§ Sec. 172.1 Purpose and applicability.

This part prescribes policies and procedures for the administration of engineering and design related service contracts under 23 U.S.C. 112 as supplemented by the common grant rule, 49 CFR part 18. It is not the intent of this part to release the grantee from the requirements of the common grant rule. The policies and procedures involve federally funded contracts for engineering and design related services for projects subject to the provisions of 23 U.S.C. 112(a) and are issued to ensure that a qualified consultant is obtained through an equitable selection process, that prescribed work is properly accomplished in a timely manner, and at fair and reasonable cost. Recipients of Federal funds shall ensure that their sub-recipients comply with this part.

§ Sec. 172.3 Definitions.

As used in this part:

Audit means a review to test the contractor's compliance with the requirements of the cost principles contained in 48 CFR part 31.

Cognizant agency means any Federal or State agency that has conducted and issued an audit report of the consultant's indirect cost rate that has been developed in accordance with the requirements of the cost principles contained in 48 CFR part 31.

Competitive negotiation means any form of negotiation that utilizes the following:

(1) Qualifications-based procedures complying with title IX of the Federal Property and Administrative Services Act of 1949 (Public Law 92-582, 86 Stat. 1278 (1972));

(2) Equivalent State qualifications-based procedures; or

(3) A formal procedure permitted by State statute that was enacted into State law prior to the enactment of Public Law 105-178 (TEA-21) on June 9, 1998.

Consultant means the individual or firm providing engineering and design related services as a party to the contract.

Contracting agencies means State Departments of Transportation (State DOTs) or local governmental agencies that are responsible for the procurement of engineering and design related services.

Engineering and design related services means program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services with respect to a construction project subject to 23 U.S.C. 112(a).

One-year applicable accounting period means the annual accounting period for which financial statements are regularly prepared for the consultant.
§ Sec. 172.5 Methods of procurement.

(a) Procurement. The procurement of Federal-aid highway contracts for engineering and design related services shall be evaluated and ranked by the contracting agency using one of the following procedures:

(1) Competitive negotiation. Contracting agencies shall use competitive negotiation for the procurement of engineering and design related services when Federal-aid highway funds are involved in the contract. These contracts shall use qualifications-based selection procedures in the same manner as a contract for architectural and engineering services is negotiated under title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541-544) or equivalent State qualifications-based requirements. The proposal solicitation (project, task, or service) process shall be by public announcement, advertisement, or any other method that assures qualified in-State and out-of-State consultants are given a fair opportunity to be considered for award of the contract. Price shall not be used as a factor in the analysis and selection phase. Alternatively, a formal procedure adopted by State Statute enacted into law prior to June 9, 1998 is also permitted under paragraph (a)(4) of this section.

(2) Small purchases. Small purchase procedures are those relatively simple and informal procurement methods where an adequate number of qualified sources are reviewed and the total contract costs do not exceed the simplified acquisition threshold fixed in 41 U.S.C. 403(11). Contract requirements should not be broken down into smaller components merely to permit the use of small purchase requirements. States and sub-recipients of States may use the State’s small purchase procedures for the procurement of engineering and design related services provided the total contract costs do not exceed the simplified acquisition threshold fixed in 41 U.S.C. 403(11).

(3) Noncompetitive negotiation. Noncompetitive negotiation may be used to procure engineering and design related services on Federal-aid participating contracts when it is not feasible to award the contract using competitive negotiation, equivalent State qualifications-based procedures, or small purchase procedures. Contracting agencies shall submit justification and receive approval from the FHWA before using this form of contracting. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

(i) The service is available only from a single source;

(ii) There is an emergency which will not permit the time necessary to conduct competitive negotiations; or

(iii) After solicitation of a number of sources, competition is determined to be inadequate.

(4) State statutory procedures. Contracting agencies may procure engineering and design related services using an alternate selection procedure established in State statute enacted into law before June 9, 1998.

(b) Disadvantaged Business Enterprise (DBE) program. The contracting agency shall give consideration to DBE consultants in the procurement of engineering and design related service contracts subject to 23 U.S.C. 112(b)(2) in accordance with 49 CFR part 26.

(c) Compensation. The cost plus a percentage of cost and percentage of construction cost methods of compensation shall not be used.
§ Sec. 172.7 Audits.

(a) Performance of audits. When State procedures call for audits of contracts or subcontracts for engineering design services, the audit shall be performed to test compliance with the requirements of the cost principles contained in 48 CFR Part 31. Other procedures may be used if permitted by State statutes that were enacted into law prior to June 9, 1998.

(b) Audits for indirect cost rate. Contracting agencies shall use the indirect cost rate established by a cognizant agency audit for the cost principles contained in 48 CFR Part 31 for the consultant, if such rates are not under dispute. A lower indirect cost rate may be used if submitted by the consultant firm, however the consultant’s offer of a lower indirect cost rate shall not be a condition of contract award. The contracting agencies shall apply these indirect cost rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment and the indirect cost rates shall not be limited by any administrative or de facto ceilings. The consultant’s indirect cost rates for its one-year applicable accounting period shall be applied to the contract, however once an indirect cost rate is established for a contract it may be extended beyond the one year applicable accounting period provided all concerned parties agree. Agreement to the extension of the one-year applicable period shall not be a condition of contract award. Other procedures may be used if permitted by State statutes that were enacted into law prior to June 9, 1998.

