHP funds. The following additional requirements shall apply to the small purchase procurement method:

(i) The scope of work, project phases, and contract requirements shall not be broken down into smaller components merely to permit the use of small purchase procedures.

(ii) A minimum of three consultants are required to satisfy the adequate number of qualified sources reviewed. In instances where only two qualified consultants respond to the solicitation, the contracting agency may proceed with evaluation and selection if it is determined that the solicitation did not contain conditions or requirements which arbitrarily limited competition. Alternatively, a contracting agency may pursue procurement following the noncompetitive method when competition is determined to be inadequate and it is determined to not be feasible or practical to re compete under a new solicitation as specified in § 172.7(a)(3)(iii)(C).

(iii) Contract costs may be negotiated in accordance with State small purchase procedures; however, the allowability of costs shall be determined in accordance with the Federal cost principles.

(iv) The full amount of any contract modification or amendment that would cause the total contract amount to exceed the established simplified acquisition threshold is ineligible for Federal-aid funding. The FHWA may withdraw all Federal-aid from a contract if it is modified or amended above the applicable established simplified acquisition threshold.

(3) Noncompetitive. The following requirements shall apply to the noncompetitive procurement method:

(i) A contracting agency may use its own noncompetitive procedures that reflect applicable State and local laws and regulations and conform to applicable Federal requirements.

(ii) A contracting agency shall establish a process to determine when noncompetitive procedures will be used and shall submit justification to, and receive approval from FHWA before using this form of contracting.

(iii) A contracting agency may award a contract by noncompetitive procedures under the following limited circumstances:

(A) The service is available only from a single source;

(B) There is an emergency which will not permit the time necessary to conduct competitive negotiations; or

(C) After solicitation of a number of sources, competition is determined to be inadequate.

(iv) Contract costs may be negotiated in accordance with contracting agency noncompetitive procedures; however, the allowability of costs shall be determined in accordance with the Federal cost principles.

(b) Additional procurement requirements--(1) Uniform administrative requirements, cost principles and audit requirements for Federal awards. (i) STAs or other recipients and their subrecipients shall comply with procurement requirements established in State and local laws, regulations, policies, and procedures that are not addressed by or are not in conflict with applicable Federal laws and regulations, as specified in 2 CFR part 1201.

(ii) When State and local procurement laws, regulations, policies, or procedures are in conflict with applicable Federal laws and regulations, a contracting agency shall comply with Federal requirements to be eligible for Federal-aid reimbursement of the associated costs of the services incurred following FHWA authorization, as specified in 2 CFR 200.102(c).

(2) Disadvantaged Business Enterprise (DBE) program. (i) A contracting agency shall give consideration to DBE consultants in the procurement of engineering and design related service contracts subject to 23 U.S.C. 112(b)(2) in accordance with 49 CFR part 26. When DBE program participation goals cannot be met through race-neutral measures, additional DBE participation on engineering and design related services contracts may be achieved in accordance with a contracting agency's FHWA approved DBE program through either:

(A) Use of an evaluation criterion in the qualifications-based selection of consultants, as specified in §172.7(a)(1)(iii)(D); or

(B) Establishment of a contract participation goal.

(ii) The use of quotas or exclusive set-asides for DBE consultants is prohibited, as specified in 49 CFR 26.43.

(3) Suspension and debarment. A contracting agency shall verify suspension and debarment actions and eligibility status of consultants and subconsultants prior to entering into an agreement or contract in accordance with 2 CFR part 1200 and 2 CFR part 180.

(4) Conflicts of interest. (i) A contracting agency shall maintain a written code of standards of conduct governing the performance of their employees engaged in the award

and administration of engineering and design related services contracts under this part and governing the conduct and roles of consultants in the performance of services under such contracts to prevent, identify, and mitigate conflicts of interest in accordance with 2 CFR 200.112, 23 CFR 1.33 and the provisions of this paragraph (b)(4).

(ii) No employee, officer, or agent of the contracting agency shall participate in selection, or in the award or administration of a contract supported by Federal-aid funds if a conflict of interest, real or apparent, would be involved. Such a conflict arises when there is a financial or other interest in the consultant selected for award by:

(A) The employee, officer, or agent;

(B) Any member of his or her immediate family;

(C) His or her partner; or

(D) An organization that employs or is about to employ any of the above.

