

FAQ Category 4 –PE/CE Consultant Issues (Read First)

This set of FAQs is called “PE/CE Consultant Issues.” These Questions and answers apply only to Federal-aid transportation projects in Nebraska funded through FHWA and projects funded with other sources that require a Federal action or approval on the part of FHWA. First, some basic background/concepts/definitions are presented to help familiarize the potential recipients of Federal-aid funds.

The intent of these FAQs is to supplement the *LPA Guidelines Manual for Federal-aid Projects*, which can be found online at the following link:

<http://www.transportation.nebraska.gov/gov-aff/lpa-guide-man.html>

DEFINITIONS

Federal Action - Federal actions tend to fall within one of the following categories:

1. Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.
2. Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.
3. Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.
4. Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

23 CFR 172.3 - Definitions

Engineering and design related services means program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services with respect to a construction project subject to 23 U.S.C. 112(a).

TITLE 23--HIGHWAYS

CHAPTER 1--FEDERAL-AID HIGHWAYS

Sec. 101. Definitions and declaration of policy

Construction - The term “construction” means the supervising, inspecting, actual building, and incurrence of all costs incidental to the construction or reconstruction of a highway, including bond costs and other costs relating to the issuance in accordance with section 122 of bonds or other debt financing instruments and costs incurred by the State in performing Federal-aid project related audits that directly benefit the Federal-aid highway program. Such term includes:

- (A) Locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the National Oceanic and Atmospheric Administration of the Department of Commerce);
- (B) Resurfacing, restoration, and rehabilitation;
- (C) Acquisition of rights-of-way;
- (D) Relocation assistance, acquisition of replacement housing sites, and acquisition and rehabilitation, relocation, and construction of replacement housing;
- (E) Elimination of hazards of railway grade crossings;
- (F) Elimination of roadside obstacles;
- (G) improvements that directly facilitate and control traffic flow, such as grade separation of intersections, widening of lanes, channelization of traffic, traffic control systems, and passenger loading and unloading areas; and
- (H) Capital improvements that directly facilitate an effective vehicle weight enforcement program, such as scales (fixed and portable), scale pits, scale installation, and scale houses.

Advanced Construction (AC) – A funding mechanism that “federalizes” a project once requested and approved by FHWA with the effective date being FHWA’s Nebraska Divisions funding approval date. Using AC **does not** guarantee FHWA funding, rather it makes the project’s future costs “eligible” for reimbursement with federal-aid funds once federal Obligation Authority (OA) becomes available to NDOR or NDOR elects to convert the AC with available OA. All activities for the “federalized” project from the FHWA Nebraska Division’s effective date forward shall follow the FHWA Federal-aid requirements. As NDOR federal OA becomes available, NDOR will need to request from the Division the conversion of the AC project to FHWA regular federal-aid funds for the project’s eventual reimbursement of eligible costs.

Federal-aid Project – If the LPA intends to seek Federal Funds for any phase of a project, it must be programmed as a FHWA Federal-aid project from its inception: **all phases of the project** must be developed in compliance with the NDOR *LPA Guidelines Manual for Federal Aid Projects*. FHWA Federal funds include discretionary or demonstration funds (earmarks). Projects not programmed as Federal-aid will not be processed through NDOR or FHWA.

GENERAL CONSULTANT SELECTION PROCEEDURES

See Chapter 4 of the NDOR *LPA Guidelines Manual for Federal Aid Projects*.

Large Purchase Contracts - See section 4.6.1

Small Purchase Contracts - See section 4.6.2

Qualification-Based Selection Process (QBS) - A negotiated procurement process for consultant selection based upon qualifications and competence in relation to the work to be performed. Cost of services cannot be a factor in evaluating potential consultants.

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 USC §112 (b)(2)(A) and 23 CFR §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.

23 CFR 1.33 states: *"It shall be the responsibility of the State to enforce the requirements" set forth pertaining to the avoidance of conflicts of interest.*

For agreements that include Federal funds in the preliminary engineering phase (PE) or construction engineering phase (CE), **FHWA authorization of funds is required prior to incurring consultant costs**. For those firms that are part of an "on-call" contract with NDOR, the same criteria apply. **ANY work completed PRIOR to FHWA authorization will NOT be eligible for Federal reimbursement.**

The Frequently Asked Questions and Answers for Consultant Issues have been provided to help clarify FHWA's position. The questions and their answers will be updated as necessary to reflect an ever evolving process and the continued coordination between NDOR, FHWA, LPAs and the consultant community.