(c) Disputed audits. If the indirect cost rate(s) as established by the cognizant audit in paragraph (b) of this section are in dispute, the parties of any proposed new contract must negotiate a provisional indirect cost rate or perform an independent audit to establish a rate for the specific contract. Only the consultant and the parties involved in performing the indirect cost audit may dispute the established indirect cost rate. If an error is discovered in the established indirect cost rate, the rate may be disputed by any prospective user.

(d) Prenotification; confidentiality of data. The FHWA and recipients and sub-recipients of Federal-aid highway funds may share the audit information in complying with the State or sub-recipients' acceptance of a consultant's overhead rates pursuant to 23 U.S.C. 112 and this part provided that the consultant is given notice of each use and transfer. Audit information shall not be provided to other consultants or any other government agency not sharing the cost data, or to any firm or government agency for purposes other than complying with the State or sub-recipient's acceptance of a consultant's overhead rates pursuant to 23 U.S.C. 112 and this part without the written permission of the affected consultants. If prohibited by law, such cost and rate data shall not be disclosed under any circumstance, however should a release be required by law or court order, such release shall make note of the confidential nature of the data.
§ Sec. 172.9 Approvals.

(a) Written procedures. The contracting agency shall prepare written procedures for each method of procurement it proposes to utilize. These written procedures and all revisions shall be approved by the FHWA for recipients of federal funds. Recipients shall approve the written procedures and all revisions for their sub-recipients. These procedures shall, as appropriate to the particular method of procurement, cover the following steps:

1. In preparing a scope of work, evaluation factors and cost estimate for selecting a consultant;

2. In soliciting proposals from prospective consultants;

3. In the evaluation of proposals and the ranking/selection of a consultant;

4. In negotiation of the reimbursement to be paid to the selected consultant;

5. In monitoring the consultant’s work and in preparing a consultant’s performance evaluation when completed; and

6. In determining the extent to which the consultant, who is responsible for the professional quality, technical accuracy, and coordination of services, may be reasonably liable for costs resulting from errors or deficiencies in design furnished under its contract.

(b) Contracts. Contracts and contract settlements involving design services for projects that have not been delegated to the State under 23 U.S.C. 106(c), that do not fall under the small purchase procedures in Sec. 172.5(a)(2), shall be subject to the prior approval by FHWA, unless an alternate approval procedure has been approved by FHWA.

(c) Major projects. Any contract, revision of a contract or settlement of a contract for design services for a project that is expected to fall under 23 U.S.C. 106(h) shall be submitted to the FHWA for approval.

(d) Consultant services in management roles. When Federal-aid highway funds participate in the contract, the contracting agency shall receive approval from the FHWA before hiring a consultant to act in a management role for the contracting agency.
B.1 A&E Federal Regulations for Consultant Acquisition


- For federally funded projects, this bill removed any alternative procedures to what is commonly known as the Brooks Act for the procurement of architectural and engineering (A&E) consultant services.

• This bill also removed public agency caps on A&E firms’ overhead rates, codified the Brooks Act language, and placed a requirement on agencies to accept the audited overhead rate established by a firm’s cognizant agency.

The impacts to WSDOT regarding the acquisition of consultant services and the changes made necessary directly affected the WSDOT on-call A&E agreement process. As part of this process is the requirement, under most circumstances, to include a competitive selection process among the listed approved consultants on call list(s). See Appendix Y for the Second Tier Competition Process steps and requirements. Other areas of the Brooks Act may need further clarification in order to develop additional applicable procedures and business rules.

The 2005 federal regulations eliminated alternative or “in-kind” procedures for A&E contracting. The legal modification specifically declared the Brooks Act, as codified in 40 USC 1101–1104, to be the legal basis for consultant selection for A&E contracts when federal funds participate. This law separates professional services of an architectural and engineering nature from all other forms of contracting for goods and services at all levels of government. Refer to Appendix C for the full text of the Brooks Act.

The four sections of the Brooks Act that together define the legal process of government contracting for A&E services are as follows:

1. § 1101 covers the government’s policy related to contracts for architectural and engineering professional services.

2. § 1102 provides definitions and specifically qualifies the broad spectrum of services that constitute A&E.

3. § 1103 describes the legal requirements for A&E selection.

4. § 1104 describes the process of negotiations and award of a contract.

