

## **600 KAR 6:070. Contracting for engineering or engineering-related services.**

RELATES TO: KRS 45A.800-45A.835, 45A.838, 23 C.F.R. 172, 23 U.S.C. 112, 121, 304, 315

STATUTORY AUTHORITY: KRS 45A.807(2), 45A.838

NECESSITY, FUNCTION, AND CONFORMITY: KRS 45A.807(2) requires the Transportation Cabinet to promulgate administrative regulations to implement its procurement of engineering or engineering-related services pursuant to KRS 45A.800 to 45A.835. KRS 45A.838 requires the cabinet to promulgate administrative regulations to establish requirements for establishing and operating a pool of firms to provide professional contract services. This administrative regulation sets forth the procedure to be used by the Transportation Cabinet to select engineering or engineering-related services while implementing the provisions of KRS 45A.800 to 45A.835.

### **Section 1. Methods of Contracting with Consultants.**

(1) The following methods of contracting with a consultant shall be used:

- (a) Lump sum;
- (b) Cost plus a fixed fee;
- (c) Specific rate of compensation;
- (d) Cost per unit of work; or
- (e) Other contract method approved by FHWA.

(2)

- (a) If the cabinet chooses the lump sum method of contracting, the consultant shall present a statement to the Division of Program Performance showing the probable cost for the elements of work and the expected operating margin.
- (b) This statement shall include a supported breakdown of the direct and indirect costs and subconsultant costs which the consultant expects to incur.
- (c) The method of dividing the project into work units and the calculation of related time units shall be devised so that the estimate can be easily reviewed.
- (d) The Division of Program Performance and the user division shall verify the following supporting documentation before recommending the contract for approval:
  - 1. Reasonableness of the amount proposed and consideration of the degrees of risk and responsibility to be assumed by the consultant;
  - 2. The extent, scope, complexity, character and duration of the required services;
  - 3. Professional and financial investments to be required of the consultant;
  - 4. The consultant's normally-expected return for services;
  - 5. Conditions under which the consultant is expected to perform;
  - 6. The cabinet's estimate of the appropriate amount for the services required; and
  - 7. The cabinet's findings on the basis of experience and knowledge.

(3)

- (a) If the cabinet chooses the cost plus a fixed fee method of contracting, an upper limit of payment of actual cost shall be established which shall not be exceeded without obtaining cabinet approval.
- (b) During negotiations, the Division of Program Performance or other negotiation unit shall be responsible for establishing the upper limit along with the fixed fee to be paid to the consultant for the services required.
- (c) The Division of Program Performance or other negotiation unit shall establish the fixed fee and an upper limit based on:
  - 1. Past experience gained from negotiations of similar projects;
  - 2. Judgment regarding scheduling;
  - 3. Complexity of work; and
  - 4. User division's estimate.

- (4)
  - (a) If the cabinet chooses the specific rate of compensation method of contracting, the Division of Program Performance or other negotiation unit shall document the basis on which the amount specified as the upper limit or upset limit was established.
  - (b) The agreement shall contain provisions which permit adjustment to this upper limit if the consultant establishes, and the user division agrees, that there has been or is to be a significant change in the:
    1. Scope, complexity or character of the services to be performed;
    2. Conditions under which the work is required to be performed; or
    3. Duration of the work if the change from the time period specified in the agreement for completion of the work warrants that adjustment.
  - (c) For a statewide agreement under which there is to be subsequent individual authorizations, the establishment of a maximum amount for the overall contract shall be submitted to the LRC's Government Contract Review Committee. A maximum amount shall be established for each of the individual authorizations which shall not exceed the maximum amount for the overall contract.
- (5)
  - (a) If the cabinet is using the cost per unit of work method of compensation, the consultant shall be paid on the basis of units completed.
  - (b) Cost per unit contracting shall be appropriate for use if:
    1. The extent of the work cannot be accurately figured; and
    2. The cost of the work per unit can be determined with reasonable accuracy in advance.
  - (c) A proposal using this method of contracting shall be supported in the same manner as that indicated for the lump sum method used for consultants.
- (6)
  - (a) For an individual acting as a consultant, the specific rates of compensation shall include the direct salary costs, salary additives, indirect costs and the net fee. The agreement of supporting data shall specifically identify these costs.
  - (b) Other direct costs may be included as an element of a specific rate or as independent cost items.

