

## **19A NCAC 02B .0164 USE OF RIGHT OF WAY CONSULTANTS**

(a) Introduction and purpose. The North Carolina Department of Transportation maintains a staff capable of performing the normal workload for most of the functions required for the acquisition of rights of way for our highway system. However, it is recognized that situations arise and certain specific needs exist which can best be met by the use of qualified consultants outside the Department.

This Rule is established for the preparation, execution and administration of contracts for right of way acquisition services by consultant firms that are over ten thousand dollars (\$10,000.00).

Due to the diversity of contract types, some portions of this Rule may not be fully applicable to all situations. The Right of Way Branch Manager shall determine when waivers from portions of this Rule are justified. Guidelines for determining if a waiver is justified shall include:

- (1) A determination of whether an emergency situation exists that affects the health and safety of the traveling public; and
  - (2) A determination of the availability of pre-qualified firms willing to perform specified work according to the Department's schedule.
- (b) The following are incorporated by reference including any subsequent amendments or editions:
- (1) General Statute 136-28.1(f) and General Statute 130A-444 thru General Statute 130A-451.
  - (2) 23 CFR 710-720, FHWA right of way regulations which contain some contracting requirements.
  - (3) 49 CFR 18.36, USDOT contracting regulations.

These documents are available for public inspection in the office of the Right of Way Branch. Copies may be obtained from the Right of Way Consultant Coordinator at a cost of five dollars (\$5.00) for each document.

(c) Definitions. The following definitions are for the purpose of clarifying and describing words and terms used in this Section:

- (1) Right of Way Consultant Coordinator - The individual who is assigned the responsibility of initiating, negotiating, and administering a contract for professional or specialized services.
  - (2) Cost per Unit of Work - A method of compensation based on an agreed cost per unit of work including actual costs, overhead, payroll additives and operating margin.
  - (3) Cost Plus Fixed Fee - A price based on the actual allowable cost, including overhead and payroll additives, incurred by the firm performing the work plus a pre-established fixed amount for operating margin.
  - (4) Cost Proposal - A submittal specifying the amount of work anticipated and compensation requested for the performance of the specific work or services as defined by the Department.
  - (5) Firm - Any private agency, firm, organization, business or individual offering qualified right of way acquisition services.
  - (6) Lump Sum - A fixed price, including cost, overhead, payroll additives and operating margin for the performance of specific work or services.
  - (7) Payroll Additive - Employer paid fringe benefits including employer's portion of F.I.C.A., comprehensive health insurance, group life insurance, unemployment contributions to the State, vacation, sick leave, holidays, workers' compensation and other such benefits.
  - (8) Proposal - An offer by a firm to perform specific work or services for the Department at specified rates of compensation.
  - (9) Scope of Work - All services, actions and physical work required by the Department to achieve the purpose and objectives defined in the contract. Such services may include the furnishing of all required labor, equipment, supplies and materials except as specifically stated.
  - (10) Contract Amendment - A written supplement to the contract which modifies the terms of an existing contract.
  - (11) Termination Clause - A contract provision which allows the Department to terminate, at its discretion, the performance of work, in whole or in part, and to make final payment in accordance with the terms of the contract.
  - (12) Right of Way Consultant Selection Committee - The Committee shall consist of the Branch Manager, Assistant Way Branch Manager, Unit Heads, and the Right of Way Consultant Coordinator or their designated representatives and shall be chaired by the Branch Right of Way Manager. When Federal funds will be used as compensation for services to be solicited, a representative of the Federal Highway Administration shall sit with the Committee but shall not be a voting member.
- (d) Application. This Rule shall apply to all contracts for right of way acquisition services which cost more than ten thousand dollars (\$10,000.00) and are obtained by the Department of Transportation pursuant to G.S. 136-28(f).

(e) Pre-qualification of firms. The Department shall advertise for firms interested in performing right of way acquisition services for the North Carolina Department of Transportation when necessitated by its projected workload. The advertisement shall be published in the North Carolina Purchase Directory, a bi-monthly publication of the N.C. Department of Administration. The advertisement shall indicate that interested firms must respond by letter to the Department indicating their interest within two weeks of the date of the advertisement. The response shall include the Federal Government's Government Accounting Office Forms 254 and 255, and copies of the firms latest brochures. Additional firms may be considered for pre-qualification at any time that the Department recognizes a need based on current projected workload for additional pre-qualified firms. Evaluation of the firms expressing interest shall be based on the following considerations:

- (1) Experience, education, reputation, and required certifications of staff in the fields of expertise required by the contract including negotiations, appraisals, and relocation assistance;
- (2) Number of staff available to perform the services required by the contract including negotiations, appraisals, and relocation assistance;
- (3) Financial ability to undertake the proposed work;
- (4) The firm's accounting system including ability to identify costs chargeable to the project;
- (5) Past performance by the firm on previous Right of Way acquisition contracts including meeting the time schedule for the work;
- (6) Equipment necessary to perform the required services.

