

## CHAPTER 11 NEGOTIATING CONTRACT FEES

Contract negotiations shall be conducted in accordance with the *FDOT Negotiation Handbook*, available on the Procurement Internet site.

### 11.1 NEGOTIATING WORK EFFORT

Upon the ranking of the shortlisted Consultants, negotiations will begin with the number one ranked Consultant. At that time, the Consultant will be requested to submit a detailed staff hour estimate and Fee Proposal with support information to the Department. Staff hour estimates for PD&E, roadway and bridge design projects must be submitted in the staff hour estimating spread sheet provided by the Department. The proposed costs must be submitted in the *Automated Fee Proposal (AFP) Spreadsheet*. Once the Consultant's detailed staff hour estimate is received, the Department will make available the Department's detailed estimate of work to the Consultant. The first date and anticipated ending date of negotiation meetings with the Consultant will be adequately noticed as public meetings. Minutes will be taken. The negotiations for work effort should focus on the technical proposal for the purpose of clarifying and resolving any differences concerning the scope of the project and the level of effort necessary to accomplish the project. The objective of work effort negotiations is to ensure that estimated work effort is fair and reasonable.

### 11.2 REVIEW PROCESS FOR FEE PROPOSAL AND AUDIT PACKAGE

The PSU is required by law to perform a detailed cost analysis of all firms (prime, subconsultants, subcontractors, and sub-vendors) on a professional services contract, to ensure the proposed compensation costs are fair, competitive, reasonable, accurate and allowable, pursuant to **23 CFR 172.7**, and **2 CFR 200.333**. Compensation means the amount paid by the Agency.

The fee proposal must contain a certification that any direct costs proposed are not included as overhead in the Consultant's accounting system, as referenced in the *Audit Certification Package for Professional Services Firms, Form No. 375-030-39*. The certification will be signed by the Consultant's comptroller, chief financial officer, accountant, or other appropriate person who is knowledgeable of the Consultant's normal accounting requirements. At a minimum, the review of the fee proposal by the PSU must include the following:

#### 11.2.1 IDENTIFICATION OF THE BASIS FOR PROPOSED WAGE RATES

- (A) The proposed wage rates will be certified in writing as being current and accurate by a responsible company official. The Department will require payroll registers

to confirm the accuracy of the proposed pay rates. A payroll register is defined as a record of pay details for an employee during a specified pay period. The payroll register will display the following information about the employee: name of employee, date, date range, hours (regular and overtime), gross pay, deductions, taxes withheld, and net pay. A payroll register is not a payroll summary, monthly projection, payroll forecast, or certified pay rate. Confidential information may be redacted. Resumes will be used to validate and confirm employee qualification. ***Audit Certification Package For Professional Services Firms, Form No. 375-030-39*** shall be included with the supporting documentation submittals, also known as the audit package. Resumes must be used to validate and confirm employee staff classifications.

- (B) If averages for select employees are used, payroll information of how the average rate was computed (i.e., straight average, weighted average, etc.) must be provided. Only employees actually committed to and needed for the project will be used in computing the average.
- (C) If the Consultant's average rates for specified job classes are used, appropriate company records that identify employees within the classes and their respective wage rates will be submitted.
- (D) Consultants (geotechnical, aerial photography, etc.) that normally work on a unit price basis will be required to provide a copy of their standard fee schedule and attest that the fees contained therein are their normal fees for such services (whether performed for private or governmental clients). Firms who are compensated in whole or in part using fee schedule rates will be required to complete a certification statement during contract negotiations, attesting to full disclosure of intended use of lower tier subconsultants/subcontractors/sub-vendors, including use of drilling subs. All lower tiered subconsultants/subcontractors/sub-vendors must be named in the contract, in accordance with the Standard Professional Services Agreement in order to be considered an authorized subconsultant/subcontractor/sub-vendor. All firms used on a contract must complete the ***Certification of Use of Subs and All Lower Tier Subs, Form No. 375-030-40***. Geotechnical and materials testing firms shall utilize the Standard Items and Item Descriptions for Geotechnical and Materials Testing firms identified in the ***Negotiation Handbook***, when submitting the AFP.
- (E) Consultants with audited overhead rates who maintain a published fee schedule but do not bill exclusively from the schedule must maintain a job cost accounting system for their hourly services. However, the direct costs of services billed on cost-based rates or scheduled fees, shall be excluded from the calculation of direct expense rates. The accounting system description will include assurance of the segregation of the costs to deliver fee or rate based services from the costs associated with hourly services. The Basis of Accounting and Description of Accounting System Note should contain the following text, or text containing