(iii) The contracting agency's officers, employees, or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from consultants, potential consultants, or parties to subagreements. A contracting agency may establish dollar thresholds where the financial interest is not substantial or the gift is an unsolicited item of nominal value.

(iv) A contracting agency may provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(v) To the extent permitted by State or local law or regulations, the standards of conduct required by this paragraph shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the contracting agency's officers, employees, or agents, or by consultants or their agents.

(vi) A contracting agency shall promptly disclose in writing any potential conflict of interest to FHWA.

(5) Consultant services in management support roles. (i) When FAHP funds participate in a consultant services contract, the contracting agency shall receive approval from FHWA, or the recipient as appropriate, before utilizing a consultant to act in a management support role for the contracting agency; unless an alternate approval procedure has been approved. Use of consultants in management support roles does not relieve the contracting agency of responsibilities associated with the use of FAHP funds, as specified in 23 U.S.C. 302(a) and 23 U.S.C. 106(g)(4) and should be limited to large projects or circumstances where unusual cost or time constraints exist, unique technical or managerial expertise is required, and/or an increase in contracting agency staff is not a viable option.

(ii) Management support roles may include, but are not limited to, providing oversight of an element of a highway program, function, or service on behalf of the contracting agency or may involve managing or providing oversight of a project, series of projects, or the work of other consultants and contractors on behalf of the contracting agency. Contracting agency written policies and procedures as specified in § 172.5(c) may further define allowable management roles and services a consultant may provide, specific approval responsibilities, and associated controls necessary to ensure compliance with Federal requirements.

(iii) Use of consultants or subconsultants in management support roles requires appropriate conflicts of interest standards as specified in paragraph (b)(4) of this section and adequate contracting agency staffing to administer and monitor the management

consultant contract, as specified in §172.9(d). A consultant serving in a management support role may be precluded from providing additional services on projects, activities, or contracts under its oversight due to potential conflicts of interest.

(iv) FAHP funds shall not participate in the costs of a consultant serving in a management support role where the consultant was not procured in accordance with Federal and State requirements, as specified in 23 CFR 1.9(a).

(v) Where benefiting more than a single Federal-aid project, allocability of consultant contract costs for services related to a management support role shall be distributed consistent with the cost principles applicable to the contracting agency, as specified in 2 CFR part 200, subpart E – Cost Principles.

§ 172.9 Contracts and administration.

(a) Contract types. The contracting agency shall use the following types of contracts:

(1) Project-specific. A contract between the contracting agency and consultant for the performance of services and defined scope of work related to a specific project or projects.

(2) Multiphase. A project-specific contract where the solicited services are divided into phases whereby the specific scope of work and associated costs may be negotiated and authorized by phase as the project progresses.

(3) On-call or indefinite delivery/indefinite quantity (IDIQ). A contract for the performance of services for a number of projects, under task or work orders issued on an as-needed or on-call basis, for an established contract period. The procurement of services to be performed under on-call or IDIQ contracts shall follow either competitive

negotiation or small purchase procurement procedures, as specified in §172.7. The solicitation and contract provisions shall address the following requirements:

(i) Specify a reasonable maximum length of contract period, including the number and period of any allowable contract extensions, which shall not exceed 5 years;

(ii) Specify a maximum total contract dollar amount that may be awarded under a contract;

(iii) Include a statement of work, requirements, specifications, or other description to define the general scope, complexity, and professional nature of the services; and

(iv) If multiple consultants are to be selected and multiple on-call or IDIQ contracts awarded through a single solicitation for specific services:

(A) Identify the number of consultants that may be selected or contracts that may be awarded from the solicitation; and

(B) Specify the procedures the contracting agency will use in competing and awarding task or work orders among the selected, qualified consultants. Task or work orders shall not be competed and awarded among the selected, qualified consultants on the basis of costs under on-call or IDIQ contracts for services procured with competitive negotiation procedures. Under competitive negotiation procurement, each specific task or work order shall be awarded to the selected, qualified consultants:

(1) Through an additional qualifications-based selection procedure, which may include, but does not require, a formal RFP in accordance with §172.5(a)(1)(ii); or

(2) On a regional basis whereby the State is divided into regions and consultants are selected to provide on-call or IDIQ services for an assigned region(s) identified within the solicitation.