However, there are other federal regulations in addition to the Brooks Act that apply to state departments of transportation and their subrecipients that receive federal-aid highway funds. These include 49 CFR 18 (Common Grant Rule) and FAR Chapter 31. The regulations are as follows:

48 CFR 31, Cost factors for architecture-engineer services
49 CFR 18, Common Grant Rule
49 CFR 18.36, Issues regarding A&E consultant services.
23 USC 106, Project approval and oversight
23 USC 112, Letting of contracts
40 USC 1101–1104, Policy (Brooks Act)
23 CFR 172, Administration of engineering and design related service contracts
49 CFR 26, Participation by disadvantaged business enterprises in department of transportation financial assistance programs

B.1.1 Washington State Laws for A&E Consultant Acquisition

Chapter 39.80 RCW, Contracts for architectural and engineering services, quotes the Brooks Act language as the basis for A&E contracting in the state of Washington and goes on to provide the basis for department policy on A&E contracting. Therefore, whether federal funds are participating or not, the requirements of the Brooks Act are to be met. The only exceptions are when an emergency exists as covered in Chapter 600 or there is justification for sole source as covered in Chapter 430.

Washington State policy, declared by the Legislature in RCW 39.80.010, reiterates the declaration of public policy made by the federal government and codified in 40 USC 1101–1104 (commonly known as the Brooks Act) for all federally funded A&E projects.

In accordance with state and federal law, there are four rules regarding A&E consultant solicitations that apply to the Washington State Department of Transportation:
1. The department shall publicly announce requirements for A&E services.
2. The department shall negotiate contracts for A&E services.
3. Selection shall be based on demonstrated competence and qualifications.
4. The department shall negotiate fair and reasonable pricing.

As with the federal regulations related to A&E services, state law distinguishes architectural and engineering services from all other professional services contracting for separate treatment by its own RCW. This separate treatment is not only addressed as separate from Professional Services, but is also clearly separated from laws related to public works. For the full text of Chapter 39.80 RCW, see Appendix D.

WSDOT Travel Directive

www.wsdot.wa.gov/business/consulting
B.2 A&E Legal Requirements

This section provides further information regarding the state and federal requirements specific to A&E contracting and describes the basis for the A&E processes.

Without going into a broad discussion of processes, which are covered in separate chapters, this section covers:

• The legal basis for the majority of A&E contracting and the legal reasons why the CSO maintains a database of consultant information (see Chapter 400).
• The legal options for how the CSO institutes selection boards and the selection process through to contract award (see Chapter 410).
• The reason for the types of contracts that may be used (see Appendix I, Contract Types).

Following are the regulations that apply to A&E contracting:

**RCW 39.80.030** pertains to an agency’s requirement for A&E services and advance publication. It states that each agency shall publish in advance that agency’s requirement for A&E services. It goes on to say that the announcement shall state concisely the general scope and nature of the project or work for which the services are required and the address of a representative of the agency who can provide further details.

An agency may comply with this section by (1) publishing an announcement on each occasion when A&E services provided by a consultant are required by the agency, or by (2) announcing generally to the public its projected requirements for any category or type of A&E services.

**RCW 39.80.040** covers the procurement of architectural and engineering services, submission of statements of qualifications and performance data, and the state’s requirements for participation by minority and women-owned firms. This RCW states that in the procurement of architectural and engineering services, an agency is to encourage firms to submit statements of qualifications in their areas of expertise, together with past performance data each year. This information, kept on file over several years by the CSO, coupled with any additional information firms are required to submit in response to solicitations for specific projects, should be the basis for determining whether a firm gets an interview. The guidelines and procedures of the agency are to include a plan that ensures minority and women-owned firms are afforded the maximum practicable opportunity to compete for and obtain public contracts for services. The RCW also states that the level of participation by minority and women-owned firms should be consistent with their general availability within the professional communities involved.

**40 USC 1101** (the Brooks Act) states that the policy of the federal government is to publicly announce all requirements for architectural and engineering services.

Whenever federal funds are used for A&E services, the state is required to publicly announce its requirements for consultant services. State law also requires a public announcement of an agency’s consultant requirements. WSDOT will publicly announce its needs for consultant services whether federal funds are participating or not.
The appropriate state law in this case is **RCW 39.80.030**, which says that “Each agency shall publish in advance that agency’s requirement for professional [sic – A&E] services.” It should be noted that the wording of this RCW is specific and deliberate; the term “requirement” is singular, not plural. The emphasis is on the agency publishing its requirement for A&E services **each time** it has a requirement for A&E services.

**RCW 39.80.030** goes on to further emphasize this published announcement for each requirement “in advance (of the need)” by stating: “The announcement shall state concisely the general scope and nature of the project or work for which the services are required...” Here, there is a distinction between services being referred to as a project, which generally involves multiple A&E disciplines, and services referred to as work, which is generally a single category or discipline. The reason this is important is that for projects with multiple disciplines, potential proposals would most likely have teams, with several subconsultants being proposed. For defined work, the usual expectation is a single category with a single firm specializing in that discipline submitting a proposal.

Lawmakers were very specific regarding how an agency is to comply with **RCW 39.80.030**. Historically, lawmakers have left the compliance details to the Washington Administrative Code (WAC) or agency policy development and rule making. But in this case, they were very specific.