the same essential elements:“The Company maintains a job-order cost accounting system for the recording and accumulation of costs incurred under its contracts. Direct costs incurred in providing services billed to clients at unit rates or on the basis of a published fee schedule are charged by functional accounts and accumulated as a single project or grouping to allow segregation of such costs from other direct costs. Each project is assigned a job number so that costs may be segregated and accumulated in the Company’s job-order cost accounting system.”

- (F) A comparison of the actual salary with prevailing rates for the class of personnel will be performed. The on-line **Consultant Wage Rate Report** provides wage rate statistics for various Consultant staff classifications by district. The **Consultant Wage Rate Report** can be accessed from the Procurement Office website. The Consultant Wage Rate Report shall be run and printed on the submittal due date for the AFP established in the Request for Fee Proposal document, or the actual date the AFP is received by the Department, whichever occurs first. If personnel with unusually high salaries are proposed, the negotiators must determine whether there is sufficient need for that individual to justify their work on the project at that rate. If the Department determines there is not a need for their expertise, they will not be allowed to bill time on the project. The Department may negotiate contract rates as averages for employee classifications.
- (G) Arbitrary or across the board limitations on direct salary/wage rates which do not consider the factors prescribed in the **Federal Acquisition Regulation (FAR)** cost principles are contrary to the requirements of the **Federal Brooks Act, 40 U.S.C. 1104(a)**, which requires fair and reasonable compensation considering the scope, complexity, professional nature, and value of the services to be rendered, as required in **23 U.S.C. 112(b)(2)**. Additionally, if limitations or benchmarks on direct salary rates and total compensation are too low, they may limit the number of Consultants and the qualifications of the Consultants who submit proposals to perform work on projects. Furthermore, direct labor limitations or benchmarks not supported by the cost principles create associated disallowed indirect costs which effectively limits the calculated indirect cost rate, contrary to **23 U.S.C. 112(b)(2)(D)** and **23 CFR 172.11(b)(1)**. Arbitrary reduction or capping of indirect cost rates is not permitted under Federal laws and regulations.
- (H) In 2015, the Department received approval from FHWA to utilize the FDOT Consultant Wage Rate Report as a benchmark or limit for contract rates on Construction Engineering and Inspection (CEI) contracts. For purposes of negotiating CEI consultant personnel direct salaries by job classification, FDOT will use the appropriate district 75th percentile by job classification (i.e., upper quartile) as the benchmark or limit, based on a one year history of actual unloaded rates. However, the 75th percentile may be exceeded when warranted by project complexity. When the 75th percentile is exceeded, it will only be for the

select position(s) that warrant such an increase, as determined by the assigned Construction Office. Detailed guidance regarding negotiation of CEI contracts is found in the **Negotiation Handbook**, available from the FDOT Procurement Office website.

- (l) Contracts written to allow rate adjustments when consultant personnel receive pay raises (known as actual rate contracts) are not allowed on professional services contracts. Additionally, annual rate escalation is not allowed on professional services contracts. For multi-year contracts of longer duration (twenty-five months or above), the Department shall apply a Contract Duration Adjustment Factor multiplier to the unloaded direct labor rate. Refer to the **Negotiation Handbook** for the restricted conditions of economic price adjustments, and rate re-negotiation scenarios for amendments.