A number of firms sufficient to perform the anticipated workload that meet the qualifications in Paragraphs (e)(1) through (e)(6) of this Rule shall be designated as pre-qualified to perform right of way acquisition services for the North Carolina Department of Transportation.

(f) Register of pre-qualified firms. The Right of Way Consultant Coordinator shall maintain a "Register of Pre-Qualified Firms" from whom specific project proposals may be solicited to perform right of way acquisition services for the North Carolina Department of Transportation - Right of Way Branch.

(g) Request for approval to solicit specific project proposals. The Right of Way Consultant Selection Committee through the Manager of Right of Way shall determine when the need for right of way acquisition services exists. Upon determining that a need exists, the Committee shall request approval from the Branch Way Manager to solicit proposals for the work.

The request shall be in writing and shall include the type of work and specific justification for the work being performed by a consultant firm such as:

- (1) non-availability of manpower,
- (2) lack of expertise, or
- (3) other reasons.

(h) Solicitations of specific project proposals. Specific Project Proposals shall be solicited from all Pre-Qualified Firms. Solicitations shall be by direct mailing of plans and Specific Project Proposal.

The Right of Way Consultant Coordinator, upon the approval of the Manager of Right of Way, shall prepare the requests for proposals. The request shall contain plans and information describing the location of the project, types and scope of work required, and the time schedule for accomplishing the work.

The solicitation for a Specific Project Proposal shall require that all firms attend a Scoping Meeting on a specified date in order to qualify to submit a Specific Project Proposal for consideration. Any firm that does not wish to submit a Specific Project Proposal on a particular project shall advise, in writing, the Manager of Right of Way of their decision not to submit a Specific Project Proposal for that project.

(i) Selection of firm for specific project contract. The Right of Way Consultant Selection Committee shall review all responses received to the request for proposals and shall select three firms from those indicating interest (except when there are fewer than three responses). When several projects are under consideration at the same time, a firm shall be selected for each project and two alternates may be selected from the entire group, at the discretion of the Selection Committee. These firms shall be listed in descending order of preference based on the Selection Committee's review and analysis of all responses. The Committee may elect to interview all or part of the firms responding to the request for proposal prior to establishing the order of preference. The Selection Committee's file shall be documented as to the reasons for the selection of a firm.

In the evaluation of the firms submitting Specific Project Proposals, the following factors shall be considered:

- (1) The monetary amount of the competitive proposal;
- (2) The firm personnel who are currently available to perform right of way acquisition services on the specific project and their qualifications; and
- (3) The ability of the firm to complete the work according to the Department's schedule.

Any firm selected to perform Right of Way Services for the North Carolina Department of Transportation shall be required to establish an office at the location of the project. This office shall be the location for maintaining all project records open for review by appropriate Department personnel.

After the authorization to proceed to negotiations is given by the Branch Way Manager, the Right of Way Consultant Coordinator shall notify the firm chosen by the Selection Committee.

(j) Negotiation of specific project contract. Prior to receiving a specific project proposal, the Right of Way Consultant Coordinator shall prepare an estimate of the cost of performing the work in-house. This estimate shall be used in evaluating the acceptability of the selected firm's cost proposal.

If considered necessary by the Right of Way Consultant Coordinator a meeting with the selected firm may be scheduled to discuss the scope of the proposed work. The discussions will vary depending upon the firm's familiarity with the Department's methods, policies, standards, etc. For firms unfamiliar with the Department's requirements, the discussions shall include:

- (1) Policies used by the Department for the type and scope of work involved;
- (2) A copy of a contract in draft form;
- (3) Methods of payment;
- (4) Procedures for invoicing;
- (5) Standard forms to be used;
- (6) Fiscal requirements;
- (7) Items and services to be provided by the Department.