## Section 2. Prenegotiation Procedures.

- (1)
  - (a) A consultant selected pursuant to 600 KAR 6:060 shall meet with cabinet representatives in accordance with the schedule identified in the procurement bulletin issued pursuant to 600 KAR 6:050 to discuss in detail the scope of services to be provided by the consultant for the project.
  - (b) The Transportation Cabinet may require a consultant to obtain project-specific professional liability insurance for an unusual project.
  - (c) If project-specific professional liability insurance is required:
    1. A firm's audit may be reexamined to determine if a change in the overhead rate is needed; or
    2. The consultants may jointly purchase the insurance if there is more than one (1) consultant involved in the project.
- (2)
  - (a) After this prenegotiation meeting, the consultant shall submit the following to the cabinet:
    1. Official minutes of the prenegotiation meeting; and
    2. All required tasks and work units.
  - (b) The cabinet shall have the following options regarding the submittal:
    1. Concur;

2. Modify and return the modification to the consultant; or
  3. Reject and ask the consultant to evaluate and resubmit the work units.
- (3) The consultant shall submit to the Division of Program Performance a fair and reasonable fee proposal which shall include the following:
- (a) Personnel classifications and average wage rates for each classification as they appear in the audit and adjusted for work in the future years;
  - (b) Distribution of work by the personnel classifications;
  - (c) Overhead rates as determined by an audit;
  - (d) Subconsultants and fee proposals for each;
  - (e) Direct expenses not included in the overhead and subject to the limitations of subsections (5), and (6) of this section; and
  - (f) Person-hours to achieve the agreed upon task to achieve the scope of services that appear in the advertisement or procurement bulletin.
- (4) After the Division of Program Performance requests a proposal and fee estimate from the consultant, the user division shall:
- (a) Prepare an estimate of resources required to complete the project;
  - (b) Discuss the project with other divisions and request resource estimates from them as necessary; and
  - (c) Coordinate all of the resource estimates from other divisions to be used by the Division of Program Performance in negotiation of the contract; and
  - (d) Submit an independent person-hour estimate for each discipline in which the firm's fee proposal exceeds 500 person-hours.
- (5) For contract negotiation purposes, travel expenses for a consultant employee or survey crew shall be limited to those incurred from an office in Kentucky or the border of Kentucky nearest the consultant's office.
- (6) For contract negotiation purposes, direct expenses shall be limited to the following items and limits:
- (a) Reimbursement rates for travel expenses related to mileage shall be the twelve-month average of reimbursement rates in accordance with the provisions of 200 KAR 2:006 beginning January 1st and ending December 31st;
  - (b) Printing of reports for distribution external to the Transportation Cabinet - estimated cost from the printer per document;
  - (c) Special equipment which is project-specific;
  - (d) Capital cost of money;
  - (e) Computer time, if accounted for as a direct charge, shall not exceed fifteen (15) dollars per hour; and
  - (f) Travel time for survey crew - travel time to and from a job site in hours multiplied by the survey crew wage rate multiplied by one and three-tenths (1.3) for salary additives.