## 11.2.2 OVERHEAD AND FRINGE BENEFITS

- (A) If the Consultant is prequalified with the Department at the unlimited level, a copy of the Procurement Office's prequalification letter with the approved overhead rate should be included in the fee proposal. FDOT approved audited overhead rates are accepted and not negotiated. The Consultant's most current approved overhead rate will be used. If the Consultant voluntarily proposes to use a lower overhead rate than the current audit in order to keep overall project costs competitive, the Department may accept the lower overhead. The use of a lower overhead rate will not be a requirement for contracting. The average overhead rates for both home office and field office overhead are provided in the Department's **Negotiation Handbook**, available on the Procurement Office website. These average overhead rates are provided for comparison purposes. They are one of the tools the Department's negotiators may use to assess Consultant cost controls and the competitiveness of the overall costs proposed. The submission of an updated overhead audit after the end of the Consultant's fiscal year is required as part of the prequalification renewal process.
- (B) If the proposed project requires the establishment of a field office, a separate overhead rate for the field office must be submitted. If the Consultant does not have an approved field office overhead rate which has been established through the prequalification process, a field office overhead rate will be prepared by the Consultant in accordance with the instructions contained in the **AASHTO Uniform Audit and Accounting Guide**, available on the Procurement Office website.
- (C) All firms performing inspection services on CEI contracts shall utilize CEI field office rates.
- (D) Use of the Field Office for non-CEI type projects: For contract negotiation purposes, a field office rate (labor & expenses) shall be applied when Consultant staff is assigned in Department space for a minimum of six consecutive months.

- (E) The Department may allow Consultants and other service providers to share Department office space for the contract duration. Use of Department space must clearly enhance the productivity of the Consultant in performing the scope of services, or daily interaction with Department staff must be required to effectively perform their duties. The decision to provide Department space to the Consultant shall be made prior to contracting so that consideration may be given to offsetting the cost of the services with the value of the space provided, through use of field office overhead rates. This will occur during the competitive negotiation of a professional services contract. Consultants housed in Department space may only work on the Department project requiring their presence. Other non-project activities, such as marketing, are prohibited. Department equipment which will be made available for Consultant use on the project shall be identified prior to contracting. When Department equipment is not available, consideration may be given to allowing the consultant to bring their own equipment into Department space for use on the project, if it is essential to the effective performance of the contracted services. All applicable Department policies, procedures, standards and guidelines pertaining to Department owned equipment, including data processing equipment and software, must be adhered to by the Consultant.
- (F) For contracts with fees less than \$500,000, the Department is authorized to contract with firms without an audited overhead rate. The Consultant must provide a self-certified overhead determination. The average overhead rates provided in the ***Negotiation Handbook*** will be used as caps on maximum awarded overhead (indirect costs) rates for firms who submit unaudited rates, including interim reimbursement rates, self-certified reimbursement rates, and job cost accounting system review reimbursement rates for use on professional services contracts.

### 11.2.3 OPERATING MARGIN

The operating margin which is paid in a Consultant contract does not represent net profit to the Consultant. Operating margin is intended to compensate the Consultants for normal business expenses that are excluded from allowable overhead by Federal Regulation (e.g., interest, advertising, unrecovered direct costs, etc.). These legitimate costs cannot be recovered on Department contracts except through operating margin. Operating margin compensates the Consultant with a reasonable fee.

Operating margin in Department contracts is calculated as a percentage of direct salaries. The percentage is negotiated within a range of 12 to 42%. For federal-aid contracts, operating margin may not exceed 15% of the total direct labor plus indirect costs of the contract. This equates to the upper range of 42 percent operating margin calculated as a percentage of direct salaries only.

The operating margin is negotiated based on the complexity of the project, the degree of risk assumed by the Consultant, the project schedule, and Consultant cost controls.

#### Operating Margin Percentage Calculation for Direct Salaries

|                      |            |
|----------------------|------------|
| Project Complexity   | 5% to 7%   |
| Degree of Risk       | 3% to 5%   |
| Project Schedule     | 1% to 3%   |
| Cost Control Efforts | 3% to 27%  |
| TOTAL                | 12% to 42% |

The Operating Margin Guidelines table in the **Negotiation Handbook** on the Procurement Internet site provides direction on how these factors shall be weighted and considered.

For contracts of longer duration, the Department shall allow a Contract Duration Adjustment Factor (CDAF) to be applied as a multiplier to direct labor. CDAF is defined as an economic price adjustment, necessitated by instability of labor costs for an extended period of contract performance. CDAF is not negotiated, but shall be a fixed number of points based on the overall anticipated length of contract (project schedule). Contract length shall be as assessed by reviewing the anticipated project schedule at the time of contract negotiation. CDAF points shall be allocated by the Department as follows:

