

### 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 the following, (services in **bold** denote that the provider must be prequalified with KYTC:

- **engineering related services**
- **geotechnical services**
- project management
- **construction engineering, management or /inspection**
- **planning services, studies, including feasibility studies**
- **surveying**
- landscape architecture
- architectural related services
- **right of way services**
- **utility design**
- **utility preconstruction coordination**
- **utility construction inspection**
- historic preservation specialists
- **value engineering services**
- operation and maintenance manual preparation
- 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, **not** cost of services.

*FHWA Guidance on the “Brooks Act” can be found at the following website:*

<https://www.govinfo.gov/content/pkg/FR-2015-05-22/pdf/2015-12024.pdf>

<https://www.fhwa.dot.gov/programadmin/172qa.pdf>

To hire a professional, the LPA may choose from the two QBS processes outlined in the following sections, depending on its needs and the expected value of the Professional Services contract. In some cases, the LPA may instead use a professional with which it has a working relationship. This relationship must have been entered into via a qualifications-based selection process and the current project scope must have been included in the original Request for Proposal (RFP) - see **Section III.3.**

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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

In all cases, expenditures must not be incurred before the LPA receives notice to proceed from the Administering Office. The professional services contract is between the LPA and the selected consultant. The LPA will pay the consultant directly, then seek reimbursement from KYTC.

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

KYTC enters multi-year statewide contracts with multiple general service consulting firms (hired by KYTC via QBS process).<sup>3</sup> LPAs may procure these professionals for their transportation projects which fall under the current per-project fee limit of \$250,000. Requests to use KYTC Statewide Contracts should be made to the Administering Office. 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.

Once assigned, the statewide consultant will work with the LPA and the Administering Office to understand the scope of the project. After the scoping meeting, if the consultant's proposed production hour estimate is 500 hours or less, the fee proposal can be submitted to the LPA and the Administering Office for review and negotiation using the LPA's cost estimate that was based on the advertised scope of work (if requested, KYTC can assist in preparing this estimate). The negotiated fee proposal is then submitted to the LPA Statewide Coordinator, who will coordinate with the KYTC Division of Professional Services to facilitate procurement of the consultant via a Letter Agreement.

If the consultant's proposed production hour estimate exceeds 500 hours for any area (roadway design, structure design, environmental services, etc.), an independent production hour estimate must be submitted for that area from both the LPA and the consultant to the LPA Statewide Coordinator who will coordinate the negotiation with the KYTC Division of Professional Services. The independent production-hour estimate is the responsibility of the LPA. KYTC will, upon request, provide a template for the LPA to use. Furthermore, if the LPA is not qualified to prepare the independent production-hour estimate, KYTC may do so for the LPA. Once any differences are negotiated and production hour estimates are approved, as stated before, KYTC Division of Professional Services will execute a Letter Agreement that procures the consultant for the project.

A Letter Agreement is a contract between KYTC and the consultant that serves as a mechanism for the LPA to procure (hire) a consultant. The LPA must then enter a contract for services with the selected consultant based on the terms of the letter agreement. KYTC does not reimburse the consultant for services provided. That is the responsibility of the LPA.

### **III.2. Professional Services Procurement Option 2 - Traditional QBS Process**

The LPA may procure professional services following the process described in KRS Chapter 45A and 23 CFR 172. In doing so, the LPA:

- must develop and obtain approval to advertise a Request for Proposal (RFP) from its Administering Office for its

*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.*

<sup>3</sup> KRS § 45A.838

specific project. An example RFP can be found at the following location:

[Example RFP](#)

- must check to see if there is a KYTC prequalification for the type of services required for its specific Federal-aid project. KYTC maintains lists of Professional Services providers qualified to perform certain tasks. A list of the prequalification service areas and firms can be found on the [KYTC Division of Professional Services](#) website. If there is a prequalification for the services to be provided, the advertisement and RFP should clearly state only those prequalified in that category may be considered
- may choose to require interviews as part of the evaluation process
- 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
- 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, and
- 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

The LPA will perform the following actions in response to the proposals:

- must verify KYTC prequalification
- must evaluate each proposal according to the evaluation criteria outlined in the RFP
- shall select at least three professionals based on their technical proposals and rank them according to their qualifications (**not fees**)<sup>4</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. A sample evaluation template can be found here: [Example Evaluation Template](#)
- **shall not include cost as a factor in the evaluation**<sup>5</sup>
- must attempt, after selection of the top professional and Notice to Proceed from the Administering Office, to negotiate a contract for a “fair and reasonable value,” as statutorily defined<sup>6</sup>. If the consultant’s proposed production hour estimate exceeds 500 hours for any area, an independent production hour estimate must be submitted from both the LPA and the consultant to the Administering Office who will coordinate the negotiation. The independent production-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 production-hour estimate, KYTC can do so for the LPA. 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

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

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

<sup>4</sup> KRS § 45A.745(3)

<sup>5</sup> KRS § 45A.745 (2)

<sup>6</sup> KRS § 45A.750(1).

with all the ranked professionals fail, the LPA shall reevaluate the Professional Services to be provided and begin the process again.<sup>7</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 also provide to the Administering Office copies of:
  - all advertisements
  - the names of all respondents and their proposals
  - the names of all selection committee members, and
  - a summary of the scores and rankings

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

### **III.3. Professional Services via Working Relationships/Contracts**

LPAs often develop working relationships with professionals and wish to directly contract with those professionals on federal-aid projects. This is only permitted if the LPA has entered that contract after completing a QBS process as detailed above. Reminder, consultants must be prequalified by KYTC and the services to be provided must have been included in the initial Request for Proposal (RFP). If these two conditions are not met, the LPA must follow one of the two processes described above (**Sections III.1-2**).

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 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 shall not begin reimbursable work until this approval is received.

Professional contracts shall be limited to two (2) years with an option of a one (1) or two (2) year extension for a total of four (4) years.

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<sup>7</sup> KRS § 45A.750(3)