An agency may comply with **RCW 39.80.030** by:

1. “...an announcement on each occasion when professional [sic – A&E] services provided by a consultant are required...” Here, there is no distinction between project services, which are usually multidisciplined, or category-specific type work, which is usually of a single discipline. It is an announcement on each occasion, regardless of whether it is a multidisciplined project or a specific category or type of work; or

2. “...announcing generally to the public its projected requirements for any category or type of professional [sic – A&E] services.” In this second part, the reference to project (multidisciplined) is specifically omitted while reference to category or type of work (single discipline) is specifically called out. Also of note is the use of the plural term “requirements.” Here, there is anticipation that there may be several tasks within that category or type of work where the A&E services of consultants are required.

Therefore, there are two potential ways to comply with **RCW 39.80.030**:

- Either the agency can announce each instance where the A&E services of a consultant are necessary, in advance, and go through the full Brooks Act requirements of selection; or
- The agency can determine, in advance, the projected requirements for the various types or categories of services that will be needed and announce those requirements by category and go through the requirements of the Brooks Act for selection.

Nothing precludes the agency from complying with both.
23 CFR 172 requires that whatever procedures a state (or any of its subdivisions) uses to meet the requirements of the Brooks Act when acquiring consultant services must be in writing and approved by the appropriate federal agency: in this case, FHWA.1

B.2.1 Competitive Selection Based on Specific Work

In accordance with RCW 39.80.040, it is the intent of the state that all selections for A&E services be based on qualifications and past performance, to the highest degree possible. Both state law (RCW 39.80.040) and federal law (40 USC 1103(b)) provide that firms’ qualifications be gathered, maintained on file, and updated annually.

It might appear that WSDOT would be justified in writing noncommittal on-call agreements for category-specific requirements, with the anticipation that the state would provide a second tier of competition between those firms awarded contracts when needs arise. However, neither state law nor federal law provides any basis for the award of contracts without at least a minimum anticipation of work to be done under that contract.

In other words, there is no legal basis to support a process of awarding multiple, purely noncommittal agreements for a multitude of categories, let alone for potentially full projects, where large numbers of agreements are awarded without any guarantee of work to the top qualifying firm(s). There is no way to determine the best qualified firm from a group of potential prospects without evaluation of their past performances and current qualifications against the work for which services are required.

If unanticipated work should arise where the timing is too short for a normal selection process to occur, then the need falls under the definition of “emergency,” which is covered in Chapter 600. Under those circumstances, the requirements are for the state to make the selection as competitive as possible within the time constraints.

In following both state and federal regulations, the steps that take place in the selection process do not allow for a selection to be made and negotiations for cost to occur until after the best qualified firms have been able to enter into discussions with the selection board regarding the anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services. How these regulations apply to the “on-call” portion of indefinite-delivery contracts (IDCs) is shown in Appendix I, Contract Types.

RCW 39.80.040 relates all work, for the purposes of selection, to projects. In context, the definition of A&E states that one of the criteria for determining whether the work is A&E is whether the work is “related” to a project that leads to alteration of physical property.

Therefore, category-specific contracts need to be accomplished in relation to the projected or anticipated needs for category-specific services as “publicly announced” prior to the start of work.

1 In certain circumstances, WSDOT may be receiving funds from other federal agencies, such as the Federal Aviation Administration or the Federal Transit Administration, and should be aware of the rules under which the state may be obligated to operate.
A second part of this discussion covers the qualifications of subconsultants and the work proposed to be assigned through subcontracts. When selections, at any point in the selection process, are based in part on the qualifications of potential subconsultants proposed by the consultant, those subconsultants should be fixed in the award and negotiations.

There is no way to make a determination of the best-qualified team to do the work, whether a full project or category-specific, without first taking into consideration those firms that have been proposed as subconsultants. Negotiations with the most qualified firms should occur prior to the award of a contract. Negotiating substitutions of proposed subconsultants after an award is made negates the qualifications-based selection process. Also detrimental to the process would be the substitution or addition of a noncompeting sub after the award of a contract, unless significant impacts or changes necessitate a change in team structure.

The substitution, removal, or addition of one or more subconsultants, or changes in the work assigned to subconsultants on a contract, requires a contract supplement and the approval of the WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer.

### B.2.2 Contract Clauses

Federal regulations require that certain clauses be included in contracts where federal funds participate. These clauses largely specify certain protections for public funds.

The required clauses and the instances for their inclusion are cited in 49 CFR 18.36(i).

### B.2.3 Disadvantaged, Minority, & Women’s Business Enterprise (DMWBE) Participation

The issue of DMWBE participation through goal setting will need to be addressed for federally funded projects. This cannot be accomplished if agreements are entered into prior to knowing what work is being contracted for. WSDOT’s Office of Equal Opportunity (OEO) and the Federal Highway Administration (FHWA) have historically taken issue with the process of awarding agreements for work “as yet undefined.”

In accordance with RCW 39.80.040, the state has legal requirements regarding participation by minority-owned, women-owned, and veteran-owned businesses in A&E consultant contracts. Agency procedures and guidelines are to include a plan to ensure minority-owned, women-owned, and veteran-owned businesses are afforded the maximum practicable opportunity to compete for and obtain public contracts for services. The level of participation by minority-owned, women-owned, and veteran-owned businesses shall be consistent with their general availability within the professional communities involved.