|                                     |              |
|-------------------------------------|--------------|
| Operating Margin Criteria Plus CDAF |              |
| Operating Margin Criteria           | Range        |
| Project Complexity                  | 5% to 7%     |
| Degree of Risk (Financial)          | 3% to 5%     |
| Project Schedule                    | 1% to 3%     |
| Cost Control Efforts                | 3% to 27%    |
| Total Operating Margin Points       | 12% to 42%   |
| CDAF Points                         | 0% to 5.5%   |
| Operating Margin plus CDAF          | 12% to 47.5% |

|                                |   |
|--------------------------------|---|
| Anticipated Length of Contract | CDAF- Contract Duration Adjustment Factor (Percentage Points applied to direct labor) |
| 0- 12 months                   | 0   |
| 13- 24 months                  | 0   |
| 25- 36 months                  | 3   |
| 37- 48 months                  | 4.5   |
| 49- 60 months                  | 5.5   |
| + 60 months                    | Renegot w/ new rates  |

Additional guidance regarding CDAF is found in the **Negotiation Handbook** on the Procurement Internet site.

#### 11.2.4 EXPENSES

- (A) Direct project expenses will be compensated using the direct expense rate which is required as a part of annual overhead audits performed for fiscal years ending December 31, 2002 and after. All professional services contracts negotiated since October 1, 2003 have included reimbursement of direct expenses by application of a direct expense rate based on the audit listing of direct costs in relation to the direct labor base. Separate audited rates are required for home office expenses and field office expenses. These rates represent the ratio of direct expenses to actual direct labor excluding premium overtime. Field office set up, mobilization, rent, and utilities costs are excluded from the audited field office direct expense rate in the audit submittal. The Department will reimburse the costs of field office set up, mobilization, de-mobilization, rent, and utility costs as a direct project cost on the contract rather than through the field office direct expense percentage, provided the aforementioned costs are documented by appropriate receipts. Utility costs may include electricity, water, natural gas, sewer, internet service, phone service, trash pick-up, and hook-up fees associated with the aforementioned utilities. Field office set-up/mobilization and de-mobilization charges involved with transporting the trailer to and from the job site may also be reimbursed. Charges for furniture, supplies, insurance,

cleaning, and equipment (including fax, copier, computer, and phone) are included in the direct expense percentage and are not compensated as an itemized expense directly on the contract. Of course, if the field office is provided through the construction contract or by the Department on another contract, the Consultant does not incur rent or utilities costs, so they cannot be invoiced or booked. There should normally be no other direct expense compensation. The only exceptions to this would be unusual and infrequently occurring items with a cost in excess of \$10,000. When such items are compensated separately from the direct expense rate, they must be excluded from the direct expense pool used to calculate the direct expense rate. When Consultants propose such items, the negotiator will forward the information to the Central Office Procurement Audit and Review Support Section for a determination prior to incorporating such items into the contract.

- (B) If the Consultant does not have a current approved audit that includes a direct expense rate, an expense rate may be determined based on a projection of expenses for the project, divided by direct labor (subject to a cap). If this method of determining the compensation for expenses is not used, then sufficient documentation must be provided to support the basis for expenses. Written quotes from vendors, invoices reflecting prices paid on previous purchases, copies of catalog pages, etc. may be used as support for the proposed prices.

As a general rule, the method of acquisition for any capital asset (item costing \$1,000 or more and having a life expectancy of 1 year or more) will be determined through the use of a lease versus purchase analysis. A copy of the analysis will be included in the fee proposal. A reasonable allowance for salvage value of the items, based on the term of the project, must be provided for the purpose of such items.

Acquisition of tangible capital assets for Department ownership through service contracts is normally not acceptable. The requirements of **Rule 60A-1.017, F.A.C.**, must be considered when this is necessary. Property acquired as part of a service contract must be handled in accordance with Procedure No. 350-090-010, Tangible Personal Property Procedure.

Unit rates used to compute travel costs may not exceed those authorized for State employee travel in accordance with Section 112.061, F.S. Air fare must be based on coach rates with reasonable advance purchase and costs for rental cars must be based on the use of compact cars, unless otherwise justified and approved by the Department. Mileage for private vehicles must be at the state rate. The **Disbursement Operations Handbook**, is available on the Department's Office of Comptroller (OOC) SharePoint site.



