

## 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(1) requires that architect-engineer, construction management, 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 professionals 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(5) requires the agency Selection Committee to evaluate each of the persons or firms interviewed in view of their (1) past performance; (2) the ability of professional personnel; (3) demonstrated ability to meet time and budget requirements; (4) location and knowledge of the locality of the project; (5) recent, current, and projected work loads of the firms; (6) creativity and insight related to the project; (7) related experience on similar projects; (8) volume of work for the agency over the past five years; and (9) any other special qualification required by the solicitation.
- 4.1.6 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.
- 4.1.7 SC Code § 11-35-3310 allows indefinite delivery 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.

### 4.2 DEFINITIONS

#### 4.2.1 Architect-Engineering and Land Surveying Services – *SC Code Ann § 11-35-2910(1)*

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. Incidental services that are not procured as a part of a contract for construction related architect-engineer or land surveying services are not architect-engineer and land surveying services and must be procured under the State Purchasing Office's procedures for procuring services rather than the qualification based procurement methods outlined in this Chapter.

#### 4.2.2 Construction Manager Agent Services – *SC Code Ann §§ 11-35-2910(2) & (4)*

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 \$25,000 OR LESS)

*SC Code Ann § 11-35-3230*

- 4.3.1 Small professional services contracts are contracts for professional services where the compensation for services is \$25,000 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 may request a firm to submit a proposal. The Agency must select a Professional taking into account the following criteria:
- A. The nature of the project;
  - B. The proximity of the consultant to the project;
  - C. The capability of the consultant to produce the required services within a reasonable time;
  - D. Past performance; and
  - E. The Professional's demonstrated ability to meet project 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 most qualified Professional, the Agency may not be able to contract with that Professional. State Law prohibits entering into a small Professional contract if the sum of all fees, excluding reimbursable expenses, paid to the Professional in the previous 24 months under small contracts exceeds \$75,000. The selected Professional must provide the Agency with a list of services provided to the Agency and fees received from the Agency under small contracts for the previous 24 month.
- 4.3.7 The Agency may use a letter agreement ~~embodying with the terms~~ SE-240, South Carolina Small Professional Services Contract Terms and ~~conditions negotiated~~ Conditions, as the contract. After executing the Professional agreement, the Agency must submit a copy to OSE for information purposes using the SE-230, Transmittal of Small Professional Service Contract.

#### 4.4 LARGE PROFESSIONAL SERVICES CONTRACTS – SC Code Ann § 11-35-3220

##### 4.4.1 Selection Committee

- A. The first step in procuring professional services that cannot be established as a Small Architect-Engineer and Land Surveying services contract as set forth in Part 4.3 above is to establish a selection committee (committee).
- B. The Agency head or designee sits as a permanent member of the committee for the purpose of coordinating and accounting for the committee's work.
- C. The Agency may 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. (See SC Code Ann. §§ 8-13-700 through 8-13-795) Committee members should become familiar with the requirements of this act and avoid any conflict of interest. The Agency must have committee members sign an SE-214, Confidentiality & Conflict of Interest Policy as a means of advising them of their responsibilities. Moreover, the Agency should have any other person involved in the decision making process sign an SE-214, Confidentiality & Conflict of Interest Policy. 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 should sign a Confidentiality & Conflict of Interest Policy. 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 Committee Duties – SC Code Ann § 11-35-3220(2)(a)

In summary, the committee's duties 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 persons or 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 – SC Code Ann § 11-35-3220(2)(B)**

- A. The committee must prepare the invitation for professional services on an SE 210, Invitation for Professional Services.
- B. At a minimum, the invitation must include the project title, 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. 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.
- D. Once the Agency is ready to advertise, it must submit the completed SE-210 to OSE in Word format for review and approval.
- E. Upon approval, OSE will submit the invitation 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 – SC Code Ann § 11-35-3220(3), (4) & (5)**

- A. Upon receiving responses to the invitation for professional services, the committee should review them for completeness. Each response (hereinafter “resumes”) should 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 resume, the Agency may contact the Professional who submitted the resume to obtain the required information provided the resume due date has not passed. Professionals must submit any such supplemental information to their resumes before the resume due date. The Agency may disqualify any Professional that fails to supply required information in their resume before the resume due date from further consideration for non-responsiveness.
- C. The committee must evaluate all resumes prior to conducting any interviews using 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 work load;
  - 6. Creativity and insight related to the project;
  - 7. Related experience on similar projects;
  - 8. Volume of work awarded by the Agency to the Professional during the previous five years with the objective of equitably distributing contracts among qualified Professionals including certified Minority Business Enterprises and firms that have not had previous state work; and
  - 9. Other special qualifications required by the solicitation.
- D. When the selection committee finds two professionals to be equally qualified, and one is non-resident, the committee must rank the resident professional higher than the non-resident. See SC Code Ann § 11-35-3215.
- E. After evaluating the resumes, the committee may create a short-list of Professionals considered most qualified for the committee to interview.
- F. The committee must select a minimum of three Professionals for interviews. If fewer than three Professionals responded to the invitation, the committee should interview each Professional that fully responded to the invitation.
- G. The committee must prepare a written report supporting its determination as to which professionals it chose to interview. In this report, the committee must list the names of all professionals that responded to the Invitation for Professional Services and must enumerate its reasons for selecting the professionals to be interviewed.
- H. Using the SE 212, Notification of Selection for Interview, the committee must notify all Professionals that responded to the invitation, which Professionals the committee selected for interviews. The Agency may send this and all other written notices to parties providing email addresses if in the solicitation, the Agency has notified all interested parties that notice will be via email.

