EXAMINING LEGAL/PROCUREMENT ISSUES ASSOCIATED WITH THE AWARD OF PROFESSIONAL SERVICE CONTRACTS

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This Presentation

- Professional Services Contracts
  - What types of contract are involved?
  - Legal authority
  - Sponsor’s obligations
    - 5 key steps
  - Tips to avoid common errors
Professional Services Contracts

- Aviation Planning Services
  - Airport system and master planning
  - Airport noise compatibility planning
  - Environmental studies (EAs & EISs)
  - Design studies
  - Airport financial planning and benefit cost analysis
  - Airspace analysis

- Architectural / Engineering (A/E) Services
Legal Authority

- **Brooks Act** *(40 U.S.C. § 1102)*
  - Qualification-based selection procedures
  - Fees for services are negotiated after the selection is made

- **Grant Assurances** *(49 U.S.C. § 47107)*
  - Brooks Act applies to airport A/E and planning contracts

- **DOT Common Rule** *(49 CFR § 18.36)*
  - Fair and open competition
Legal Authority (cont.)

- FAA Advisory Circular (150/5100-14D)
- FAA AIP Handbook (Order 5100.38, Chapter 9 – Procurement and Contract Requirements)
- http://www.faa.gov/airports/aip/procurement/professional_services/
Contracting Objectives

- Identify responsible, experienced, ethical, and **qualified** contractors
  - Maximum open and free competition
  - Fair negotiations
  - Avoid any suggestion of unfair / unethical conduct
  - Ensure equitable fees
Contracting Realities

...therefore, we're in complete compliance with all federal guidelines.

\[ \pi \sigma + 0.045w + \pi(4-\mu) \approx \gamma s^2 + e^2 \]
\[ J \Sigma \{m/n^2\} \dot{A} \infty (b^3) \]
\[ a^5 (4-\mu) \approx \gamma sw^2 + y^2 \]
\[ 6.667 \bdot \partial - [f/\varphi] (4.5^b + jw^9... - mn) \]
\[ \gamma sw^2 + y^2 \approx 8 \Omega \bdot \partial \infty - [f/\varphi] (4.5^b + jw^9... + mn) k14.5\pi/\partial \]
\[ \gamma s^2 + G^2 \]
\[ J \Sigma \{m/n^2\} \infty (b^3) - ma + p2/k \approx b^6 p16.06 \]
\[ w (4-\mu) \approx \gamma sw^2 + y^2 \]
\[ 6.667 \bdot \partial - [f/\varphi] (4.5^b + jw^9... + mn) k14.5\pi/\partial \]
\[ J \Sigma \{m/n^2\} \infty (b^3) - ma + p2/k \approx b^6 p1/n^2 \]
\[ U \infty (b^3) 6.89 \]
\[ \#8.0 \mu, T^3 67 \bdot \partial - [f/\varphi] (4.5^b + jw^9... + mn) \approx \gamma sw^2 + y^2 \]
\[ 6.667 \bdot \partial - [f/\varphi] (4.5^b + jw^9... + mn k14.5\pi/n^2) \infty (b^3)^8 \]
\[ rtk/\partial 2.34 \]
\[ f1 (9.9/a^5) \infty (b^3) - ma + p2/k \approx b^6 p1/\partial - [f/\varphi] (4.5)^4 2.3 \]
\[ k6.7 = x \]
Five Key Steps

1. Use Qualifications- Based Selection Process
2. Define Scope of Services
3. Negotiate Fee
4. Document the Selection Process
5. Prepare a Conforming Contract
Preliminary scope of services

Sponsor establishes selection board

Determine selection policy

Develop selection criteria & weights

Sponsor solicits interest

Evaluate pool of qualified consultants

Apply selection criteria & weights

Develop short list

Develop & Distribute RFQ

Issue RFP

Evaluate RFPPs

Rank qualified consultants

Interview

FAA QUALIFICATIONS-BASED SELECTION PROCEDURES

Notify unsuccessful consultants

Non-Selected

Selected

Short list firms submit RFPPs

Review experience & qualification data
STEP ONE: Qualifications-Based Selection

- Create selection board
  - At least 3 persons
  - At least one engineer, planner or knowledgeable professional

- Develop selection criteria and weighting
  - Relevant experience
  - Professional qualifications & reputation
  - Current workload / ability to meet schedule
STEP ONE: SELECTION (cont.)

