

# Answers from ODOT to questions raised during “Understanding QBS” workshop held on October 19, 2004

## LOCAL PROGRAM Q&A

1. What is the process for responding to a local agency RFP that requests cost when QBS should apply? Who contacts the local agency to ensure the provisions of the RFP are in accordance with QBS?  
Federal Statutes, Oregon Revised Statutes, and Oregon Administrative Rules mandate the use and selection of QBS for the Architectural and Engineering consultants. Under the current Local Agency Agreements to Agree (ATA's), the ODOT Region liaisons provide the Point of Contact (POC) to the Local Agencies to ensure the provisions of the RFP are in accordance with QBS. The selection documents and instructions are posted on the ODOT Local Government website.
2. What training/outreach has ODOT done to inform local agencies of QBS?  
After evaluation and selection of the Primary Consultants for the new Local Agency ATAs, OPO provided training to all 5 ODOT Regions regarding QBS and the Two-Tier process. Training consisted of review and selection procedures based on Options A, B, and C of the Two-Tier process.
3. How are local agencies being given this information? Local agencies seem to be a focus ~ how big is the issue?  
This information is available to Local Agencies through the Local Government Section's website and was communicated to them during the solicitation and award process. The Local Agency program was the first to implement the use of the Two-Tier selection process with the State Legislature passing and implementing HB3804 and their current program is over \$300 million.
4. What training does ODOT provide ODOT/local staff that reviews/scores proposals.  
OPO provides guidance to ODOT customers who in turn provide an advisory role to Local Agencies for review and scoring of proposals.
5. How come locals do not follow QBS?  
If Local Agencies use their own allotted funds for Transportation-related projects, the Local Agency is not required to follow the Brooks Bill QBS process. However, if Federal funding is used, then the Brooks Bill applies and if ORS 279.047(9) criteria are met, then the state QBS process applies to local agencies.

## ROLES AND RESPONSIBILITIES Q&A

6. Given the reorganization and for regions to shoulder the responsibility to deliver their projects, has there been discussion of providing contracting staff to regions and allowing regions control over their RFPs, contracts, and ATAs?  
Yes, discussions are occurring about OPO staff being co-located with their customers, including the Regions. However, the staff would continue to report to Central Procurement to assure consistent legal sufficiency and risk analysis review and approval policy and procedures are applied.
7. In an emergency, the Brooks Bill allows for non-competitive negotiation. Who determines when an emergency situation exists that would allow for non-competitive negotiation?  
The level of approval for declaring an emergency varies depending on the emergency. However, it is possible for Maintenance managers to declare an emergency in a Region to enable procurement of emergency services.

8. Who decides composition of negotiation team?  
Composition of the Negotiation Team is determined by “Best Practice” and is included in the draft Negotiation Policy currently under review by ODOT Management. The recommendation is that representatives from the Business Line, the Procurement Office and Financial Services, at a minimum, be included on each Team.
9. Are there reasonable limits (or should there be limits) on the amount of change order cost (and/or time) that can be added to an existing contract before it is required to conduct another competition for the additional work?  
The Request for Proposal must establish time limits for the contract, and if extensions are allowed, then what those time extensions can be. Likewise, the RFP must establish monetary limits, i.e., amounts not to be exceeded; including potential amounts not to be exceeded for any extensions. As for change orders, amendments and modifications, the limits are connected to the scope of work of the original procurement documents and the contract. Material or substantial modifications in scope, time and money are not allowed except under limited circumstances. E.g., you cannot start out with a contract to design a bridge and modify it to design an office building. However, if in the design of the bridge it is discovered that because of geological information discovered during the design, it has to be a different type of bridge than originally scoped in the RFP or identified in the contract, then a change order/amendment may be possible, to address that change.