### Section 3. Contract Negotiations.

- (1)
  - (a) The Division of Program Performance shall be the designated negotiating agent for the Department of Highways in the Cabinet.
  - (b) If engineering or engineering-related services are requested by user divisions within the cabinet but not in the Department of Highways, that user division shall designate the negotiating agent.
- (2)
  - (a) The Division of Program Performance or other designated negotiation unit shall receive the proposal and fee estimate from the consultant.
    1. The proposal submitted by the consultant shall include a breakdown of the estimated fee for performing the work and one (1) of the following:

- a. A statement that the payment shall be based on the percentage of work completed; or
  - b. The proposed project milestones and corresponding maximum percentage payments.
2. The breakdown of the estimated fee shall include:
  - a. Direct salaries;
  - b. Overhead;
  - c. Other direct costs including cost of materials which are not included in the overhead;
  - d. Subconsultant costs;
  - e. Operating margin; and
  - f. Use of DBE firms.
- (b) The Division of Program Performance or other designated negotiation unit shall analyze the proposal and may confer with others regarding the proposal as necessary. The proposal shall be used as a basis for further negotiation of the professional services agreement.
- (c) Unreasonable or deliberately inflated proposals shall be rejected and may be cause for terminating negotiations in accordance with KRS 45A.825(9).
- (3) If the contract which is being negotiated uses a method of compensation other than lump sum, the consultant shall use an accounting system which segregates and accumulates reasonable, allocable and allowable costs to be charged to a contract for an audit by the External Audit Branch.
- (4)
  - (a) If a consultant intends to utilize the services of a subconsultant to perform any part of the work, at the time of negotiations the consultant shall submit a fee proposal for the amount of work to be subcontracted.
  - (b) The fee proposal shall be based on the audited overhead and wage rates for the subconsultant.
  - (c) A subconsultant shall be prequalified with the cabinet to perform the services to be subcontracted to it if the services are required to be prequalified.
  - (d) Prior approval from the Division of Program Performance or other negotiation unit shall be necessary.
  - (e) If a consultant desires to utilize a subconsultant to perform part of the work after a contract has been approved and notice has been given to begin work, the procedures set forth in Section 6 of this administrative regulation shall be followed.
- (5) A consultant which is awarded a contract for engineering or engineering-related services with the cabinet shall perform at least fifty (50) percent of the dollar value of the work for the project unless otherwise approved by the Director of the Division of Program Performance, or designee.
- (6)
  - (a) The operating margin allowed an engineering or engineering-related services consultant shall be allowed only on the negotiated direct labor and overhead costs regardless of the type of contract and shall not exceed the following:
    1. For a lump sum contract, fifteen (15) percent of the total direct labor cost plus overhead costs for a contract, including all contract modifications up to and including \$2,000,000 and ten (10) percent of the total direct labor cost plus overhead costs for a contract, including all contract modifications, for the amount in excess of \$2,000,000. The subconsultant's fee negotiated as part of the contract shall not be counted against the first \$2,000,000; or
    2. For a unit price contract, fifteen (15) percent of the estimated unit cost at the time of execution of the contract.

- (b) A cost plus fixed fee contract shall have a lump sum fee equal to ten (10) percent of the estimated cost at the time of the execution of the agreement.
- (7) The Division of Program Performance or other negotiation unit shall compare the consultant's proposed fee with the cabinet's estimate to determine both the reasonableness of the fee and areas of substantial differences which may require further negotiation.
- (8) The Division of Program Performance or other negotiation unit shall negotiate with the consultant to establish a reasonable fee and basis of payment, including incremental payments for completed work if appropriate, for the services to be performed under the contract.
- (9)
  - (a) The consultant shall keep written documentation of each negotiation meeting and shall submit to the Division of Program Performance or other negotiation unit the following:
    - 1. Minutes of negotiations;
    - 2. As-negotiated fee;
    - 3. As-negotiated person-hours;
    - 4. Classification percentage distribution; and
    - 5. Direct cost breakdowns.
  - (b) The public shall not be denied access to the items set forth in paragraph (a) of this subsection.
- (10) After the Division of Program Performance or other negotiation unit has negotiated a contract, the head of the unit shall comply with the provisions of KRS 45A.825(10).