- Solicit interest
  - Issue a Request for Qualifications (RFQ)
  - Public announcements (local newspapers, trade journals)
  - Send announcements to known potentially qualified consultants

- Identify short-list of qualified teams
- Interviews
- Rank consultants
STEP ONE: SELECTION (cont.)

- **Informal Procedures if Contract < $100,000**
  - Sponsor must call at least three firms to discuss qualifications to perform work
  - Negotiations with best-qualified firm
  - Submit statement to FAA explaining bases for selection and method used to determine reasonable fee
  - **Must consult with FAA before using informal procedures**
The selection process for an EIS Contractor has some significant differences.

- FAA will provide scope of work
- FAA must concur with selection/evaluation criteria
- FAA will participate in interviews
- FAA ultimately ranks contractors
STEP TWO: Scope of Work

- Early Steps
  - Define the scope of services before creating selection criteria and issuing the RFQ

- Negotiation Phase
  - Sponsor and first-ranked contractor develop a well-defined project description and scope of services
  - Scoping process must be complete prior to negotiating fee
STEP THREE: Fee Negotiations

- Sponsors must perform some form of fee analysis for every A/E contract

- If Contract > $100,000:
  - Contractor prepares fee proposal
  - Sponsor prepares independent cost estimate (ICE)
  - Contractor’s proposal is generally reasonable if within 10% of the ICE
STEP THREE: Fees (cont.)

- Negotiate final fee
  - If sponsor cannot negotiate mutually acceptable terms with first-ranked contractor, move to second-ranked contractor

- FAA’s Role
  - FAA does not participate in fee negotiations
  - FAA determines reasonableness of fee
STEP FOUR: Documentation

- Prepare a Record of Cost Negotiations
  - Address any changes in scope
  - Explain any significant differences between the sponsor’s ICE and the final fee agreed upon
  - Provide a detailed fee analysis
  - Include copy in contract file
  - If requested by FAA, submit the Record to the agency for a reasonableness determination
STEP FOUR: Documentation (cont.)

- Prepare a report for the sponsor’s administrator / governing body
  - Document the basis for recommending the selected contractor
STEP FIVE: The Contract


- civil rights
- DBE
- breach of contract
- contract termination
- debarment certification
- lobbying
- trade restrictions
- rights to inventions
STEP FIVE: Contract (cont.)

- Permissible Methods of Contracting
  - Direct Personal Services
  - Retainer
  - Cost-Plus-A-Fixed Fee (Not to Exceed)
  - Fixed Lump Sum Payment
    - Cost-Plus -A-Percentage-Of-Cost (CPPC) is prohibited
- Permissible Costs
  - Direct Salary Costs
  - Overhead (Labor & General and Administrative)
  - Direct non-Salary Expenses
    - Bonus payment for early completion of work is prohibited
- FAA Review
Tips to Avoid Common Legal Issues

1. Educate appropriate staff about federal contracting requirements.
2. Understand and harmonize local and federal requirements.
3. Don’t assume. When in doubt, coordinate with your FAA officer.
4. Review and understand contract templates and forms; update as necessary.
5. You can use local preference as a selection criterion, but it must be carefully crafted.
Tips to Avoid Common Legal Issues (cont.)

6. Remember that EIS contracts have very different rules.
7. Don’t seek AIP funding for attorney fees unless they are attributable to State or local project issues.
8. Make certain that you have and correctly follow an approved DBE program.
9. Review all implications of proposed contract modifications / amendments before acting.
10. Educate your board / approving authority.
QUESTIONS?

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