A representative of the firm shall keep minutes of the meeting, have them typed and submit a copy to the Right of Way Consultant Coordinator. The minutes shall be reviewed for completeness, accuracy and confirmation of mutual understanding of the scope of work. The minutes shall be approved by the signature of the Right of Way Consultant Coordinator and an approved copy shall be returned to the firm.

The firm's competitive cost proposal shall be supported by a breakdown of the manhours required to perform each of the services contained in the contract and the fixed billable rate for each of the classifications of personnel to be utilized. The fixed fee must be specifically broken out on the firm's specific project cost proposal. The firm's cost proposal must also include a breakdown of all non-salary direct costs and any sub-contract or fee services.

Upon receipt of the selected firm's cost proposal, a review shall be made. The review shall include a comparison with the in-house estimate and is intended to determine both the reasonableness of the proposal and areas of substantial differences which may require further discussion and negotiation. When further negotiations are required, they shall be the responsibility of the Right of Way Consultant Coordinator.

The final negotiations shall satisfactorily conclude all remaining points of difference and shall consider any comments submitted by the External Audit Unit. The Right of Way Consultant Coordinator with the concurrence of the Manager of Right of Way shall approve the final fee.

If an acceptable contract cannot be negotiated, negotiations shall be terminated, the firm shall be notified in writing and the next listed firm shall be contacted to initiate negotiations for the work.

(k) Board of Transportation approval and execution of contract. After final negotiations are completed, the firm shall execute a minimum of two contract originals and submit them to the Consultant Coordinator.

The Consultant Coordinator shall submit the contract to the Chief Engineer who may consult with the Advisory Budget Commission pursuant to G.S. 136-28.1(f). The Manager of Right of Way shall submit the proposed contract to the Board of Transportation for approval. After the Board of Transportation approves the contract, the Manager of Right of Way shall execute and return the contract to the Right of Way Consultant Coordinator.

The Right of Way Consultant Coordinator shall transmit one original contract to the contracting firm and shall retain one in the project file. The Consultant Coordinator shall provide each of the following with a copy of the contract: the Manager of DOT Program and Policy Branch, DOT Fiscal Section, and Federal Highway Administration when federal-aid funds are involved.

(l) Sub-contracting. A contracting firm may sublet portions of the work proposed in the contract only upon approval of the Right of Way Consultant Coordinator.

The responsibility for procuring a subcontractor and assuring the acceptable performance of the work lies with the prime contractor. Also, the prime contractor shall submit the proper supporting data to the Contract Administrator for all work that is proposed to be sublet.

(m) Methods of compensation:

- (1) Lump Sum - This method of compensation is suitable for contracts where the amount and character of required work or services can be defined and understood by both the Department and the contracting firm.

- (2) Cost Plus Fixed Fee - This method of compensation is suitable for contracts where the general magnitude of work is known but the scope of work or period of performance cannot be defined and the Department needs more flexibility in expediting the work without excessive amendments to the contract.
  - (3) Cost Per Unit of Work - This method of compensation is suitable for contracts where the magnitude of work is uncertain but the character of work is known and a cost of the work per unit can be determined accurately.
  - (4) Cost Plus a Percentage of Cost - This method of compensation shall not be used.
- (n) Administration of contract. The administration of the contract shall be the responsibility of the Right of Way Consultant Coordinator. This shall include the review of invoices and recommendation for payment to the Fiscal Section.
- (o) Contract Amendments. Each contract shall contain procedures for contract modifications and define what changes can only be made by means of a contract amendment. Any change in the amount of compensation must be accomplished by contract amendment. For contracts which use federal funds as compensation for services, the contract amendment must be approved by the Federal Highway Administration.
- (p) Monitoring of work. The responsibility for monitoring the work, the schedule and performing reviews at intermediate stages of the work shall rest with the Right of Way Consultant Coordinator.
- (q) Final payment. When it is determined that the work is complete, the final invoice shall be approved by the Right of Way Consultant Coordinator and forwarded to the Fiscal Section with a recommendation for payment. When the contract is terminated by the Department, the final payment shall be for that portion of work performed.
- (r) Termination of contracts. All contracts shall include a provision for the termination of the contract by the Department. Such termination by the Department shall be in writing and shall be effective upon receipt by the contracting firm.

*History Note: Authority G.S. 136-28.1(f);  
Eff. November 1, 1991;  
Amended Eff. December 1, 2012; August 1, 1998; October 1, 1993; November 2, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. September 6, 2016.*