Frequently Asked Questions for PE/CE Consultant Issues

For ease of understanding, we have broken the project development process (PE and CE work) into 3 Steps with specific phased work activities, for which a consultant may be retained to prepare/do any of the listed activities for each Step:

Step 1	Independent Cost Estimate (ICE), Scope of Services (SOS), Grant Applications, Work Hour Estimates (WHE).
Step 2	Feasibility Study
	Preliminary Engineering Services (Preliminary Design)
	Environmental Services
	Preparation of NEPA Document
	Final Design
Step 3	Construction Engineering Services

Preliminary Engineering

Step 1) Project-specific related Planning; preparing Independent Cost Estimate (ICE); preparing a Scope of Services; Preparing Grant Applications, WHE.

Step 2) Conducting a Feasibility Study; Preliminary Engineering Services (Preliminary Design), Providing Environmental Services; Preparing NEPA Documents; Providing Final Design Services

Construction Engineering

Step 3) Providing Construction Engineering Services (including but not limited to: construction inspection, project surveying and staking; and materials sampling and testing)

FREQUENTLY ASKED QUESTIONS: PE/CE CONSULTANT ISSUES

4-1. Q. What Step and related activities can the consultant work on?

A. A consultant may work on any phase of a project, as long as that phase was covered in the RFP. The exception to this is if a consultant is hired to prepare or assist with the development of an RFP; the consultant would have an inherent advantage and would be disqualified from responding to the RFP. Note that it is important to evaluate consultants for all of the work categories identified in the RFP, not just the first phase or work. .

If an RFP was done that covered multiple phases of a project, each phase must follow the negotiation process outlined in Chapter 4 of the LPA Manual and work cannot begin until federal funds have been obligated.

RFP's and "on-call" type services cannot be used for perpetuity. This will be further defined in the NDOR Procurement manual, currently under development. Until the manual is complete, it is reasonable to assume that after 4 years an RFP expires for any phase that has not yet been completed and must be re-procured. Consultants would still be eligible to do future work, but those services must be procured under a new RFP.

This is independent of funding source.

4-2. Q. If consultant is on an “on-call” contract, what Step and related activities may the consultant work on?

A. The same rationale applies as mentioned in question 1. The on-call consultant may only work on those activities that were requested in the RFP for which they were selected for the on-call services.

See FAQ #4-4 about adding activities to an RFP.

4-3. Q. Can NDOR or the LPA add additional dollars and/or time to a Step’s original activity/activities?

A. Yes. For additional funds to cover increased costs of activities originally agreed to, a supplemental agreement is required to be processed through NDOR for approval prior to incurring any additional costs above the original agreed amount. Effective date of eligibility for these additional funds is the date of FHWA’s Nebraska Division’s funding authorization. The LPA will be notified when funding has been authorized by FHWA. Any additional costs incurred prior to the effective date are considered by FHWA as ineligible.

4-4. Q. Can NDOR or the LPA add additional activities to a contract if the activities were not identified in the RFP?

A. No. A new competitively bid RFP is required to add activities which were not identified in the original RFP. New agreements will be written to cover the activities specified in any subsequent RFP for the Step. The subsequent RFP and any Supplemental Agreement is required to be processed through NDOR for approval prior to incurring any additional costs associated with the new RFP activities. Effective date of eligibility for these additional funds is the date of FHWA's Nebraska Division's funding authorization. Any additional costs incurred prior to this effective date are considered as FHWA ineligible. See FAQ #4-3 above for additional information.

4-5. Q. Can an LPA execute a contract with a consultant that includes more than one of the activities in a given step (for example, feasibility study, PE, NEPA and final design)?

A. Yes. The RFP must include all of the activities that the LPA intends to include in the contract. If the RFP is developed to encompass more than one discrete Federal activity (e.g. Feasibility Study, PE, NEPA, final design) a scope of work and independent cost estimate must be completed for each and every activity covered by the RFP. Negotiations, following procedures described in the LPA manual Sections 4.4, for all activities must take place at the same time. The LPA cannot develop a contract (LPA manual Sections 4.5 and 4.9) until all negotiations are completed.

This method is not recommended for complex projects with unknown elements that could affect the level of effort required. Contact your Local Projects Division Project Coordinator for assistance.

4-6. Q. If the designer of a Federal-aid project does not do the construction staking, how is the design data transferred to the construction engineering (CE) firm, and will the design consultant be compensated for preparing that data?

A. Conversion of data or preparation of the field staking books or data needs to be included in the applicable Design Services Agreement. This task is eligible for Federal reimbursement. See FAQ#3 regarding additional funds request and FAQ #4-21, Design Support during the extended design services step.

4-7. Q. Can the consultant serving as city or county engineer design the project if it is let by NDOR?

A. No, a consultant city or county engineer may not design projects for that jurisdiction.

4-8. Q. Can a consultant hired to act as a city or county engineer (or superintendent) design or seal design plans for the jurisdiction?

A. No, a consultant city or county engineer (or superintendent) may not design projects for that jurisdiction. Refer to LPA Guidelines Manual for Federal-aid Projects, Chapter 4 including Section 4.2.