In 1998, the people of the State of Washington passed Initiative 200 (I 200), which says that the state “shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”
The initiative was very specific in its use of the term “quotas,” which the initiative eliminated as the basis for balancing participation by disadvantaged, minority, and women’s businesses. The federal regulation regarding public contracting specifically forbids the use of quotas in balancing discrimination and specifies the use of goals instead.

Since the passage of I-200, there have been claims that the use of goals creates preferential treatment and establishes reverse discrimination. Yet the term “goals” is never used in I-200, only quotas. It should be noted that the term “preferential treatment” was not defined in I-200.

According to the language, the state shall not discriminate against any individual or group. However, that is what is occurring when specific groups are not included on contracts in proportion to the number of qualified firms available in the community where the work is occurring.”

RCW 39.80.040 describes the selection criteria established by the agency as being synonymous with the agency’s policies and procedures related to the selection process.

Here, the criteria are not just the score sheets or qualifications data. Rather, the criteria are the full “procedures and guidelines” established for the selection process. Those procedures and guidelines are to include a plan that ensures minority- and women-owned businesses are afforded the maximum practicable opportunity to compete for and obtain public contracts for services.

Under RCW 39.80.040, a state plan should address methods where all firms have the opportunity to compete for and be awarded contracts as primes. To accomplish this, the plan needs to address different economic levels and capacities. If the only contracts offered are of a dollar size outside the reach of smaller firms, regardless of their ownership, the state has not truly addressed the intent of the RCW.

**B.2.4 Contract Estimates**

Federal regulations, in addressing the issue of government estimates for A&E contracts, specify that the contracting officer perform a detailed cost analysis in connection with each procurement action, including contract modifications. As a starting point, the contract officer should have an independent estimate made for the services required prior to receiving proposals, in accordance with 49 CFR 18.36(f)(1&2).

48 CFR 31.205-6(b)(2) specifies the appropriate process and method for performing a qualified cost analysis based on the cost proposal of the firm with which negotiations are held.

**Note:** Contract officers and/or lead negotiators are encouraged to become familiar with the specifications in the above citations, as they address what determines “fair and reasonable pricing” to the government.
B.3 A&E Contract Administration

Following are the federal and state laws and regulations on which A&E contract administration is based.

B.3.1 Federal Regulations

For federally funded projects, the Common Grant Rule, 49 CFR 18, governs the administration of federal participatory funds. However, there are slight differences\(^2\) among federal agencies regarding how those regulations are applied.

In addition to the Federal Highway Administration (FHWA), other potential federal agencies that might be involved include the Federal Transit Authority, Federal Aviation Administration, United States Army Corp of Engineers, United States Department of the Interior or Bureau of Land Management, and the United States Department of Agriculture (usually the Forest Service).

Applicable federal regulations have been cited previously. The area consultant liaison and the WSDOT project team need to be aware of the clauses required by 49 CFR 18.36(i) and included in the contract to understand the potential impacts to the project.

B.3.2 Washington State Laws

The basis for A&E contract administration at WSDOT starts with the Department Enterprise Services’s (DES’s) *State Administrative and Accounting Manual* (SAAM). WSDOT’s *Purchasing Manual* is based in part on the SAAM. The *Purchasing Manual* covers the processes involved in verifying invoices for payments, signatures and authorizations for payments, and other administrative issues.

Chapter 10 of the WSDOT *Purchasing Manual* covers travel for companies with offices located inside the state of Washington. For interstate travel expenses related to consultants whose corporate or primary place of business is outside the state of Washington, FAR 31 governs cost reimbursement, provided those expenses have been included in the negotiations and approved in the contract in detail.

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\(^2\) Generally, the federal agency with the largest percentage of participation takes the lead regarding applicable regulations that will apply to WSDOT. The ACL and the WSDOT project managers should meet with the appropriate federal field personnel to discuss what regulations may apply for the specific project involved.
B.4 Consultant Evaluations

Following are the federal and state laws and regulations upon which consultant evaluations are based.

B.4.1 Federal Regulations

40 USC 11, 1101–1104, Selection criteria

49 CFR 18.36(t), Collecting data on and appraising firms’ qualifications

49 CFR 18.36(b)(8), Past performance evaluation

B.4.2 Washington State Law

RCW 39.80.040 states that, in the procurement of architectural and engineering services, the agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency shall evaluate current statements of qualifications and performance data on file with the agency in the process of selecting the most qualified firms for award of contracts.

B.5 Legal References for Emergency Contracts

Following are the federal and state laws and regulations upon which legal references for emergency contracts are based.

B.5.1 Federal Regulations

23 CFR 172.5(3) states that noncompetitive negotiation may be used to procure engineering and design-related services on federal-aid participating contracts when it is not feasible to award the contract using competitive negotiation, equivalent state qualifications-based procedures, or small purchase procedures. Contracting agencies shall submit justification and receive approval from the FHWA before using this form of contracting.

Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

• The service is available from only a single source;
• There is an emergency that will not permit the time necessary to conduct competitive negotiations; or
• After solicitation of a number of sources, competition is determined to be inadequate.
B.5.2 Washington State Law

RCW 39.26.130 defines “emergency” as a set of unforeseen circumstances beyond the control of the agency that either:

- Present a real, immediate threat to the proper performance of essential functions; or
- May result in material loss or damage to property, bodily injury, or loss of life if immediate action is not taken.

RCW 39.26.130 states that all emergency contracts shall be filed with DES and made available for public inspection within three (3) working days following the commencement of work or execution of the contract, whichever occurs first. Documented justification for emergency contracts shall be provided to DES when the contract is filed.

RCW 39.80.060 pertains to procurement of architectural and engineering services, with an exception for emergency work. It states that:

- This RCW need not be complied with by any agency when the contracting authority makes a finding in accordance with this or any other applicable law that an emergency requires the immediate execution of the work involved.
- Nothing in this chapter shall relieve the contracting authority from complying with applicable law limiting emergency expenditures.

49 CFR 18.36(d)(4) pertains to situations where:

- An unusual and compelling urgency precludes full and open competition, and
- Delay in award of a contract would result in serious injury, financial or other, to the government.

Contracts awarded using this authority shall be supported by written justifications and approvals. This statutory authority requires that agencies request offers from as many potential sources as is practicable under the circumstances.

B.6 Legal References for Disadvantaged Business Enterprise

Following are the federal and state laws and regulations upon which legal references for Disadvantaged Business Enterprise (DBE) are based. In addition, FHWA’s website (www.fhwa.dot.gov/HEP/49cfr26.htm) contains an extensive question and answer overview of the federal requirements under the federal regulation. It also has detailed explanations of “good faith effort,” what constitutes social and economic disadvantage, and what forms are necessary for federal reporting.
B.6.1 Federal Regulations

23 CFR – Highways
   Subchapter B – Payment Procedures
      Part 172 – Administration of engineering and design related service contracts
   Subchapter C – Civil Rights
      Part 200 – Title VI program and related statutes – Implementation and review procedures

45 CFR – Public Welfare
   Part 90 – Nondiscrimination on the basis of age in programs or activities receiving federal financial assistance

49 CFR – Transportation
   Part 21 – Nondiscrimination in federally-assisted programs of the Department of Transportation – Effectuation of Title VI of the Civil Rights Act of 1964
   Part 26 – Participation by disadvantaged business enterprises in Department of Transportation financial assistance programs
   Part 27 – Nondiscrimination on the basis of disability in programs or activities receiving [or benefiting from] federal financial assistance

B.6.2 Washington State Law

Chapter 18 RCW, Businesses and professions
   18.08 Architects
   18.43 Engineers and land surveyors
   18.96 Landscape architects

Chapter 39 RCW, Public contracts and indebtedness
   39.26 Professional Service contracts
   39.80 Contracts for architectural and engineering services

Chapter 49 RCW, Labor regulations
   49.60 Discrimination – Human rights commission
   49.60.180 Unfair practices of employers
B.7  Legal References for Ethics and Organizational Conflict of Interest (OCOI)

It is expected that all parties in a contracting situation will follow the basic principles of ethical behavior. These include, but are not limited to:

• Maintaining the highest professional standard of job performance and exercising due diligence in carrying out professional duties.
• Maintaining trust and confidence in the integrity of the contracting process.
• Avoiding involvement in any transaction that might conflict or appear to conflict with the proper discharge of one’s professional duties.
• Maintaining knowledge of and complying with all relevant laws and regulations governing the contracting process.
• Not intentionally influencing others to commit any act that would constitute an ethical violation.

Following are the federal regulations and state laws and policies upon which the legal references for ethics and OCOI are based.

B.7.1  Federal Regulations

49 CFR 18.36(b)(3): These sections cover individual and organizational conflict of interest requirements, including ethical behavior (see Appendix M) on the part of state employees and their contractors. They also include specific guidelines for grantee state employees, their immediate families, partners, or associates, and the relationships they might have with any contractor or potential contractor. This section requires rules and procedures for identifying, evaluating, and resolving organizational conflicts of interest in contract acquisitions.

49 CFR 18.36(c)(1)(v.): Organizational conflicts of interest

B.7.2  Washington State Laws

Chapter 42.52 RCW; WAC 292: This statute and its related administrative rules establish a framework for ethics in public service that provides specific guidelines and prohibitions related to activities that may be incompatible with the public duties of state employees.

Chapter 18.43 RCW; RCW 18.235.140; WAC 196-27A: These statutes and rules provide guidelines for the professional conduct of engineers and land surveyors.

B.7.3  WSDOT Policy

WSDOT management adheres to the provisions of Chapter 42.52 RCW, Ethics in Public Service, and has published supporting policy statements in a variety of areas, including guidelines on the use of state resources.

