

### III. PROFESSIONAL SERVICES

This chapter explains the LPA’s responsibilities and options for choosing a Professional Service provider for Federal-aid projects.

Professional Services include:

- engineering related services;
- geotechnical services;
- program management;
- construction management/inspection;
- studies, including feasibility studies;
- surveying;
- mapping;
- landscape architecture;
- architectural related services;
- historic preservation specialists;
- investigations;
- tests;
- evaluations;
- consultations;
- comprehensive planning services;
- conceptual design, plan, and specification services;
- value engineering services;
- soils engineering services;
- construction phase services;
- drawing reviews;
- operation and maintenance manual preparation; and
- other related services.<sup>1</sup>

There are federal and state statutes the LPA must follow when hiring professionals to perform Professional Services.<sup>2</sup> The purpose of these rules is to ensure that a qualified professional is obtained through an equitable selection process, referred to as qualifications based selection (“QBS”). The Federal statute requiring that LPAs follow a QBS process when using federal funds is commonly referred to as the Brooks Act. The Brooks Act requires agencies to promote open competition by advertising, ranking, selecting, and negotiating contracts based on demonstrated competence and qualifications.

*FHWA Guidance on the “Brooks Act” can be found at the following website:*  
<https://www.fhwa.dot.gov/programadmin/121205.cfm>  
<https://www.fhwa.dot.gov/programadmin/172qa.pdf>

To hire a professional, the LPA may choose from the three QBS processes outlined in the three following sections, depending on its needs and the expected value of the Professional Services contract. In some cases, the LPA may instead use either its own staff for Professional Services

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<sup>1</sup> 40 USC § 1102(2)(C) and 23 CFR § 172

<sup>2</sup> 40 USC § 1101-1104, 2 CFR 200.320, 23 USC § 112, 23 CFR § 172, KRS § 45A.735-750, and KRS § 45A.800-838. 40 USC § 1102(2)(C) and 23 CFR § 172

(see **Section III.4**) or a professional with which it has a working relationship (must have been entered into via a qualifications based selection process and the current project scope must have been included in the original contract - see **Section III.5**).

In all cases, expenditures must not be incurred before the LPA receives notice to proceed from the Administering Office. And, the LPA will pay the consultant, then, seek reimbursement from KYTC.

### **III.1. Professional Services Procurement Option 1 – KYTC Statewide Contracts**

KYTC enters into multi-year statewide contracts with multiple general service design firms (hired by KYTC via QBS process).<sup>3</sup> LPAs may hire these professionals for their transportation projects which fall under the current per-project fee limit of \$250,000. Upon request, the KYTC State Highway Engineer assigns these consultants to projects based on a rotating list. The master agreements currently in place between KYTC and each of the statewide LPA consultants include a per-project fee limit. The KYTC State Highway Engineer must review and approve any request to exceed the current per-project limit. The LPA should contact its Administering Office to inquire about or request use of one of the statewide LPA consultants.

After working with the LPA to understand the scope of the project (previously agreed to by KYTC and the LPA), the consultant must submit production hour estimates to the KYTC Division of Professional Services for review and approval. If the production hours estimate is greater than 500 hours for any area, an independent estimate must be made<sup>4</sup>. The independent person-hour estimate is the responsibility of the LPA. KYTC will, upon request, provide a template for the LPA to use. Further, if the LPA is not qualified to prepare the independent person-hour estimate, KYTC can do so for the LPA. Once any differences are negotiated and production hour estimates are approved, KYTC Professional Services will issue a letter agreement for each individual project. The letter agreement is a contract between KYTC and the consultant.

### **III.2. Professional Services Procurement Option 2 - Price Contracts (“Finance Cabinet List”)**

For any engineering, environmental, architecture/landscape architecture, or geotechnical project for which the engineering fees will certainly be less than \$75,000, the LPA may choose to follow the small procurement statutes, specifically, the Price Contract statute.<sup>5</sup> To use this option, the LPA:

- must contact its Administering Office (OLP or District LPA Coordinator) who will provide the list of firms eligible for price contracting. Note: The Administering Office should request this information from the KYTC Statewide LPA Coordinator who maintains current price contract information from the Kentucky Finance and Administration Cabinet;
- must consider multiple professionals and choose one from the list;
- must provide the Administering Office with a completed Price Contract Selection Form indicating why it chose that Professional Service Provider. The Price Contract Selection Form can be found here:

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<sup>3</sup> KRS § 45A.838

<sup>4</sup> 600 KAR 6:070 Section 2 4d

<sup>5</sup> KRS § 45A.837, 23 CFR § 172.5(a)(2), 2 CFR 200.320

<http://transportation.ky.gov/Program-Management/Documents/LPA3%20-%20Attach%201%20-%20Price%20Contract%20Selection%20Form.pdf>.

A copy is provided as an attachment to this chapter. The consultant selection must be approved by the Commissioner of the Department of Highways prior to the LPA signing the price contract with the Professional Service Provider. Note: The Administering Office must obtain approval from the Commissioner of the Department of Highways through the statewide LPA Coordinator;

- must keep careful track of the price contract(s) it awards. And, must ensure the consultant is not paid more than the amount approved by KYTC for a price contract. Any amount paid to the Professional Service Provider over the amount approved by the Commissioner of Highways will be the responsibility of the LPA. Note: KYTC will track consultant procurement approvals to ensure that no consultant receives more than \$150,000.00 in price contract fees per discipline (engineering, environmental, architecture/landscape architecture, and geotechnical) per fiscal year;<sup>6</sup>
- must obtain approval from the Administering Office of the professionals production hour/fee proposal; and
- must pay the professional the rates prescribed by the Finance Cabinet.

