



US Department
of Transportation
Federal Highway
Administration

Memorandum

Subject: **INFORMATION:** Awarding Engineering and Design Services
Contracts Based on Brooks Act Requirements

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From: Dwight A. Horne *Dwight A. Horne*
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Reply to
Attn. of: HIPA-20

To: Division Administrators

On November 30, 2005 the President signed into law the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006 (119 Stat. 2396; Public Law 109-115, HR 3058 ("the FY 2006 Appropriations Act"). Section 174 of this Act, amends 23 U.S.C. §112(b)(2) relating to the award of engineering and design services (A&E) contracts that are directly related to a construction project and use Federal-aid highway funding. This amendment strikes existing provisions of law and requires that these contracts shall be awarded in the same manner as a contract for architectural and engineering services is negotiated under the "Brooks Act" provisions contained in chapter 11 of 40 U.S.C. (copy attached).

The Brooks Act requires agencies to promote open competition by advertising, ranking, selecting, and negotiating contracts based on demonstrated competence and qualifications for the type of engineering and design services being procured, and at a fair and reasonable price. Engineering and design related services are defined in 23 U.S.C. §112 (b)(2)(A) and 23 C.F.R. §172.3 to include program management, construction management, feasibility studies, preliminary engineering, design engineering, surveying, mapping, or other related services. These other services may include professional engineering related services, or incidental services that may be performed by a professional engineer, or individuals working under their direction, who may logically or justifiably perform these services.

The changes resulting from this amendment in Federal law are effective immediately. Effective with the enactment of the FY 2006 Act, §112(b)(2) of title 23 reads as follows:

"(2) Contracting for Engineering and Design Services.--

- (A) General Rule.--Subject to paragraph (3), each contract for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping or architectural related services with respect to a project subject to the provisions of subsection(a) of this section shall be awarded in the same manner as a contract for architectural and engineering services is negotiated under chapter 11 of title 40.
- (B) Performance and Audits—Any contract or subcontract awarded in accordance with subparagraph (A), whether funded in whole or in part with Federal-aid highway funds, shall be performed and audited in compliance with the cost principles



contained in the Federal Acquisition Regulations of part 31 of title 48, Code of Federal Regulations.

- (C) Indirect Cost Rates.—Instead of performing its own audits, a recipient of funds under a contract or subcontract awarded in accordance with subparagraph (A) shall accept indirect cost rates established in accordance with the Federal Acquisition Regulations for 1-year applicable accounting periods by a cognizant Federal or state government agency, if such rates are not currently under dispute.
- (D) Application of Rates.—Once a firm's indirect cost rates are accepted under this paragraph, the recipient of the funds shall apply such rates for the purpose of contract estimation, negotiation, administration, reporting, and contract payment and shall not be limited by administrative or defacto ceilings of any kind.
- (E) Prenotification; Confidentiality of Data.—A recipient of funds requesting or using the cost and rate data described in subparagraph (D), shall notify any affected firm before such request or use. Such data shall be confidential and shall not be accessible or provided, in whole or in part, to another firm or another government agency which is not part of the group of agencies sharing cost data under this paragraph, except for written permission of the audited firm. If prohibited by law, such cost and rate data, shall not be disclosed under any circumstances.
- (F) Subparagraphs (B),(C),(D), and (E) herein shall not apply to the States of West Virginia or Minnesota.

As a result, State and local agencies are no longer entitled to procure engineering and design related service contracts (directly relating to construction) with Federal-aid highway funding using either "alternative" or "equivalent" Brooks Act procedures that were permitted prior to this amendment. State and local agencies will also be required to use the indirect cost rates established by a cognizant agency audit (23 C.F.R. §172.7) based on the cost principles contained in 48 C.F.R. Part 31 for the consultant, eliminating the placing of caps on indirect cost rates.

West Virginia and Minnesota are granted exceptions from the requirements relating to audits, indirect cost rates, pre-notification and confidentiality of data. However these States must also follow the Brooks Act requirements when procuring engineering and design services using Federal-aid highway funding.

We are currently reviewing the Federal Regulations (23 C.F.R. Part 172) pertaining to the administration of engineering and design related services contracts to determine the modifications that may be required to our existing regulations. We are also reviewing the implementing guidance that supports administering engineering and design related service contracts (<http://www.fhwa.dot.gov/programadmin/172qa.htm>) to determine what specific changes need to be made to implement Brooks Act procurement policies.

The laws, policies, procedures, and practices that State and local agencies follow in procuring engineering and design related service using Federal-aid highway funding need to comply with the amendments to §112(b)(2) that are contained in Section 174 of the FY 2006 Appropriations Act. Pursuant to the Secretary's authority under 23 U.S.C §315 all requests for proposals (RFPs) issued on or after December 1, 2005 for engineering and design related service contracts directly related to a construction project using Federal-aid highway funding are required to comply with these new requirements. As a result, to ensure compliance with this amendment the Division offices need to

review these requirements with their state DOT partners and advise the States of the necessity to revise, as appropriate all requests for proposals that conflict with the Brooks Act requirements that were not authorized on or prior to November 30, 2005.

In the interim, to facilitate the provision of immediate guidance on implementing this amendment to the State DOTs, the Brooks Act provisions and the FAR regulations implementing these requirements are attached. If you have any questions pertaining to the implementation of §174 of the FY 2006 Appropriations Act, please contact Mr. Jon Obenberger (jon.obenberger@fhwa.dot.gov) in my Office, or Mr. Steve Rochlis (steve.rochlis@fhwa.dot.gov) of the Chief Counsel's office.

Attachments