In addition, Secretary’s Executive Order E 1059, Organizational Conflicts of Interest, and the Organizational Conflicts of Interest Manual, provides guidance relating specifically to design-build and design-bid-build construction projects. For further details, see Appendix P, OCOI.
Appendix C

The Brooks Act

United States Code (U.S.C.) Title 40 – Public Buildings, Property and Works

Chapter 11, Section 1101 – 1104: Selection of Architects and Engineers
Commonly referred to as the Brooks Act

§ 1101. Policy (Formerly 40 U.S.C. § 541)

The policy of the Federal Government is to publicly announce all requirements for architectural and engineering services and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

§ 1102. Definitions (Formerly 40 U.S.C. § 542)

In this chapter, the following definitions apply:

(1) **Agency head** – The term “agency head” means the head of a department, agency, or bureau [of the Federal Government].

(2) **Architectural and engineering services** – The term “architectural and engineering services” means–

   (A) professional services of an architectural or engineering nature, as defined by state law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide the services described in this paragraph;

   (B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

   (C) other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

(3) **Firm** – The term “firm” means an individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the profession of architecture or engineering.
§ 1103. Selection procedure (Formerly 40 U.S.C. § 543)

(a) In general – These procedures apply to the procurement of architectural and engineering services by an agency head.

(b) Annual statements – The agency head shall encourage firms to submit annually a statement of qualifications and performance data.

(c) Evaluation – For each proposed project, the agency head shall evaluate current statements of qualifications and performance data on file with the agency, together with statements submitted by other firms regarding the proposed project. The agency head shall conduct discussions with at least 3 firms to consider anticipated concepts and compare alternative methods for furnishing services.

(d) Selection – From the firms with which discussions have been conducted, the agency head shall select, in order of preference, at least 3 firms that the agency head considers most highly qualified to provide the services required. Selection shall be based on criteria established and published by the agency head.

§ 1104. Negotiation of contract (Formerly 40 U.S.C. § 544)

(a) In general – The agency head shall negotiate a contract for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Federal Government. In determining fair and reasonable compensation, the agency head shall consider the scope, complexity, professional nature, and estimated value of the services to be rendered.

(b) Order of negotiation – The agency head shall attempt to negotiate a contract, as provided in subsection (a), with the most highly qualified firm selected under section 1103 of this title. If the agency head is unable to negotiate a satisfactory contract with the firm, the agency head shall formally terminate negotiations and then undertake negotiations with the next most qualified of the selected firms, continuing the process until an agreement is reached. If the agency head is unable to negotiate a satisfactory contract with any of the selected firms, the agency head shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached.
Appendix D

Chapter 39.80 RCW – Contracts for architectural and engineering services

**RCW 39.80.010 – Legislative declaration**

The legislature hereby establishes a state policy, to the extent provided in this chapter, that governmental agencies publicly announce requirements for architectural and engineering services, and negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

**RCW 39.80.020 – Definitions**

Unless the context clearly requires otherwise, the definitions in this section shall apply throughout this chapter.

1. “State agency” means any department, agency, commission, bureau, office, or any other entity or authority of the state government.

2. “Local agency” means any city and any town, county, special district, municipal corporation, agency, port district or authority, or political subdivision of any type, or any other entity or authority of local government in corporate form or otherwise.

3. “Special district” means a local unit of government, other than a city, town, or county, authorized by law to perform a single function or a limited number of functions, and including but not limited to, water-sewer districts, irrigation districts, fire districts, school districts, community college districts, hospital districts, transportation districts, and metropolitan municipal corporations organized under chapter 35.58 RCW.

4. “Agency” means both state and local agencies and special districts as defined in subsections (1), (2), and (3) of this section.

5. “Architectural and engineering services” or “professional services” means professional services rendered by any person, other than as an employee of the agency, contracting to perform activities within the scope of the general definition of professional practice in chapters 18.08, 18.43, or 18.96 RCW.

6. “Person” means any individual, organization, group, association, partnership, firm, joint venture, corporation, or any combination thereof.

7. “Consultant” means any person providing professional services who is not an employee of the agency for which the services are provided.

8. “Application” means a completed statement of qualifications together with a request to be considered for the award of one or more contracts for professional services.
**RCW 39.80.030 – Agency’s requirement for professional services – Advance publication**

Each agency shall publish in advance that agency’s requirement for A&E services. The announcement shall state concisely the general scope and nature of the project or work for which the services are required and the address of a representative of the agency who can provide further details. An agency may comply with this section by: (1) Publishing an announcement on each occasion when A&E services provided by a consultant are required by the agency; or (2) announcing generally to the public its projected requirements for any category or type of A&E services.

**RCW 39.80.040 – Procurement of architectural and engineering services – Submission of statement of qualifications and performance data – Participation by minority-owned, women-owned, and veteran-owned firms**

In the procurement of architectural and engineering services, the agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with one or more firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, based upon criteria established by the agency, the firm deemed to be the most highly qualified to provide the services required for the proposed project. Such agency procedures and guidelines shall include a plan to insure that minority and women-owned firms and veteran-owned firms are afforded the maximum practicable opportunity to compete for and obtain public contracts for services. The level of participation by minority and women-owned firms and veteran-owned firms shall be consistent with their general availability within the professional communities involved.

