

## CHAPTER 4

# PROCURING PROFESSIONAL SERVICES INDEPENDENT OF CONSTRUCTION SERVICES

### 4.1 RELATED STATUTORY AUTHORITY

- 4.1.1 SC Code §§ 8-13-700 through 8-13-795 of the Ethics, Government Accountability and Campaign Reform Act of 1991 establishes the Rules of Ethical Conduct for public employees.
- 4.1.2 SC Code § 11-35-2910 defines architect-engineer and land surveying services
- 4.1.3 SC Code § 11-35-3210 requires that architect-engineer, construction management agent, and land surveying services be procured as provided in § 11-35-3220 except as authorized by §§ 11-35-1560 (Sole Source), 11-35-1570 (Emergency) and 11-35-3230 (Small Professional Services Contract).
- 4.1.4 SC Code § 11-35-3215 provides for a preference for resident design services when qualifications appear to be equal. A business responding to an invitation for design services must submit a certification with its response stating whether it is a South Carolina resident. Submission of a false certification is grounds for suspension or debarment.
- 4.1.5 SC Code § 11-35-3220 outlines the qualification base selection procedures including the criteria that shall be used by the Agency Selection Committee to evaluate the interviewed firms.
- 4.1.6 SC Code § 11-35-3230(4) prohibits breaking projects into small projects for the purpose of circumventing the provisions of § 11-35-3220.
- 4.1.7 SC Code § 11-35-3245 prohibits architects or engineers who perform design work on a project under a contract awarded pursuant to § 11-35-3220 or § 11-35-3230 from also performing construction work on that project.
- 4.1.8 SC Code § 11-35-3310 allows indefinite quantity contracts to be awarded on an as-needed basis for construction related professional services pursuant to procurement procedures set forth in §§ 11-35-3220 and 11-35-3230.
- 4.1.9 SC Code § 11-35-4210 provides information to protest a solicitation or an award. See Chapter 1 for details on the protest process including lifting the stay on further action.

### 4.2 DEFINITIONS

#### 4.2.1 Architect-Engineering and Land Surveying Services

Those professional services associated with the practice of architecture, engineering, land surveying, landscape architecture, and interior design pertaining to construction. Such services include incidental services that members of these professions and their employees may logically or justifiably perform, including studies, investigations, evaluations, consultations, etc.

#### 4.2.2 Construction Manager Agent Services

Those professional services associated with contract administration, project management and other specified services provided in connection with the administration of a project delivery method. Construction Management Services does not include construction.

#### 4.2.3 Professional Services

As used in the remainder of this Chapter and wherever referred to in the Manual, the term Professional Services means architect-engineer, construction manager agent, and land surveying services as defined in 4.2.1 & 4.2.2 above.

### 4.3 SMALL PROFESSIONAL SERVICES CONTRACTS (FEES OF \$50,000 OR LESS)

- 4.3.1 Small professional services contracts are contracts for professional services where the compensation for services is \$50,000 or less.
- 4.3.2 This sum includes compensation for both basic services and additional services as defined in the Professional agreement.
- 4.3.3 This sum does not include payments for reimbursable expenses.
- 4.3.4 In awarding a small professional services contract, the Agency should request a firm to submit a proposal. The Agency may award contracts by direct negotiation and selection taking into account the following criteria:
  - A. The nature of the project;
  - B. The proximity of the firm to the project;
  - C. The capability of the firm to produce the required services within a reasonable time;
  - D. Past performance; and

E. Demonstrated ability to meet time and budget requirements.

- 4.3.5 Subject to the foregoing considerations, the Agency may enter into contract negotiations with the selected firm.
- 4.3.6 However, if the Agency has now or has previously had other contracts with the firm, the Agency may not be able to contract with that firm. State Law prohibits entering into a small Professional contract if the sum of all fees, excluding reimbursable expenses, paid to the firm in the previous 24 months under small contracts exceeds \$150,000.
- 4.3.7 The Agency must use a proposal letter with the South Carolina Small Professional Services Contract Terms and Conditions (SE-240) or the Professional Services Incidental Services Contract (SE-235) to serve as the contract. After executing the professional agreement, the Agency must submit a copy to OSE for information purposes using the Transmittal of Small Professional Service Contract (SE-230).
- 4.3.8 Splitting of Larger Projects Prohibited. Agencies may not break a project into small projects for the purpose of circumventing the provisions of SC Code Section 11-35-3220 and 11-35-3230.
- 4.3.9 When negotiating a Small Professional Services Contract, agencies may not negotiate with a firm unless any unsuccessful negotiations with a different firm have been concluded in writing. Once negotiations with a firm have been concluded, negotiations may not be reopened.