## 11.2.5 SUBCONSULTANT/SUBCONTRACTOR/SUB-VENDOR COSTS

Subconsultant/subcontractor/sub-vendor costs must be specifically identified in the price proposal and supported in a manner that will allow the contracting office to make a determination that the proposed costs are fair, reasonable and competitive. Intended use of all lower tier subs must be disclosed during contract negotiations, regardless of tier level or type of subconsultant, subcontractor, or sub-vendor. Unauthorized subs are not in accordance with the **Standard Professional Services Agreement**, Section 7A, which states: "The Consultant...will not sublet, assign, or transfer any work under this Agreement to other than subconsultants specified in the Agreement without the written consent of the Department." Subs will require submission of the same type of data as required for the prime Consultant. This includes support for wage rates, rates per unit of work, direct expense rates and overhead rates. Subconsultants technically qualified in a standard work type are required to submit an overhead audit prepared by an independent CPA if their fees on a single contract are \$500,000 or greater. If the subconsultant fee is less than \$500,000, a self-certified overhead statement certified by a principal of the subconsultant firm must be completed on the **Self-Certification of Accounting System and Reimbursement Rates, Form No. 375-030-51**, which must be sent to Central Office Procurement for review and approval. Certified billing rates are not acceptable for negotiating rates for non-professional services firms utilized as subs on professional services contracts. The Department shall utilize one of following methodologies for negotiating rates for non-professional services firms utilized as subs on professional services contracts:

- (A) Prime Consultant shall request at least two quotes and will utilize the lowest rates. This is to be used for equipment rates, court reporters, corrosion inspection and testing, aerial photography, and maintenance of traffic.
- (B) Non-professional services firms shall submit the **Simplified Self-Certification for Non-Professional Services Firms, Form No. 375-030-92**. Adequate support must be provided with the form when submitted, including payroll registers or evidence of draws.
- (C) Rates supported by competitively procured contractual services contracts where price was a factor in selection can be used (support of best value).
- (D) Procurement staff will utilize available comparable salary survey information for labor rates to negotiate a reasonable rate.

The prime Consultant shall not receive overhead and operating margin for subconsultant/subcontractor/sub-vendor services. Subconsultant/subcontractor/sub-vendor fees are pass-through costs, and cannot include administrative mark-up.

The prime Consultant and all subconsultants/subcontractors/sub vendors shall attest to full disclosure of intended use of lower tier subconsultants/subcontractors/sub-vendors, including use of drilling subs.

Private attorney services may not be utilized on Department contracts without advance approval from the Attorney General's Office. The advance approval may only be requested by Department General Counsel, and not the Consultant. Since approval cannot be assumed, consultant firms shall refrain from proposing legal firms as part of the professional services Consultant team in their procurement response and proposal documents.

The University Master Agreement is the appropriate means for contracting with Florida universities. When necessary for a professional services contract, the Department's Project Manager may procure university services by means of a task work order issued against a University Master Agreement.

### 11.3 FEE PROPOSAL REVIEW

The PSU will verify the cost elements of the fee proposal, verify and confirm proposed consultant classification of staff in the AFP in accordance with the FDOT Standard Job Classes, review all proposed salaries and other cost information, and shall perform a detailed cost analysis, in accordance with **Section 287.055(5)(a), F.S.** and the **Negotiation Handbook** available on the Procurement Internet website. A comparison of the actual current salary rates with prevailing rates for the class of personnel will be performed by PSU. The Consultant Wage Rate Report on the Procurement Internet website provides wage rate statistics for various Consultant staff classifications by district.

Any errors, deficiencies, omissions, etc., noted during the review of the fee proposal by the PSU will be brought to the attention of the selected Consultant, and corrected data will be requested immediately.

### 11.4 ESTABLISHING THE METHOD OF COMPENSATION

The method of compensation to the consultant shall be set forth in the original solicitation, contract, and in any contract modification thereto. Compensation for professional services agreements will involve one or more of the following methods:

**LUMP SUM:** A firm fixed price not subject to adjustment due to the actual cost experience of the Consultant in the performance of the contract. This places the maximum risk on the Consultant and provides motivation for efficient cost management to maximize profits. It also minimizes the Department's time in contract administration. It is the recommended method of compensation when the scope of services is well defined and the level of effort can be reasonably predicted. The use of lump sum contracts for CEI work is prohibited unless the "extent, scope, complexity, character and duration of the work" have been established.