### **III.3. Professional Services Procurement Option 3 - Traditional QBS Process**

The final option the LPA may use to procure professional services is to follow the process described in KRS Chapter 45A. In doing so, the LPA: must develop and obtain approval of a Request for Proposal (RFP) and advertisement from its Administering Office for its specific project. An example advertisement and example RFP can be found at the following locations, respectively:

*Federal requirements prohibit the use of in-State or local-hiring preferences and do not allow the consideration of cost in the evaluation, ranking, and selection of the most highly qualified professional.*

<http://transportation.ky.gov/Program-Management/Documents/LPA3%20-%20Attach%202%20-%20RFQ%20Advertisement.pdf>

<http://transportation.ky.gov/Program-Management/Documents/LPA3%20-%20Attach%203%20-%20RFP.docx>

A copy of each is provided as an attachment to this chapter.

- must check to see if there is a KYTC prequalification category for the type of services required for its particular Federal-aid project. KYTC maintains lists of Professional Services providers qualified to perform certain tasks. The types of tasks in which Professional Services providers can be prequalified are referred to as prequalification categories. See page 2 of the TC 40-1 form at [https://transportation.ky.gov/Organizational-Resources/Pages/Forms-Library-\(TC-40\).aspx](https://transportation.ky.gov/Organizational-Resources/Pages/Forms-Library-(TC-40).aspx) for a list of prequalification categories (additional information is available at <https://transportation.ky.gov/ProfessionalServices/Pages/Prequalified-Firms.aspx>). If there is a prequalification category that applies to the services to be provided, the

<sup>6</sup> KRS 45A.837(2)(c).

advertisement and RFP should clearly state only those prequalified in that category may be considered;

- must use an RFP that clearly defines the statutorily-required evaluation criteria that will be used to assess and rate the qualifications of responding professionals, along with the scoring weight for each of the assigned criteria; and
- must post the notice online or in a newspaper of general circulation at least 21 days prior to the date the LPA awards the Professional Services contract.
- Must make it clear that price is not to be included in the response to the RFP and may not consider price when evaluating responses to the RFP.

In response to the LPA’s RFP, professionals will submit proposals. The LPA:

- must verify KYTC prequalification.
- must evaluate each proposal according to the evaluation criteria outlined in the RFP.
- may require interviews as part of this evaluation process.
- shall select at least three professionals on the basis of their technical proposals and rank them according to their qualifications (not fees)<sup>7</sup>. A sample evaluation template can be found here:

<https://transportation.ky.gov/Program-Management/Documents/LPA3%20-%20Attach%204%20-%20Evaluation%20Template.pdf>

A copy is included as an attachment to this chapter.

- **shall not include cost as a factor in the evaluation.**<sup>8</sup> If fewer than three professionals responded to the advertisement or if fewer than three are judged to be qualified then only those professionals shall be ranked.
- must attempt, after selection of the top professional, to negotiate a contract for a “fair and reasonable value,” as statutorily defined<sup>9</sup>. If the LPA is unable to reach a contractual agreement with the highest ranked professional, it then begins negotiations with the second ranked professional, and so on. If negotiations with all of the ranked professionals fail, the LPA shall reevaluate the Professional Services to be provided and begin the process again.<sup>10</sup>
- must provide the project’s Administering Office documentation confirming that the LPA chose and followed this QBS process, including a statement signed by an authorized LPA official certifying that 1) the QBS process followed proper procedures, 2) the process met the intent of the Brooks Act, and 3) the negotiated scope, fee and schedule are fair and reasonable. The LPA must provide to the Administering Office copies of:
  - all advertisements;
  - the names of all respondents;

*FHWA Video: “Hiring a Consultant Using Competitive Negotiation Procedures”:*

<http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=7>

<sup>7</sup> KRS § 45A.745(3)

<sup>8</sup> KRS § 45A.745 (2)

<sup>9</sup> KRS § 45A.750(1).

<sup>10</sup> KRS § 45A.750(3)

- the names of all selection committee members; and
- score sheet(s) for selection.

After the Administering Office has reviewed the documentation and deemed it satisfactory, it will approve the QBS process (via email). The Professional Service Provider may not begin reimbursable work until this approval is received.

#### **III.4. Professional Services via In House Staff**

If the LPA employs a person as part of its regular staff who is able to adequately perform the Professional Services, this individual may complete the work in house and the LPA will not need to use a QBS process.

The same design standards which apply to outside services apply to those designs prepared by in-house staff. If the Professional Services require a license or certification, the person performing the services must have these credentials. For example, if the Professional Services are engineering or engineering related services, the person performing the services must be a Kentucky licensed Professional Engineer (“PE”). This is discussed further in **Chapter V**.

The LPA must be able to segregate and provide an accounting of the design effort spent specifically on the Federal-aid project if the LPA intends to seek reimbursement for this work or to have it count as match (both of which require pre-approval).

#### **III.5. Professional Services via Working Relationships/Retainer Contracts**

LPAs often develop working relationships with professionals and wish to contract with those professionals on federal projects. This is only permitted if the LPA has a retainer contract in place with the professional with a scope broad enough to encompass the work to be done on the project and the LPA entered into that contract after completing a QBS process. If these two conditions are not met, the LPA may only consider the professional as part of one of the QBS processes described above (**Sections III.1-3**).

If utilizing this option, the LPA must provide KYTC with:

- The advertisement for services from the original QBS selection
- The response from industry
- The selection committee and score sheet or other process for selection
- A copy of the retainer contract
- Negotiation minutes for the current federal-aid project

After the Administering Office has reviewed the documentation and deemed it satisfactory, it will approve the QBS process (via email). The professional service provider may not begin reimbursable work until this certification is complete.