#### Section 4. Contract Preparation and Execution.

- (1) The Division of Program Performance or other negotiation unit shall prepare an agreement or contract to cover the services to be provided, method and amount of payment, the time of completion and necessary special provisions.
  - (a) The agreement shall include by reference the General Provisions Attachment, unless the project is for a consultant structure inspection.
  - (b) If the project is for a consultant structure inspection, the agreement shall also include by reference the Division of Maintenance, Consultant Inspection Provisions.
- (2) The contract and negotiation minutes shall be sent to the consultant for the signature of an authorized representative. All original documents shall be returned to the Division of Program Performance or other negotiation unit.
- (3) The contract shall be reviewed and approved by the secretary of the cabinet.
- (4) For each project that has received final approval for state or federal funding, the Division of Program Performance shall retain the following documents:
  - (a) A copy of the contract;
  - (b) The negotiated fee and person-hours;
  - (c) The consultant's fee and person-hour proposal;
  - (d) The cabinet's person-hour estimate;
  - (e) The minutes of the negotiation;
  - (f) The minutes of the predesign conference;
  - (g) A copy of the advertisement and announcement;
  - (h) The list of firms that responded to the announcement in a timely manner;
  - (i) The written approval from the secretary of the cabinet to engage a professional firm;
  - (j) The minutes of the Professional Engineering and Engineering-related Services Selection Committee;
  - (k) The memorandum from the Chairman of the Selection Committee stating the ranking of the three best-qualified firms by the Professional Engineering and Engineering-related Services Selection Committee; and
  - (l) The audit report of overhead and wage rates which was used to establish the fee.

(5) If FHWA does not approve the contract, the secretary of the cabinet, after discussion with the State Highway Engineer and staff, may decide to modify the contract, redefine the project, terminate the project or ask for reconsideration by the FHWA.

#### Section 5. Notice to Proceed and Payments.

(1)

(a) Before a notice of approval for payment can be issued, funds shall be encumbered by the cabinet.

(b) The funds for statewide contracts shall be encumbered on a project by project basis.

(2) After the Division of Program Performance or other negotiation unit receives notification indicating that the LRC Government Contract Review Committee has received the contract and project information for review, a notice to proceed shall be transmitted to the consultant indicating that it may commence work but it shall not bill for services until specifically authorized to do so. For projects requiring approval of a unit of the federal government, notice to proceed shall not be issued until the federal approval is obtained.

(3) If the LRC Government Contract Review Committee issues a notification of acceptance on a contract, the Division of Program Performance or other negotiation unit shall issue a letter to the consultant informing it that it may bill the cabinet for charges incurred while working on the project.

(4)

(a) If the LRC Government Contract Review Committee objects to the contract and the cabinet determines that the contract is to be canceled, the Division of Program Performance or other negotiation unit shall notify the consultant of the cancellation and shall take necessary steps to close the contract.

(b) If the cabinet determines that the contract is to be modified to comply with the concerns of the LRC Government Contract Review Committee, the Division of Program Performance or other negotiation unit shall notify the consultant of the necessary modifications and shall follow the contract modification procedures specified in Section 7 of this administrative regulation.

(c) If the cabinet determines that the contract is to be executed as submitted to the LRC Government Contract Review Committee, the Division of Program Performance or other negotiation unit shall issue a letter to the consultant informing it that it may bill the cabinet for charges incurred while working on the project.

#### Section 6. Contract Administration. All work performed under a professional services contract shall be subject to general supervision, direction, review and approval by the cabinet.

(1)

(a) A project manager shall be assigned to the project by the director or office head of the user division.

(b) The division director or office head may serve as the project manager.