#### 4.4 LARGE PROFESSIONAL SERVICES CONTRACTS

##### 4.4.1 Selection Committee

- A. To procure professional services that cannot be established as a Small Professional Services Contract as set forth in Part 4.3 above, the Agency must establish a selection committee (Committee). The Committee must be composed of those individuals the agency head determines to be qualified to make an informed decision as to the most competent and qualified firm for the proposed project. The Committee shall consist of no less than 3 voting members. The Committee can be comprised of voting and non-voting members. Potential committee members may include:
1. End user of the project (Dean, Director, etc.),
  2. Director of Agency engineering/planning and or
  3. Director of Agency physical plant.
- B. The Agency head or their designee sits as a permanent member of the Committee for the purpose of coordinating and accounting for the Committee's work.
- C. The Agency should invite the OSE Project Manager to sit on the Committee as a non-voting member to assist the Committee as needed.
- D. Committee members are subject to the Ethics, Government Accountability and Campaign Reform Act of 1991. Committee members should become familiar with the requirements of this act and avoid any conflict of interest.
1. The Agency must have all committee members sign a Confidentiality & Conflict of Interest Policy (SE-214), as a means of advising them of their responsibilities.
  2. Moreover, the Agency must have any other person involved in the decision making process sign an SE-214. For example, if the Agency Head is not a member of the Committee but has final say over the Committee's decision, the Agency Head must sign an SE-214. The same is true for members of a Board of Trustees.
- E. The Committee must comply with the Freedom of Information Act; however, committee members must not disclose confidential information derived from proposals and negotiations submitted by competing offerors during the selection process. There is a summary of the requirements of this act in Chapter 1.

##### 4.4.2 Selection Committee Duties

In summary, the duties of the Selection Committee are to:

- A. Develop the description of the proposed project;
- B. Determine the professional services required for the project;
- C. Prepare the formal invitation for professional services;
- D. Determine the ranking range for each of the evaluation criteria;
- E. Evaluate all timely responses and determine the list of firms to be interviewed; and
- F. Attend all interviews, evaluate the qualifications of each firm, and determine the ranking of the firms interviewed.

#### 4.4.3 Invitation for Professional Services

- A. The Committee must prepare the invitation on an Invitation for Professional Services (SE 210).
- B. At a minimum, the invitation must include the project name, the general scope of work, a description of all professional services required for the project, the anticipated project delivery method, the submission deadline, and how interested firms may apply for consideration.
- C. If the agency intends to use an Alternate Delivery Method, they must have approval from the State Engineer before advertising for professional services.
- D. The date for submission of information from interested firms in response to the invitation must not be less than fifteen (15) days after publication of the invitation.
- E. The invitation should also notify all interested firms that their response must include a certification stating whether the business is a resident of South Carolina.
- F. Once the Agency is ready to advertise, it must submit the completed SE-210 to OSE in MS Word format for review and approval.
- G. Upon approval, OSE will submit the SE-210 to South Carolina Business Opportunities (SCBO) for advertisement. The Agency may advertise elsewhere but must advertise in SCBO.

#### 4.4.4 Short-Listing Professionals for Interviews

- A. Upon receiving submittals in response to the invitation for professional services, the Agency shall review them for completeness. Each submittal shall include the following information:
  - 1. Federal Standard Form 330;
  - 2. Certification stating whether the business is or is not a South Carolina resident;
  - 3. Information responsive to the selection criteria; and
  - 4. Any other information that the invitation required.
- B. In the event of an incomplete submittal, the Agency may contact the firm to obtain the required information provided the submittal due date has not passed. Firms must submit any such supplemental information before the submittal due date. The Agency may disqualify any firm that fails to supply required information before the due date from further consideration for non-responsiveness.
- C. The Committee must evaluate all submittals prior to conducting any interviews.
- D. When the Committee finds two firms to be equally qualified, and one is a non-resident, the Committee must rank the resident higher than the non-resident.
- E. After evaluating the submittals, the Committee shall create a short-list of firms considered most qualified for the Committee to interview.
- F. The Committee shall select a minimum of three firms for interviews. If fewer than three firms responded to the invitation, the Committee should interview each firm. If only one submittal is received, the Committee should evaluate the firm's qualifications. The committee may or may not conduct an interview.
- G. The Committee must prepare a written report supporting its determination as to which firms it chose to interview using the Selection Committee Report for Interview Selection (SE-211).
- H. The Agency must immediately send a copy of the Notification of Selection for Interview (SE-212) to all firms that responded to the Invitation for Professional Services and post the SE-212 at the location set forth in the Invitation.