(b) Payment methods. (1) The method of payment to the consultant shall be set forth in the original solicitation, contract, and in any contract modification thereto. The methods of payment shall be: lump sum, cost plus fixed fee, cost per unit of work, or specific rates of compensation. A single contract may contain different payment methods as appropriate for compensation of different elements of work.

(2) The cost plus a percentage of cost and percentage of construction cost methods of payment shall not be used.

(3) The lump sum payment method shall only be used when the contracting agency has established the extent, scope, complexity, character, and duration of the work to be required to a degree that fair and reasonable compensation, including a fixed fee, can be determined at the time of negotiation.

(4) When the method of payment is other than lump sum, the contract shall specify a maximum amount payable which shall not be exceeded unless adjusted by a contract modification.

(5) The specific rates of compensation payment method provides for reimbursement on the basis of direct labor hours at specified fixed hourly rates, including direct labor costs, indirect costs, and fee or profit, plus any other direct expenses or costs, subject to an agreement maximum amount. This payment method shall 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. This specific rates of compensation payment method should be limited to contracts or components of contracts for specialized or support type services where the consultant is not in direct control of the number of hours worked, such as construction engineering and inspection. When using

this payment method, the contracting agency shall manage and monitor the consultant's level of effort and classification of employees used to perform the contracted services.

(6) A contracting agency may withhold retainage from payments in accordance with prompt pay requirements, as specified in 49 CFR 26.29. When retainage is used, the terms and conditions of the contract shall clearly define agency requirements, including periodic reduction in retention and the conditions for release of retention.

(c) Contract provisions. (1) All contracts and subcontracts shall include the following provisions, either by reference or by physical incorporation into the language of each contract or subcontract, as applicable:

(i) Administrative, contractual, or legal remedies in instances where consultants violate or breach contract terms and conditions, and provide for such sanctions and penalties as may be appropriate;

(ii) Notice of contracting agency requirements and regulations pertaining to reporting;

(iii) Contracting agency requirements and regulations pertaining to copyrights and rights in data;

(iv) Access by recipient, the subrecipient, FHWA, the U.S. Department of Transportation's Inspector General, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the consultant which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions;

(v) Retention of all required records for not less than 3 years after the contracting agency makes final payment and all other pending matters are closed;

(vi) Standard DOT Title VI Assurances (DOT Order 1050.2);

(vii) Disadvantaged Business Enterprise (DBE) assurance, as specified in 49 CFR 26.13(b);

(viii) Prompt pay requirements, as specified in 49 CFR 26.29;

(ix) Determination of allowable costs in accordance with the Federal cost principles;

(x) Contracting agency requirements pertaining to consultant errors and omissions;

(xi) Contracting agency requirements pertaining to conflicts of interest, as specified in 23 CFR 1.33 and the requirements of this part; and

(xii) A provision for termination for cause and termination for convenience by the contracting agency including the manner by which it will be effected and the basis for settlement.

(2) All contracts and subcontracts exceeding \$100,000 shall contain, either by reference or by physical incorporation into the language of each contract, a provision for lobbying certification and disclosure, as specified in 49 CFR part 20.

(d) Contract administration and monitoring--(1) Responsible charge. A full-time, public employee of the contracting agency qualified to ensure that the work delivered under contract is complete, accurate, and consistent with the terms, conditions, and specifications of the contract shall be in responsible charge of each contract or project. While an independent consultant may be procured to serve in a program or project management support role, as specified in §172.7(b)(5), or to provide technical assistance in review and acceptance of engineering and design related services performed and

products developed by other consultants, the contracting agency shall designate a public employee as being in responsible charge. A public employee may serve in responsible charge of multiple projects and contracting agencies may use multiple public employees to fulfill monitoring responsibilities. The term responsible charge is intended to be applied only in the context defined within this regulation. It may or may not correspond to its usage in State laws regulating the licensure and/or conduct of professional engineers. The public employee's responsibilities shall include:

(i) Administering inherently governmental activities including, but not limited to, contract negotiation, contract payment, and evaluation of compliance, performance, and quality of services provided by consultant;