#### **RFP/WOC PROCESSES Q&A**

10. What are the owner’s options if the A&E firm selected changes personnel (i.e. they tell you one thing in the procurement process but give you something else)? Renegotiation of the cost? Insist on the original team? Terminate the contract?  
This depends in part on when this change of personnel occurs. If made apparent during award negotiations that their score was based on different personnel, it may or may not result in terminating negotiations. If judged not the fault of Contractor, negotiations may continue, depending on how critical the original staff was to the project. If judged an intentional misrepresentation, or switch, of personnel, ODOT may terminate the negotiations. If the change occurs during the contract performance period, the Agency reserves right to approve key replacement personnel.
11. Can a second or third firm protest the award? (WOC assignment.)  
Assignment of a WOC may be questioned but the rules do not provide for formal protests.
12. For multi-year consultant contracts, how does ODOT address salary increases for consultant staff?  
If the salary increase is within the maximum amount of the approved billing rates, the firm may increase the salary and invoice for up to the maximum amount. If the salary increase would result in a billing rate greater than the contract maximum billing rate, a firm must submit a request to ODOT to consider rate increases. A protocol and related documents have been implemented for firms to request increases, and for ODOT Contract Administrators/Project Managers to assess the requests.
13. Since different work orders have different risk factors, why not different profit rates? For ATA’s that became effective after October 1, 2003, profit is negotiated for each WOC that results from the ATA’s.

14. Current ODOT contracts do not provide a yearly adjustment for overhead rates, why? If a consultant lowers their overhead rate, the department does not benefit and the consultant makes a much larger profit than negotiated?

A protocol and related documents have been implemented for the firms to use to request increases and for Administrators/Project Managers to use to assess the requests. ODOT does have the right to initiate rate negotiations at any time, such as when the consultant lowers their overhead rates.

15. Is ODOT considering electronic billing and electronic payment for consultants?

ODOT is looking into allowing electronic billing and payment, however, the capability does not yet exist and would require a substantial economic investment in software.

16. You mentioned 140 days to develop an RFP; what is the typical timeframe you establish for a decision or selection? How long do firms have to respond?

The normal base timeline for RFP development through to contract signing is about 140 days. But lengthy Statement of Work development, increased ad time (which is usually 28 to 42 days), unpredictable factors such as interviews, occasional prolonged negotiations, slow response to requests for insurance, or large numbers of SOPs add measurably to this timeline. Other steps, such as DOJ or DAS review, may add up to 14 to 21 days for each agencies review. FHWA may also be involved and by statute are allowed 21 days to review and comment.

Generally RFPs contain a “questions” timeline, with a cutoff date for such general RFP related questions set from seven to ten days before SOP due date. Two protest dates are included. The first allows Proposers to protest or challenge technical matters, terms or conditions, and these are accepted up to 7-10 days before RFP closure (specified in each RFP). The second protest period starts with the Notice of Intent to Award letter. RFPs generally allow Proposers seven days to submit their challenges to Agency’s award decision.

17. Define professional services vs trade services.

"Professional or Personal Services" are specialized skills, knowledge and resources in the application of highly technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment. Examples of professional services include architectural and engineering services, management and system consultation, research, etc.

“Trade Services” any contract that provides a commodity or service that can be obtained without special attention to highly specialized needs (highly specialized expertise), e.g. flaggers, carpenter. Service generally does not include design or similar creative efforts.

18. Please elaborate on 279.057(3)(c): how can price and cost data from previous projects be considered in a firm? Specific hours and costs, or general management of initial budget and any changes? Second tier only?

Historical “total project cost related” information may be considered in evaluating a Statement of Proposal when it is clearly defined as a scoring criterion and is focused on the control of costs and management of previous projects, changes and resources.

19. Please explain the emphasis on errors and omissions liability?

Required coverage for errors and omissions (E&O) has always been present, and requirements have changed little. However, recent changes in the size of contracts and their associated risks, (e.g. OTIA III – responsibility for 300 plus bridges) has resulted in demands for increased coverage. The “traditional” ODOT projects still require the \$1 million in Professional Liability or equivalent coverage. Very small, low risk projects occasionally result in even less E&O coverage.

20. Level of effort information in RFP's: can number of hours per task be requested? How specific can the questions get?

If the information requested pertains to previous jobs, it could be a QBS criterion. If the requested information pertains to the upcoming project that is the subject of the RFP, that information is probably not within the QBS method, since this information could be used to determine price. However, there may be ways to request and require a level of effort response without triggering QBS issues. Number of hours per task is likely not a valid QBS criteria. Questions which are general in nature concerning effort, such as type or level of personnel that will be used, but which do not provide information sufficient to allow a cost comparison among respondents, would likely be allowable.