#### 4.4.5 Interviewing and Evaluating Short Listed Professionals

- A. No later than ten days before the interview date, the Committee shall send written notice of the date and location for interviews to the short-listed firms.
- B. All interviews should occur on the same day.
- C. If the Committee will be interviewing the firms in various locations, the Chair should make sure that each location is similarly equipped and furnished.
- D. Each voting member of the Committee must be present for each interview. Only members of the Committee may be present during interviews and interviews should be held in "executive session".
- E. During the interviews, the Committee must evaluate the firms on the following criteria:
  - 1. Past performance;
  - 2. Ability of professional personnel;
  - 3. Demonstrated ability to meet time and budget requirements;
  - 4. Proximity to and knowledge of the locality of the project (application of this criterion must leave an appropriate number of qualified firms, given the nature and size of the project);

5. Recent, current and projected workloads of the firms;
6. Creativity and insight related to the project;
7. Related experience on similar projects;
8. Volume of work awarded by the using Agency to the Professional during the previous five years - objective is to equitably distribute contracts among qualified Professionals including certified Minority Business Enterprises and firms that have not had previous state work; and

NOTE: Firms awarded more work in the last 5 years must be scored lower than those who have been awarded less.

9. Other special qualifications required by the solicitation.
- F. The Committee must not discuss fees and compensation with the firms during the interviews.
- G. After the close of all interviews, each committee member must complete an evaluation of all interviewed firms using the Professional Services Selection Committee Member A/E Evaluation (SE 215). If a committee member determines two firms to be equally qualified, the committee member must re-evaluate their rankings to break any ties in scores prior to submitting the SE-215 to the Committee Chair.
- H. After each committee member has completed and submitted their SE-215 to the Chair, the Chair must compile these rankings into a committee ranking using the Professional Services Selection Committee Summary (SE 217).
- I. If the Committee determines two firms to be equally qualified and one firm is a resident and the other is a non-resident, the committee must rank the resident higher than the non-resident.
- J. If the Committee determines two firms to be equally qualified, the Committee must re-evaluate their rankings to break any ties in final rankings.

#### 4.4.6 Final Determination and Notification of Selection

- A. The Committee's decision on the ranking of each firm is final, subject only to the Agency's internal approval process.
- B. Once the Agency determines its ranking report is final, the Agency must prepare a Notification of Selection for Contract Negotiation (SE-219), listing the highest ranked firm.
- C. The Agency must immediately send a copy of the SE-219 to all firms that responded to the Invitation for Professional Services and post the SE-219 at the location set forth in the Invitation.
- D. The Agency must support the selection of a non-resident with a written determination explaining why they selected that firm.

#### 4.4.7 Negotiating Professional Services Contracts

- A. The Agency must attempt to negotiate with the firm with the highest ranking.
- B. If the Agency is unable to negotiate an acceptable contract with that firm, the Agency may terminate those negotiations and approach the second highest ranked firm. For more on terminating negotiations and negotiating with another firm, see 4.4.8 below.
- C. Successful contract negotiations require an exchange of information. The Agency should provide the firm with the Agency's budgetary goals for the project, master plans, program data, Agency standards, and with all available technical information about the project work area. This will enable the firm to estimate the design effort required for the project. Examples of technical information the Agency should provide, if available, include:
  1. Program (unless it is to be developed by the Professional);
  2. Site boundary and/or topography surveys;
  3. Testing and surveys for hazardous material;
  4. Sub-surface investigations;
  5. Material testing, etc.
- D. The Agency should obtain a description of the services the firm proposes to provide and determine if the proposed scope of services is adequate or excessive.
- E. The Agency should also become familiar with the standard professional services contracts, SCOSE versions of the AIA Document B101, B133, B132 and the Professional Services Incidental Services Contract (SE-235). During the review of the standard contract, the Agency should ask and answer any number of questions. Examples are:
  1. Are the insurance limits adequate to cover the potential risk on this project and if not, are we willing to bear the risk?

2. If we want increased insurance limits are we willing to pay the additional cost? (Check with the firm to see what their insurance limits are. They may already be greater than the limits stated in the contract)
  3. What deliverables do we want?
  4. Do we have critical delivery dates for some or all of the deliverables and if so, what are they?
  5. Do we want digital drawings and if so what format and media?
- F. After exchanging information and agreeing on changes to the standard contract, prior to submittal to OSE for approval, the Agency is in a position to consider what would be a fair and reasonable fee for the firm's services. The OSE Project Manager should be consulted on any proposed changes to the standard contract.
- G. In addition to negotiating the Basic Services Fee, the Agency should negotiate any required Additional Services (those not covered by the scope of the Basic Services fee) and for reimbursable expenses.