(ii) Being familiar with the contract requirements, scope of services to be performed, and products to be produced by the consultant;

(iii) Being familiar with the qualifications and responsibilities of the consultant's staff and evaluating any requested changes in key personnel;

(iv) Scheduling and attending progress and project review meetings, commensurate with the magnitude, complexity, and type of work, to ensure the work is progressing in accordance with established scope of work and schedule milestones;

(v) Ensuring consultant costs billed are allowable in accordance with the Federal cost principles and consistent with the contract terms as well as the acceptability and progress of the consultant's work;

(vi) Evaluating and participating in decisions for contract modifications; and

(vii) Documenting contract monitoring activities and maintaining supporting contract records, as specified in 2 CFR 200.333.

(2) Performance evaluation. The contracting agency shall 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. The contracting agency shall provide the consultant a copy of the performance evaluation and an opportunity to provide written comments to be attached to the evaluation. The contracting agency should prepare additional interim performance evaluations based on the scope, complexity, and size of the contract as a means to provide feedback, foster communication, and achieve desired changes or improvements. Completed performance evaluations should be archived for consideration as an element of past performance in the future evaluation of the consultant to provide similar services.

(e) Contract modification. (1) Contract modifications are required for any amendments to the terms of the existing contract that change the cost of the contract; significantly change the character, scope, complexity, or duration of the work; or significantly change the conditions under which the work is required to be performed.

(2) A contract modification shall clearly define and document the changes made to the contract, establish the method of payment for any adjustments in contract costs, and be in compliance with the terms and conditions of the contract and original procurement.

(3) A contracting agency shall negotiate contract modifications following the same procedures as the negotiation of the original contract.

(4) A contracting agency may add to a contract only the type of services and work included within the scope of services of the original solicitation from which a qualifications-based selection was made.

(5) For any additional engineering and design related services outside of the scope of work established in the original request for proposal, a contracting agency shall:

- (i) Procure the services under a new solicitation;
- (ii) Perform the work itself using contracting agency staff; or
- (iii) Use a different, existing contract under which the services would be within the scope of work.

(6) Overruns in the costs of the work shall not automatically warrant an increase in the fixed fee portion of a cost plus fixed fee reimbursed contract. Permitted changes to the scope of work or duration may warrant consideration for adjustment of the fixed fee portion of cost plus fixed fee or lump sum reimbursed contracts.

§ 172.11 Allowable costs and oversight.

(a) Allowable costs. (1) Costs or prices based on estimated costs for contracts shall be eligible for Federal-aid reimbursement only to the extent that costs incurred or cost estimates included in negotiated prices are allowable in accordance with the Federal cost principles.

(2) Consultants shall be responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with Federal cost principles.

(b) Elements of contract costs. The following requirements shall apply to the establishment of the specified elements of contract costs:

(1) Indirect cost rates. (i) Indirect cost rates shall be updated on an annual basis in accordance with the consultant's annual accounting period and in compliance with the Federal cost principles.

(ii) Contracting agencies shall accept a consultant's or subconsultant's indirect cost rate(s) established for a 1-year applicable accounting period by a cognizant agency that has:

(A) Performed an audit in accordance with generally accepted government auditing standards to test compliance with the requirements of the Federal cost principles and issued an audit report of the consultant's indirect cost rate(s); or

(B) Conducted a review of an audit report and related workpapers prepared by a certified public accountant and issued a letter of concurrence with the related audited indirect cost rate(s).

(iii) When the indirect cost rate has not been established by a cognizant agency in accordance with paragraph (b)(1)(ii) of this section, a STA or other recipient shall perform an evaluation of a consultant's or subconsultant's indirect cost rate prior to acceptance and application of the rate to contracts administered by the recipient or its subrecipients. The evaluation performed by STAs or other recipients to establish or accept an indirect cost rate shall provide assurance of compliance with the Federal cost principles and may consist of one or more of the following:

(A) Performing an audit in accordance with generally accepted government auditing standards and issuing an audit report;

(B) Reviewing and accepting an audit report and related workpapers prepared by a certified public accountant or another STA;

(C) Establishing a provisional indirect cost rate for the specific contract and adjusting contract costs based upon an audited final rate at the completion of the contract; or

(D) Conducting other evaluations in accordance with a risk-based oversight process as specified in paragraph (c)(2) of this section and within the agency's approved written policies and procedures, as specified in §172.5(c).