## TEMPLATES Q&A

21. In ODOT's implementation of QBS, how will SOW templates improve the process?

In our experience to date, the templates are tweaked by each processor and processing a work order takes as long as ever. Your experience to date may not have been with true DOJ approved, Menu of Services (MOS) / Statement of Work (SOW) Templates created by ODOT's Procurement Office. Processing of Templated SOWs has been substantially simplified – significantly reducing the need to edit or rewrite the submitted SOW for clarity, and for identifying deliverables and due dates. Essentially reducing the process at OPO to matching the task or subtask to the ATA, and verifying that a due date is set. Substantial savings in processing time has been realized with the use of the Templates currently in place.

22. Future use of templates for RFPs, ATAs, and SOWs?

The use of MOS Templates will continue and the development of additional discipline specific templates will accelerate as we rapidly approach a March 2005 completion target.

23. For design contracts, what we want is an engineering solution to the problem, as described in the prospectus, which is expressed in plans and specifications, which conform to ODOT standards. Half our consultants used to work for ODOT, and understand perfectly well what we need. Why, then, is writing a statement of work so complicated? Can we just use a template? Regardless of whether the consultant previously worked for ODOT or not, a personal services contract by definition requires specialized skills, knowledge and resources in the application of highly technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment. Therefore the consultant is expected to know "how" to perform the tasks. Unfortunately many SOWs received by OPO for processing contain an excess of "how" to do things and lack clarity on what is to be the result of the activity, inadequate focus on identifying the deliverables and specifying when they are due, and absent or vague references to standards or means to know when the Agency has received what has been requested. Thus the recognized need for Templates.

Every Oregon Personal/Professional Service contract must contain all normal contract elements including the following:

- The contract is in written form;
  - The contract contains all the essential elements of a legally binding contract, such as a description of any required consideration (money, performance, or forbearance); and
  - The statement of work or comparable provisions and business or commercial terms must be sufficiently clear and definite to be enforceable. (OAR 137-045-0015(4) (a), (c) & (g))
- OPO is developing Templates to enhance compliance with Oregon statutes, administrative rules and Agency policies, and to reduce contract processing time.

24. Is ODOT Procurement Office (OPO) developing some templates for PE & CE SOW? Status? Many of the disciplines yet to have templates developed for them are now assembled in WOC's through ADU and become interactive in the Preliminary Engineering (PE) development stage. It is hoped that the Template approach can be blended into the ADU effort to standardize the PE development process. CE services have already been developed in a Template format.

## FEDERAL REQUIREMENTS

25. When hiring a prime, at what time do you worry about DBEs? Is this something of a "quota" that needs to be addressed or is it merely a "goal" to shoot for? What about DBEs off of work orders for Agreements to Agree?  
Compliance with the federal requirements concerning Disadvantaged Business Enterprises will be a condition of responsiveness for any proposal where federal funds are involved. A DBE goal will be established, and the proposal must identify DBE subConsultants, areas of work and ultimately (before contract execution) amounts committed to such subConsultants. Proposers are required to meet the goal, it is not a quota, and if the goal is not reached, then the proposers must show that they have made good faith efforts to meet the goal. Failure to meet the goal or to show adequate good faith efforts at time of proposing could result in proposal rejection. When the Agreement is an ATA, the goal will not be established until the work order contract (WOC) stage. However, the WOC must reflect the commitment to meet the goal established for that wWOC, the DBE subConsultants and the amount of commitment. DBE requirements will be included in the procurement documents.
26. Typical project has federal and state funds. Do the stricter of the two regulations apply? Normally, the more strict of the two apply, however, there are some circumstances where the federal requirement will preempt the state requirement. And in the case of a direct conflict between two regulations, and federal funds are involved, the federal requirements will control.

## QBS Q&A

27. On large projects with multiple disciplines, how can you be sure that QBS is getting you what you want for very small piece of the design work?  
This is accomplished through technical scrutiny by the business (the new Technical Center staff) and the procurement office.
28. How will contracts ensure qualifications for technical areas of expertise when executing "big daddy" statewide contracts. As a follow-up, given the fact that different regions will likely have different sets of criteria, how will these contracts equally represent the needs of individual regions (i.e. experience in Portland metro area, local jurisdictions, coastal issues vs Eastern Oregon issues).  
The same process will be used as for question 27.
29. In multi-consultant ATA settings, how much QBS needs to be included in work order assignments? Can cost and time be used at this step? Must cost be excluded? How do we manage workload distribution?  
QBS will be followed in all new ATA's and therefore cost can not be used as a basis for selection. Workload management will be completed by the firms asked to do ODOT work.
30. Under QBS, past performance is very important, so how does the QBS process ever allow for the selection of a new firm?  
Firms are encouraged to participate as an emerging small business or use individual firm members experience to qualify.