**COST REIMBURSEMENT:** The Consultant is reimbursed the actual costs incurred in the performance of the contract. A "maximum limiting amount" is normally established to cap the amount the Department will pay for the services. This method is used when the services are so vague or complex that the level of effort or expenditure cannot be estimated with reasonable accuracy. This provides minimal incentive to the Consultant to control costs and is time consuming to administer. FHWA only participates in cost reimbursement contracts in which the Consultant's operating margin is a lump sum or "fixed fee." In such instances, partially loaded hourly rates paid in conjunction with fixed fee shall exclude compensation for operating margin.

**COST PER UNIT OF WORK:** A negotiated unit rate for a repetitive task or deliverable product is established and paid for each unit produced. The unit rate is not subject to adjustment. A maximum limiting amount is normally established based on the estimated number of units required. This method is frequently used for geotechnical services, lab tests, soil explorations, traffic counts, bridge inspections, etc.

**SPECIFIC RATES OF COMPENSATION:** Billing rates are established for units of time, usually per hour. These rates normally include wages, overhead, estimated expenses and operating margin. A maximum limiting amount is normally established. This method is frequently used for surveying services. The Department has received approval from FHWA to use fixed hourly rates method of payment for professional services task assignment contracts, such as district-wide miscellaneous minor professional services contracts, continuing contracts, groupings, and also for maximum limiting amount/cost reimbursement contracts. Use of specific rates compensation (fixed hourly rates) will protect consultant confidential audit information, and eliminate the need to display consultant multipliers such as overhead rate in the contract documents. Only design contracts are excluded from use of this payment method for basic services on federal-aid contracts. For design services, the Department shall utilize the lump sum method of payment for basic design services, where appropriate and where the level of effort and scope can be reasonably determined.

Overhead data shall be restricted to Department employees only in PSU, who will receive the information submitted by the Consultant by means of the AFP during contract negotiations. PSU will be responsible for converting Consultant rate information into fixed hourly rates. In accordance with **23 USC 112**; and **23 CFR 172.11(d)**, cost and rate data (audit information) shall be confidential and shall not be accessible or provided, in whole or in part, to another individual, firm or to any government agency which is not part of the group of agencies sharing cost data, except by written permission of the audited firm.

**COST PLUS PERCENTAGE OF COST:** The cost-plus percentage of cost payment method shall not be used on federal-aid eligible contracts.

The method of compensation will be described in the agreement using the standard Method of Compensation language.

Contract compensation elements shall be established as either limits or estimates in the contract compensation summary table. A limit is a not-to-exceed maximum amount for a compensation element. An estimate is a non-binding amount provided for project management purposes. A compensation element established as an estimate may go beyond the stipulated amount, as long as it is offset by a reduction in the same amount from other compensation elements also established as estimates. Compensation elements established as estimates may not exceed overall contractual limits.

## **11.5 NEGOTIATION PROCESS**

During the entire negotiation process, a summary or taped record of the resolution of all decisions between the Consultant and the Department will be kept and will be filed with the official agreement records in the PSU.

Consultant support staff may be present during Department contract negotiations, but Department staff shall lead when negotiating Consultant contracts. Consultant support staff shall not have access to confidential consultant audit data.

Final negotiations will reconcile any variances in work effort from that previously negotiated and establish the compensation to be paid the Consultant for the services to be rendered. The results of all negotiations with the Consultant must be documented in writing and made a part of the permanent project file.

Compensation will be negotiated within the limits established by state and federal law, rules and regulations, whichever is more restrictive. The negotiated compensation will be in an amount the Department determines is fair, competitive, and reasonable considering the scope and complexity of the project.

Should the Department be unable to resolve differences in the considered data or negotiate a fair and reasonable fee for the services as determined by the Department, the Department will terminate negotiations with the Consultant and provide written notice of termination to the Consultant. The Department will then initiate negotiations with the Consultant previously ranked second by the Department's Selection Committee.

Should the Department be unable to negotiate an agreement with the second ranked Consultant, the aforementioned process will be initiated with the third ranked Consultant. Should the Department be unable to negotiate a satisfactory agreement with any of the selected Consultants, the Department will select additional Consultants in order of their competence and qualification and continue negotiations in accordance with these procedures until an agreement is reached, or initiate a new selection process in accordance with this procedure.

The decision to terminate negotiations is a business decision the Department makes and it should not cause the Consultant to be viewed negatively or in any way impact their opportunity for future selections.