(iv) A lower indirect cost rate may be accepted for use on a contract if submitted voluntarily by a consultant; however, the consultant's offer of a lower indirect cost rate shall not be a condition or qualification to be considered for the work or contract award.

(v) Once accepted in accordance with paragraphs (b)(1)(ii) through (iv) of this section, contracting agencies shall apply such indirect cost rate for the purposes of contract estimation, negotiation, administration, reporting, and contract payment and the indirect cost rate shall not be limited by administrative or de facto ceilings of any kind.

(vi) A consultant's accepted indirect cost rate for its 1-year applicable accounting period shall be applied to contracts; however, once an indirect cost rate is established for a contract, it may be extended beyond the 1-year applicable period, through the duration of the specific contract, provided all concerned parties agree. Agreement to the extension of the 1-year applicable period shall not be a condition or qualification to be considered for the work or contract award.

(vii) Disputed rates. If an indirect cost rate established by a cognizant agency in paragraph (b)(1)(ii) of this section is in dispute, the contracting agency does not have to

accept the rate. A contracting agency may perform its own audit or other evaluation of the consultant's indirect cost rate for application to the specific contract, until or unless the dispute is resolved. A contracting agency may alternatively negotiate a provisional indirect cost rate for the specific contract and adjust contract costs based upon an audited final rate. Only the consultant and the parties involved in performing the indirect cost audit may dispute the established indirect cost rate. If an error is discovered in the established indirect cost rate, the rate may be disputed by any prospective contracting agency.

(2) Direct salary or wage rates. (i) Compensation for each employee or classification of employee must be reasonable for the work performed in accordance with the Federal cost principles.

(ii) To provide for fair and reasonable compensation, considering the classification, experience, and responsibility of employees necessary to provide the desired engineering and design related services, contracting agencies may establish consultant direct salary or wage rate limitations or "benchmarks" based upon an objective assessment of the reasonableness of proposed rates performed in accordance with the reasonableness provisions of the Federal cost principles.

(iii) When an assessment of reasonableness in accordance with the Federal cost principles has not been performed, contracting agencies shall use and apply the consultant's actual direct salary or wage rates for estimation, negotiation, administration, and payment of contracts and contract modifications.

(3) Fixed fee. (i) The determination of the amount of fixed fee shall consider the scope, complexity, contract duration, degree of risk borne by the consultant, amount of

subcontracting, and professional nature of the services as well as the size and type of contract.

(ii) The establishment of fixed fee shall be contract or task order specific.

(iii) Fixed fees in excess of 15 percent of the total direct labor and indirect costs of the contract may be justified only when exceptional circumstances exist.

(4) Other direct costs. A contracting agency shall use the Federal cost principles in determining the reasonableness, allowability, and allocability of other direct contract costs.

(c) Oversight--(1) Agency controls. Contracting agencies shall provide reasonable assurance that consultant costs on contracts reimbursed in whole or in part with FAHP funding are allowable in accordance with the Federal cost principles and consistent with the contract terms considering the contract type and payment method. Contracting agency written policies, procedures, contract documents, and other controls, as specified in §§172.5(c) and 172.9 shall address the establishment, acceptance, and administration of contract costs to assure compliance with the Federal cost principles and requirements of this section.

(2) Risk-based analysis. The STAs or other recipient may employ a risk-based oversight process to provide reasonable assurance of consultant compliance with Federal cost principles on FAHP funded contracts administered by the recipient or its subrecipients. If employed, this risk-based oversight process shall be incorporated into STA or other recipient written policies and procedures, as specified in §172.5(c). In addition to ensuring allowability of direct contract costs, the risk-based oversight process shall address the evaluation and acceptance of consultant and subconsultant indirect cost

rates for application to contracts. A risk-based oversight process shall consist of the following:

(i) Risk assessments. Conducting and documenting an annual assessment of risks of noncompliance with the Federal cost principles per consultant doing business with the agency, considering the following factors:

(A) Consultant's contract volume within the State;

(B) Number of States in which the consultant operates;

(C) Experience of consultant with FAHP contracts;

(D) History and professional reputation of consultant;

(E) Audit history of consultant;

(F) Type and complexity of consultant accounting system;

(G) Size (number of employees or annual revenues) of consultant;

(H) Relevant experience of certified public accountant performing audit of consultant;

(I) Assessment of consultant's internal controls;

(J) Changes in consultant organizational structure; and

(K) Other factors as appropriate.