#### 4.4.5 Interviewing and Evaluating Short Listed Professionals

*SC Code Ann §§ 11-35-3220(4) & (5) and 11-35-3215*

- A. No later than ten days before the interview date, the committee should send written notice of the date and location for interviews to the short-listed Professionals.
- B. All interviews should occur on the same day.
- C. If the committee will be interviewing the Professionals in various locations, the chair should make sure that each location is similarly equipped and furnished.
- D. The committee should include with the notice of interview date and location the relative ranking of the criteria that the committee will use to score interviews.
- E. Each voting member of the committee needs to be present for each interview.
- F. During the interviews, the committee may only evaluate the Professionals 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 work loads 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
  - 9. Other special qualifications required by the solicitation.
- G. The committee must not discuss fees and compensation with the Professionals during the interviews.
- H. After the close of all interviews, each committee member must complete an evaluation of all interviewed firms using the SE 215, Professional Services Selection Committee Member – A/E Evaluation. 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.
- I. After each committee member has completed and submitted his or her rankings to the chair, the committee must compile these rankings into a committee ranking using the SE 217, Professional Services Selection Committee Summary.
- 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.
- K. If the committee determines two firms to be equally qualified and one firm is a resident firm and the other is a non-resident firm, the committee must rank the resident firm higher than the non-resident firm.

#### 4.4.6 Final Determination and Notification of Selection

*SC Code Ann § 11-35-3215, § 11-35-3220(6) & § 11-35-4210(1)(b)*

- A. The committee's decision on the ranking of each Professional 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 an SE-219, Notification of Selection for Contract Negotiation, setting forth the highest ranked person or firm.
- C. The Agency must immediately send a copy of the SE-219 to all Professionals 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 non-resident with a written determination explaining why they selected that firm.
- E. SC Code § 11-35-4210 provides any Professional that responded to the invitation the right to protest an award. A Professional must protest within ten days after the posting of the SE-219, Notice of Selection for Contract Negotiation. If an offeror files a protest, the Agency may not enter into a contract for the professional services until the protest is resolved or until after the State Engineer grants relief from the automatic stay on any further action. See Chapter 1 for details on the protest process including lifting the stay on further action.

#### 4.4.7 Negotiation Professional Services Contracts– SC Code Ann § 11-35-3220(7)

- A. The Agency must attempt to negotiate with the Professional with the highest ranking in the ranking report.
- B. Only if the Agency is unable to negotiate an acceptable contract with that Professional may the Agency terminate those negotiations and approach the second highest ranked Professional. For more on terminating negotiations and negotiating with another Professional, see 4.4.8 below.
- C. Successful contract negotiations require an exchange of information. The Agency should provide the Professional 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 Professional 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 Professional proposes to provide and determine if the proposed scope of services is adequate or excessive. This will enable the Agency to put a value on the Professional's services.
- E. The Agency should also become familiar with the standard professional services contract. After reviewing 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 Professional to see what his/her 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, the Agency is in a position to consider what would be a fair and reasonable fee for the Professional's services.
- G. In addition to negotiating the Basic Services Fee, the Agency should negotiate allowances for any required Additional Services (those not covered by the scope of the Basic Services fee) and for reimbursable expenses. OSE staff are available to provide guidance based on their professional experience.

#### 4.4.8 Unsuccessful Negotiations – SC Code Ann § 11-35-3220(7)

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

#### 4.4.9 Successful Negotiations Submittal to State Engineer - SC Code Ann § 11-35-3220(8) & (9)

- A. Following successful negotiations, the Agency must submit an SE-220, Request for Authority to Execute a Professional Service Contract, to OSE for approval.

- B. If the project is a PIP, the Agency needs to have an approved Form A-1 before submitting the Request to OSE. The Agency must include with the submission the attachments listed at the bottom of the form.
- C. The Agency may not execute the contract or authorize the Professional to begin work until OSE has approved the Request.
- D. OSE has ten days to review and approve the Request for Authority to Execute a Professional Service Contract. Upon approval, OSE will return an approved copy of the Request to the Agency. The Agency may then execute a contract with the selected Professional.
- E. If OSE does not approve the Request, 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 will hear any such contest at its next regularly scheduled meeting after notification of the Agency. The SFAA will notify the Agency in writing of its decision.

#### 4.5 PROFESSIONAL SERVICES INDEFINITE DELIVERY CONTRACTS (IDCs)

*SC Code Ann § 11-35-3310(1)(b)*

- 4.5.1 A Professional Services Indefinite Delivery Contract (IDC) 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 IDC’s 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 IDC’s.

#### 4.6 PROCEDURES FOR AMENDING PROFESSIONAL SERVICES CONTRACTS

*SC Code Ann § 11-35-3220(8) & (9)*

- 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 If an amendment to a Professional Services contract exceeds the Agency’s Architect/Engineer Contract Amendment certification, the Agency must submit a completed SE 260, Request for Authority to Amend a Professional Services Contract, to the OSE for approval, prior to authorizing the work.
- 4.6.3 If an amendment to a Professional Services contract is within the Agency’s Architect/Engineer Contract Amendment certification, the Agency shall submit a completed SE-260 to the OSE for information.

#### 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 Article 2 of the South Carolina modified AIA Document B101, 2007-sets, [the SE-235, Professional Services Incidental Services Contract, and the SE-240, SC Small Professional Services Contract Terms and Conditions](#), 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 project manager, in conjunction with its risk management office, should evaluate the 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.