31. How does QBS impact a new emerging firm (i.e. how can procurement make the evaluation less cold, numbers oriented).  
ODOT is working closely with emerging small business to assist in understanding and participating in the procurement process.
32. Twice asked how to use QBS to select Consultants under existing ATAs, but answers missed the point. Current contract specify that ODOT will use a rotational basis to select the contractor so using QBS would violate the existing contracts. How do we use QBS for selection without violating existing contract terms?  
All current ATA's do allow ODOT to make selections based on specific qualifications and/or conditions.  
Currently ODOT uses a rotational method for consultant uses, how does this process ensure the "most qualified" firm is used? What is FHWA's view point on this issue?  
New ODOT solicitations and project assignments will contain a process whereby qualifications will be the basis of selection and costs will be incorporated in negotiations for every WOC. As appropriate, current ATA's will be reviewed to determine if action will be taken regarding WOC and project assignment.
33. In ADU, under our initial ATA 10-firm contracts, we use a rotation for assigning projects (i.e. not a qualification evaluation for each assignment). Is this a conflict with what Roger McClellan said? Should this procedure be changed in continued work under these contracts?  
It is the policy of the Oregon Department of Transportation (ODOT) to select the most qualified consultant firm(s) for any given solicitation, based on demonstrated competence and qualifications to perform the services required. During the entire solicitation and selection phase of a request for proposals (RFP) that result in an Agreement to Agree (ATA), ODOT reviews and evaluates qualifications of the consultant firms / teams, including sub-Consultants, to ensure that projects assigned later by work order contract (WOC) are supported by individuals with the credentials and expertise in the specific discipline required.
34. Who reviews the process that the agency uses to opt out of the QBS process?  
ODOT Management, DOJ and FHWA must review.

## **NEGOTIATIONS Q&A**

35. Must the owner start negotiations with the "highest ranked" firm? Or can they start with anyone of the top ranked firms?  
For an initial solicitation, negotiations must begin with the highest ranked firm or firms (as described in the solicitation). In an ATA or pre-qualification situation where several firms have been qualified, the agency must select the firm with whom they will begin negotiations based on the criteria defined in the original solicitation.
36. If negotiations fail with one firm and the owner moves to the next firm, can the owner ever go back and select the first firm? The agency may not go back to the first firm once negotiations have begun with another firm.
37. How many times has procurement gone to the second firm during the negotiation process? While it does not happen often, in past solicitations the agency and its top ranked firms have failed to reach agreement during negotiations, and has begun negotiations with the next firms in the rankings.
38. Once we get through the ranking process, how does a public owner know they are negotiating a fair and reasonable cost? Several factors go into determining whether a cost is fair and reasonable. At the ATA or pre-qualification level, such factors as comparisons of position and

overhead rates, a firm's compliance with federal accounting regulations, and other factors may be used to make the determination. At the project level, such factors as similar project costs, risk, unique project features, hours and positions required for tasks, should be used to make the determination.

39. What would make a negotiation process break down? Any aspect of disagreement in a negotiation may cause a breakdown. Disagreement on project cost, terms and conditions, project delivery requirements, or any other factor deemed important by the agency may be cause to terminate negotiations.

## QUESTIONS FOR FHWA

40. Is there a conflict between the Governor's goal of "putting Oregonians to work" and the QBS requirements? In other words, can ODOT give a preference to "in state" firms in the QBS process?

There is a potential conflict because ODOT, when using Federal funding, cannot give preference to Oregon firms.

The intent of the Brooks Act is to ensure that top qualified – not the cheapest -firms obtain contracts. Therefore, the use of in-state preference as a criterion cannot be used. However, a small locality preference criterion of no more that 10 percent, may be used. This criterion cannot be based on political boundaries and should be used on a project basis for projects where a need has been established. 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 considered to have meet the locality criteria.