(ii) Risk mitigation and evaluation procedures. Allocating resources, as considered necessary based on the results of the annual risk assessment, to provide reasonable assurance of compliance with the Federal cost principles through application of the following types of risk mitigation and evaluation procedures appropriate to the consultant and circumstances:

(A) Audits performed in accordance with generally accepted government audit standards to test compliance with the requirements of the Federal cost principles;

(B) Certified public accountant or other STA workpaper reviews;

(C) Other analytical procedures;

(D) Consultant cost certifications in accordance with paragraph (c)(3) of this section; and

(E) Consultant and certified public accountant training on the Federal cost principles.

(iii) Documentation. Maintaining supporting documentation of the risk-based analysis procedures performed to support the allowability and acceptance of consultant costs on FAHP funded contracts.

(3) Consultant cost certification. (i) Indirect cost rate proposals for the consultant's 1-year applicable accounting period shall not be accepted and no agreement shall be made by a contracting agency to establish final indirect cost rates, unless the costs have been certified by an official of the consultant as being allowable in accordance with the Federal cost principles. The certification requirement shall apply to all indirect cost rate proposals submitted by consultants and subconsultants for acceptance by a STA or other recipient. Each consultant or subconsultant is responsible for certification of its own indirect cost rate and may not certify the rate of another firm.

(ii) The certifying official shall be an individual executive or financial officer of the consultant's organization at a level no lower than a Vice President or Chief Financial Officer, or equivalent, who has the authority to represent the financial information utilized to establish the indirect cost rate proposal submitted for acceptance.

(iii) The certification of final indirect costs shall read as follows:

Certificate of Final Indirect Costs

This is to certify that I have reviewed this proposal to establish final indirect cost rates and to the best of my knowledge and belief:

1. All costs included in this proposal (identify proposal and date) to establish final indirect cost rates for (identify period covered by rate) are allowable in accordance with the cost principles of the Federal Acquisition Regulation (FAR) of title 48, Code of Federal Regulations (CFR), part 31; and

2. This proposal does not include any costs which are expressly unallowable under applicable cost principles of the FAR of 48 CFR part 31.

Firm: _____

Signature: _____

Name of Certifying Official: _____

Title: _____

Date of Execution: _____

(4) Sanctions and penalties. Contracting agency written policies, procedures, and contract documents, as specified in §§172.5(c) and 172.9(c), shall address the range of administrative, contractual, or legal remedies that may be assessed in accordance with Federal and State laws and regulations where consultants violate or breach contract terms and conditions. Where consultants knowingly charge unallowable costs to a FAHP funded contract:

(i) Contracting agencies shall pursue administrative, contractual, or legal remedies and provide for such sanctions and penalties as may be appropriate; and

(ii) Consultants are subject to suspension and debarment actions as specified in 2 CFR part 1200 and 2 CFR part 180, potential cause of action under the False Claims Act as specified in 32 U.S.C. 3729-3733, and prosecution for making a false statement as specified in 18 U.S.C. 1020.

(d) Prenotification; confidentiality of data. FHWA, recipients, and subrecipients of FAHP funds may share audit information in complying with the recipient's or subrecipient's acceptance of a consultant's indirect cost rates pursuant to 23 U.S.C. 112 and this part provided that the consultant is given notice of each use and transfer. Audit information shall not be provided to other consultants or any other government agency not sharing the cost data, or to any firm or government agency for purposes other than complying with the recipient's or subrecipient's acceptance of a consultant's indirect cost rates pursuant to 23 U.S.C. 112 and this part without the written permission of the affected consultants. If prohibited by law, such cost and rate data shall not be disclosed under any circumstance; however, should a release be required by law or court order, such release shall make note of the confidential nature of the data.

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