#### **4.4.8 Unsuccessful Negotiations**

- A. If the Agency is unable to negotiate a contract with the highest ranked firm, the Agency may terminate negotiations.
- B. The Agency must provide the highest ranked firm with written notice of the termination of negotiations.
- C. Upon providing written notice of termination to the highest ranked firm, the Agency must prepare and post a new SE-219 showing the intent to negotiate a contract with the firm receiving the next highest ranking. This new Notice must be provided to all firms responding to the invitation.
- D. The Agency may then attempt to negotiate with this new firm.
- E. If the Agency is unable to negotiate a contract with this firm as well, the Agency may continue the process in the same manner until the Agency is able to negotiate a contract. At no time, however, should negotiations include more than one firm.

#### **4.4.9 Successful Negotiations Submittal to State Engineer**

- A. Following successful negotiations, the Agency must submit a Request for Authority to Execute a Professional Service Contract (SE-220), to OSE for approval.
- B. If the project is a PIP, the Agency needs to have an approved Form A-1 before submitting the SE-220 package to OSE. The Agency must include with the submission all the attachments listed at the bottom of the SE-220.
- C. The Agency may not execute the contract or authorize the firm to begin work until OSE has approved the SE-220.
- D. OSE has ten days to review and approve the SE-220. OSE will return an approved copy of the SE-220 to the Agency. The Agency may then execute a contract with the selected firm.
- E. If OSE does not approve the SE-220, the State Engineer will give written notification to the Agency declaring his intention to contest the proposed contract and the reasons why. The State Fiscal Accountability Authority (SFAA) will hear any such contest at its next regularly scheduled meeting after notification of the Agency. SFAA will notify the Agency in writing of its decision.

### **4.5 PROFESSIONAL SERVICES INDEFINITE QUANTITY CONTRACTS (IDQs)**

- 4.5.1** A Professional Services Indefinite Quantity Contract (IDQ) is a contract whereby the professional agrees to provide the Agency professional services on an "as-needed" basis during the term of the contract.
- 4.5.2** Agencies procure Professional Services IDQs in the same manner as any professional service contract as set forth in this chapter. They do not, however, have to obtain OSE approval of the individual delivery orders to the contract.
- 4.5.3** Chapter 9 of this manual provides guidance on procuring IDQs.
- 4.5.4** The SE-600 series forms shall be used for IDQ professional services contracts.

### **4.6 PROCEDURES FOR AMENDING PROFESSIONAL SERVICES CONTRACTS**

- 4.6.1** The Agency should negotiate fees for changes in the scope of work using good procurement practices and in keeping with the terms of the contract.
- 4.6.2** For amendments to small Professional Services contracts:  
After executing the amendment, the Agency must submit a copy to OSE for information purposes using the Transmittal of Amendment to Small Professional Services Contract (SE-232).
- 4.6.3** For amendments to large Professional Services contracts that exceed the Agency's Architect/Engineer Contract Amendment certification:  
Prior to authorizing the work, the Agency must submit a completed Request for Authority to Amend a Professional Services Contract (SE 260), to OSE for approval.

- 4.6.4** For amendments to large Professional Services contracts within the Agency's Architect/Engineer Contract Amendment certification:  
After executing the amendment, the Agency must submit a copy to OSE for information purposes using the Request for Authority to Amend a Professional Services Contract (SE 260), indicated that the change is within Agency Architect-Engineer Contract Amendment Certification.

#### **4.7 SOLE SOURCE AND EMERGENCY SELECTION OF PROFESSIONAL SERVICES**

The Agency must make all Sole Source and Emergency procurements in accordance with Chapter 8 of this manual. Prior OSE approval of such procurements is not required.

#### **4.8 PROFESSIONAL LIABILITY INSURANCE**

- 4.8.1** All design professionals working for the State should carry professional liability insurance.
- 4.8.2** The SCOSE AIA Document B101, B132, B133, SE-235 and SE-240 set forth a recommended minimum amount of insurance. These amounts take into account the State's limited liability under Sovereign Immunity.
- 4.8.3** The Agency should evaluate their risks associated with each project and the potential consequences, and adjust the amounts accordingly.

#### **4.9 DESIGN PROFESSIONAL ERRORS AND OMISSIONS**

- 4.9.1** The Agency should notify the Design Professional whenever the Agency believes the Design Professional's work product contains errors or omissions. The A/E must correct any error or omission without cost to the agency.
- 4.9.2** When the Design Professional's error or omission results in costs to the Agency over those the Agency would have paid had the error or omission not occurred, the Design Professional is responsible for such additional cost. For purposes of determining costs, each error or omission constitutes a separate event.
- 4.9.3** If some or all of the increased costs due to an error are owed to a third party, such as a contractor, the Design Professional may elect to negotiate directly with the contractor and pay the contractor directly.
- 4.9.4** All work added due to an omission must be negotiated through the agency to be sure the additional work is included in the construction contract by change order.