4-9 Q. Is a subconsultant required to be pre-certified or prequalified?

A. Yes, if NDOR has a prequalification category for the work type involved. If no prequalification category exists, then the LPA is responsible to assure the consultant hires a qualified, competent subconsultant.

4-10 Q. Are inspection activities eligible for Federal reimbursement?

A. Yes, as long as the LPA Guidelines Manual for Federal-aid Projects is followed.

4-11. Q. Can the design engineer be involved in the construction process by reviewing shop drawings?

A. Yes. This activity must be included in the PE contract. See Q #4-6 and Q #4-21 for further information.

4-12. Q. Does QBS apply if the anticipated dollar amount of engineering services is below \$60,000?

A. Yes. Regardless of contract amount, a Qualifications Based Selection process must be followed. Follow the process in Chapter 4 of the *LPA Guidelines Manual for Federal-aid Projects*.

4-13. Q. If an LPA does the inspection itself but needs to hire someone for testing, is QBS required?

A. Yes. Follow the process in Chapter 4 of the LPA Guidelines Manual for Federal-aid Projects.

4-14. Q. How is pricing considered in the QBS process?

A. A firm is selected based on its qualifications, and then the price is negotiated. If a mutually acceptable fee cannot be negotiated with the first consultant, then the next qualified consultant is chosen and negotiations are undertaken.

4-15. Q. Is there a standard QBS process?

A. Yes. Refer to the *LPA Guidelines Manual for Federal-aid Projects* Chapter 4 - Consultant Selection.

4-16. Q. Does QBS apply to all federally funded transportation projects?

A. Yes.

4-17. Q. Does QBS apply to all activities which involve consultant procurement, for federally funded projects?

A. Yes. Note however, certain right-of-way services are not considered professional services and may be exempt; for right-of-way (ROW) services follow the process in Chapter 7 of the *LPA Guidelines Manual for Federal-aid Projects*.

4-18. Q. Does QBS have anything to do with the funding source?

A. No. **All phases of a transportation project funded in whole or in part with federal funds** must be developed in compliance with the NDOR *LPA Guidelines Manual for Federal Aid Projects* regardless of funding source.

4-19. Q. Can a locality preference be used during the selection phase?

A. Yes. Although a locality factor is not directly a qualification factor, a small locality preference of 5 percent, but no more than 10 percent, may be used. This criterion cannot be based on political boundaries (State, County, City) and should be used on a project-by-project basis for projects where a need had been established. Further if a firm currently outside the locality criteria indicates as part of its proposal that it will satisfy that criteria in some manner, such as establishing a local project office, it should be considered to have met the locality criteria.

4-20. Q. If an LPA has an existing PE agreement, is it OK for the LPA to issue a supplemental agreement for extended design services through the construction phase, without going out with a new RFP for those services?

A. No. However, for projects which had an executed PE agreement prior to September 16, 2009, an exception will be made to allow for extended design services through CE activities to be amended into the agreement, provided all Federal laws, rules, regulations and policies were followed for the original procurement. For all PE agreements executed after that date, extended design services must be identified in the original RFP and included in the scope of services.

Please see Q #4-21 for a list of acceptable “extended design services”.

4-21. Q. If the consultant firm which is the designer-of-record does not do construction engineering, can that firm perform “extended design services” during construction?

A. Yes. The Step 2 consultant professional engineer or architect design firm may provide ongoing professional (design) services during the construction phase for the same Federal-aid project as an extension of the design effort. The purposes of these services are to advise the LPA concerning interpretations of the plans and specifications prepared by the consultant, confer with the LPA as to any changed or unanticipated

field conditions that impacts the work, and to participate in a formal partnering process if applicable. It is expected that personnel assigned to these extended design services should be the same personnel that designed the project and prepared the plans. The Step 2 consultant firm shall not have duties in administration of the construction contract or inspection, surveying or testing of materials on the project.

If the activity was described in the RFP, the extension of the consultant's PE services could be supplemented into the agreement between the LPA and the consultant once design work is completed and there is a better idea of what services need to be extended. This requires NDOR and FHWA approval. Preparation of the ICE, SOS and negotiation of the extended design services can be delayed until PS&E time when there is a better understanding of the scope of the work.

A consultant doing Step 2 services can do the following types of typical extended design service activities:

Assist the LPA in answering pre-bid questions and attend the pre-bid meeting. Attend meetings, including the preconstruction meeting, job progress meetings, partnering meetings, if applicable, and other meetings as requested.

Respond to design questions (RFI's) and visit the job site on an as-needed basis for unforeseen site conditions related change orders.

Assist the LPA in review of contractor shop drawings.

Bridge shim shot calculations/adjustments.