(c) The project manager shall be responsible for coordinating all cabinet activities with the consultant and for providing necessary supervision through the duration of the contract. This coordination shall include the following:

1. Scheduling, monitoring and controlling the consultant's activities;

2. Reporting the status of these activities to the appropriate authority;

3. Periodically reviewing the work to determine if the work:

a. Is acceptable;

b. Is in accordance with the agreement for the particular project; and

c. Scope has changed to the point that it may require a supplemental agreement and increased or decreased compensation; and

4. Completing and processing the Consultant Monthly Report Form incorporated by reference in Section (9) of this administrative regulation.

(2)

(a) During the project, the consultant may subcontract with other firms to perform specialized services in a manner similar to Section 1(4) of this administrative regulation. The subconsultant shall be prequalified by the cabinet in accordance with the provisions of 600 KAR 6:040 if the services that are subcontracted are required to be prequalified.

(b) If the services to be performed by the subconsultant are subject to prequalification by the cabinet and were not previously identified in the original negotiation or subsequent contract modifications, the consultant shall submit a request for a fee adjustment for the person-hours to be performed by the subconsultant.

(c) If the subconsultant services are not subject to prequalification procedures and exceed \$25,000, they shall be reviewed by the External Audit Branch for reasonableness of cost. For subcontracts equal to or less than \$25,000, the Director of the Division of Program Performance or other negotiation unit, upon recommendation of the negotiator, may accept the rates and costs if they are reasonable and in line with past costs incurred for similar work.

#### Section 7. Contract Modifications.

(1) If it is determined by either the consultant or the cabinet that one (1) or more of the following conditions are acceptable and necessary, a contract modification for a fee or schedule adjustment may be requested:

(a) Change in termini or section;

(b) Addition of major phases of work to the negotiated scope of work;

(c) Modification of previously approved work resulting from factors beyond the control of the consultant;

(d) Modification of a major item, if in the original contract, the item is designated as a basis of the original negotiations and the conditions for a contract modification consideration are identified in the original contract;

(e) Delay by the cabinet as outlined in each contract;

(f) Use of a subconsultant for services previously identified to be done by the consultant or other subconsultant; or

(g) Availability of current audit established in accordance with 600 KAR 6:080.

(2) The request for a contract modification may be originated by the Division of Professional Services, user division, highway district office or the consultant.

(3)

(a) If the director or office head of the user division determines the change is appropriate, the user division shall advise the consultant in writing of the contemplated change in the scope, complexity, extent, character or duration of the original agreement.

(b) If additional or reduced compensation is justified, the user division shall request a revised proposal from the consultant.

(4) The contract modification shall be negotiated using the procedures set forth in Sections 1, 2, and 3 of this administrative regulation.

(5) The Division of Program Performance or other negotiation unit shall send the Contract Modification form TC 40-17 to the consultant for its approval.

(6) After approval by the cabinet, the contract modification, LRC's proof of necessity form and other supporting documentation shall be submitted to the LRC Government Contract Review Committee.

(7) For projects requiring FHWA oversight, the approved contract modification shall be sent to the Federal Highway Administration for approval.

(8) Funds shall be encumbered by the cabinet sufficient to pay for the approved contract modification.

(9) If a contract modification results in a fee negotiated for the contract modification in other than lump sum as a method of compensation, the consultant shall use an accounting system which segregates and accumulates allocable and allowable costs which are to be charged to the contract modification.

#### Section 8. Completion of Contract.

(1) Upon completion of the contract, the cabinet shall review the work performed to determine that it meets the terms and conditions of the contract and shall evaluate the consultant for future reference.

(2) The project manager or the director of the user division shall review the work performed by the consultant, including any progress and final reports, to determine that all terms and conditions of the contract have been met before processing the final voucher for payment or releasing the consultant.

(3) Before approving the final invoice for payment, the director of the user division or the project supervisor shall evaluate the consultant and prepare written documentation of the consultant's performance on the project.

(4) The user division shall send the consultant written documentation of the consultant's performance for the project. Copies of the documentation shall be placed in the contract file maintained by the Division of Program Performance and in the consultant's experience record file.