41. At the federal level, is there any faction challenging the Brooks Bill?  
FHWA is not aware of any significant challenges to the Brooks Bill.
42. What guideline should consultants follow to get project information in the RFQ stage?  
Both ODOT and the consultants have responsibilities in this area: (1) questions and answers should be in writing to the individual listed in the RFQ; (2) changes, including clarifications and explanations should be shared with all potential proposers.
43. Why can't project locale (proximity to) be a way to give Oregon firms a leg up? Brooks Bill allows it, why not Oregon?  
A "familiar with project area" or similar criterion can be used so long as it does not give preference to firms only if located near the project. For example, a northern California firm might be familiar with the project area in southern Oregon as a result of previous work in the area. They could score as high for this criterion as a southern Oregon firm.
44. Is OBDP required to use QBS for selection of their sub-consultants, and also those sub-consultants' sub-consultants, etc.  
FHWA considers OBDP to be a program management consultant acting on behalf of ODOT. QBS procedures must be followed in their selection of all subsequent "prime" consultants. There is no QBS requirement when these consultants choose sub-consultants.

## QUESTIONS FOR DOJ

45. How do you prevent a conflict of interest in some projects where a consultant has worked on some parts of the project already?  
Requires a case-by-case response. Consultants provide conflict of interest disclosures and then propose mitigation measures to reduce or eliminate the conflict. These mitigation measures are then incorporated into the contract, and the contract also provides for a continued obligation of the Consultant to disclose conflicts. In some cases, the conflict cannot be mitigated and will require exclusion of that consultant from participation.
46. Does QBS extend to design-build?  
No, provided the value of construction services predominates in the design-build contract (when compared to the design services to be provided under the contract), as is usually the case.
47. Is the driving force behind 279A,B&C simply clarification, or was there something else with it?  
Clarification and simplification.
48. Can we use QBS for construction contracts? (Please.) Yes, with a competitive bidding exemption. Note, however, that such an exemption will require findings (that the exemption is unlikely to encourage favoritism or substantially diminish competition, and that the exemption will result in substantial cost savings), and will require a public hearing.
49. What are the big issues/challenges seen by Dale Hormann and Blake Underwood regarding QBS? Explaining how not using price in selection criteria gives the agency the most cost-effective project. Making sure new and emerging firms, with little or no history and work experience can obtain contracts and work. Keeping the ATA and WOC process simple and easy to use.
50. In Oregon and ODOT, any legal challenges to QBS so far? None of which we are aware.
51. Once ODOT has established a ranked list of qualified firms, how does a local agency choose a firm for a specific project? The Tier II selection process requires a QBS selection process. The local agency second-tier selection from the short list established by ODOT could be a mini-RFP or even review of the previously provided Statements of Qualification for local agency ranking. ODOT's ranking might or might not be considered, or might only be considered for short listing. If the local agency wants to establish a selection method outside the scope of the two-tiered RFP, the local agency retains the ability to conduct its own procurement and enter into a contract directly with the consultant.
52. Local agencies are currently asking for rates and forms in proposals for OTIA III bridge projects (e.g. Clackamas County). Is this consistent with state and federal QBS laws (35% + \$400K thresholds will be exceeded)? OTIA III local bridge projects will most likely not use federal funds, so the Brooks Act won't apply. If a consultant feels QBS applies to a local consultant contract, because thresholds have been met or exceeded, the consultant should bring the issue to the local agency's attention during the RFP review process.
53. Is requiring level of effort (hours) in the RFP considered QBS? It depends on the "level of effort" information that is requested. If the information requested pertains to previous jobs, it could be a QBS criterion. If the requested information pertains to the upcoming project that is the subject of the RFP, that information is probably not within the QBS method, since this information could be used to determine cost and price. However, there may be ways to request and require a level of effort response without triggering QBS issues.

54. Does ODOT have a responsibility to enforce QBS with local agencies on state funded projects (e.g. OTIA III bridges)? **No.**
55. How does the QBS projects/Brooks Bill allow for alternative indirect labor cost evaluations and caps outside of the FAR audits? **If we understand the question properly, these topics seem to be somewhat un-related . The Oregon QBS statute and the Brooks Act deal with selection process. As we understand the use of alternative labor cost evaluations and caps, those are not issues that are taken into consideration in the initial selection.**