(5)

(a) If a consultant receives a below average rating, he may appeal, in writing, to the user division director within thirty (30) days of receiving the rating notification.

(b) The written notice of appeal shall specifically set forth the reasons why the consultant believes the below average rating is erroneous.

(c) The appeal shall be conducted in accordance with KRS Chapter 13B.

(d) At the conclusion of the appeal, if the performance evaluation is revised, the initial documentation of the below average rating shall be:

1. Removed from the file; and

2. Replaced with the revised performance documentation.

(6) The Director of the Division of Program Performance or head of other negotiation unit shall request the External Audit Branch to perform a final audit if appropriate. The audit shall determine the total allowable contract costs and the total dollars to be paid to the consultant. All contracts utilizing a cost plus fixed rate method of payment shall be audited.

(7) The user division shall forward the Federal Highway Administration a copy of all progress and final reports for federal-aid projects if required or requested by the FHWA.

#### Section 9. Cancellation of Contract.

(1) Each professional service contract shall include a provision for the termination of the agreement and shall allow for the cancellation of the contract by the cabinet with proper notice to the consultant.

(2) If the cabinet decides to cancel a professional services contract, the Division of Program Performance or other negotiation unit shall notify the consultant of the cancellation and of the reasons for the cancellation.

(3) The cabinet shall not be liable for payment of services past the effective date of cancellation of the contract as specified by the terms of the contract.

(4) The cabinet shall be liable for a demobilization fee equal to ten (10) percent of the remaining balance of the contract not to exceed \$25,000, unless the contract is terminated due to criminal, fraudulent, or negligent behavior.



Section 10. Payments to Consultants. Before payment of a partial or final request for payment, the cabinet shall review the work of the consultant, including any progress or final reports, to ensure that the work for which the payment is to be made has been completed and that the terms and conditions of agreement have been satisfactorily followed.

(1) During the course of the project, progress billings shall be submitted by the consultant as agreed upon in the contract. The consultant shall submit an Engineer's Pay Estimate, TC 61-408 and a Consultant Monthly Report, Exhibit 200-02 as an invoice to the chief district engineer or director of the user division or to their designees.

(2) The chief district engineer or director of the user division or his designee shall review the Engineer's Pay Estimate and Consultant Monthly Report, verify that the work has been completed as described in the document, and sign both forms.

(3) If an Engineer's Pay Estimate is not needed to be submitted to the chief district engineer or director of the user division within a given month, the Consultant Monthly Report shall still be submitted.

(4) A final invoice and request for payment shall not be authorized until after all work has been reviewed and accepted or approved, including any final reports prepared by the consultant. All terms and conditions of the contract shall be satisfactorily met and the final audit shall be performed prior to processing the final payment.

Section 11. Incorporation by Reference.

(1) The following material is incorporated by reference:

(a) "Contract Modification", Form TC 40-17, September 1999 edition;

(b) "Engineer's Pay Estimate", Form TC 61-408, October 2002 edition;

(c) "Consultant Monthly Report", Exhibit 200-02, August 2005 edition;

(d) "General Provisions Attachment (Exhibit 15-06)", May 2003 edition; and

(e) Division of Maintenance Consultant Inspection Provisions, May 1993 edition.

(2) This material may be inspected copied, or obtained, subject to applicable copyright law, at the Transportation Cabinet, Division of Program Performance, 200 Mero Street, Frankfort, Kentucky 40622, 8 a.m. to 4:30 p.m.

(22 Ky.R. 1414; 1628; 1844; eff. 4-5-1996; 24 Ky.R. 1378; 1693; eff. 2-19-1998; 25 Ky.R. 1954; 2413; 2561; eff. 5-4-1999; 29 Ky.R. 1881; 2489; 2884; eff. 6-3-2003; 33 Ky.R. 552; 1314; eff. 11-9-2006; Crt eff. 4-1-2019.)