**RCW 39.80.050 – Procurement of architectural and engineering services – Contract negotiations**

(1) The agency shall negotiate a contract with the most qualified firm for architectural and engineering services at a price which the agency determines is fair and reasonable to the agency. In making its determination, the agency shall take into account the estimated value of the services to be rendered as well as the scope, complexity, and professional nature thereof.

(2) If the agency is unable to negotiate a satisfactory contract with the firm selected at a price the agency determines to be fair and reasonable, negotiations with that firm shall be formally terminated and the agency shall select other firms in accordance with RCW 39.80.040 and continue in accordance with this section until an agreement is reached or the process is terminated.
RCW 39.80.060 – Procurement of architectural and engineering services – Exception for emergency work

(1) This chapter need not be complied with by any agency when the contracting authority makes a finding in accordance with this or any other applicable law that an emergency requires the immediate execution of the work involved.

(2) Nothing in this chapter shall relieve the contracting authority from complying with applicable law limiting emergency expenditures.

RCW 39.80.070 – Contracts, modifications reported to the office of financial management

Contracts entered into by any state agency for architectural and engineering services, and modifications thereto, shall be reported to the office of financial management on a quarterly basis, in such form as the office of financial management prescribes.

RCW 39.80.900 – Savings

Nothing in this chapter shall affect the validity or effect of any contract in existence on January 1, 1982.

RCW 39.80.910 – Severability – 1981 c 61

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.
E.1 Introduction

There are times during a construction contract when a potential error or omission in the design is discovered. Other times an error or omission is discovered after the work is completed. Regardless of the cause, design errors and omissions can be costly in many ways. This section explains how to determine whether a consultant error or omission has occurred and establishes uniform procedures for resolution and cost-recovery.

The following process may be subject to other requirements for arbitration or legal proceedings based on the consultant contract under which the work was done. The manager of the WSDOT HQ Consultant Services Office (CSO) is to be contacted as soon as a possible design error or omission is suspected. The CSO manager will gather the appropriate information and make first contact with the Attorney General’s Office to determine whether other processes must take precedence.

Note: This process is also to be used for other determinable errors or omissions that may occur in consultant work efforts, such as survey and geotechnical work.

E.1.1 WSDOT Project Manager Identifies Design Error

The department spends a considerable amount of time reviewing design alternatives, working with constructability issues, and conducting value engineering studies. Extensive analysis is done during the various stages leading up to a construction contract. However, design flaws in the plans or specifications are sometimes found by the construction contractor during or after construction.

It is critical to determine as early as possible whether an error or omission has occurred. If an error or omission is discovered during construction, there are potentially significant financial impacts and delays to the progression of the project. If discovered after construction is completed, the impacts could be very costly.

When an error or omission is discovered prior to or during construction, the first course of action is to allow the consultant to correct the error or omission. If that is not an option, then efforts must be made to correct the problem and recover financial damages to the state.

The financial impacts to the state may include, but are not limited to: the costs of redesign; correction of construction work already accomplished; delay costs to the contractor; loss of participating funding; delayed revenue collections while bond interest may need to be paid; and potential litigation costs.

At the first sign of a potential consultant design error or omission, the WSDOT project manager must immediately notify the project supervisor and the area consultant liaison (ACL) regarding the potential design error(s) or omission(s).

Documentation of the full situation is important. Area consultant liaisons should be aware of the potential for disagreement. All pertinent facts and documents need to be gathered for analysis.
E.1.2 **WSDOT Project Manager Meets With the Area Consultant Liaison**

Upon notification of a potential design error or omission, the ACL will meet with the state’s project manager and the appropriate WSDOT executive staff member to discuss the magnitude of the alleged consultant design error(s) or omission(s). The project manager’s team will be asked to gather very detailed documentation—more than what is normally required for a project. Documentation should include: all decisions made to date; descriptions of work performed; photographs; communications between WSDOT team members and consultant team members; negotiation notes; records of labor, materials, and equipment; and any other items that might pertain to the issue.

If federal funds are involved, the work is on part of the Interstate System, or the project meets the definition of “major project” under 23 USC 106(h), the Federal Highway Administration will be notified of the potential design error(s) or omission(s). If the project includes funds from another federal agency, that agency should also be advised of the issue. The appropriate federal agency should be kept informed of the proceedings throughout the process to conclusion.

The following checklist is to be used to determine consultant design error(s) or omission(s) throughout the process. In order to collect costs or damages as a result of design error or omission, the government must be able to substantiate that:

1. There was in fact a design error or there was an omission.
2. The error or omission was the result of or caused by the negligence\(^{1}\) of the consultant firm/team.
3. The state suffered measurable damages as a result of the error(s) or omission(s). The state has a responsibility to mitigate any damages it incurs due to the error(s) or omission(s).
4. There were no outside actions that contributed to the error(s) or omission(s).

E.1.3 **CSO Manager Contacts Consultant**

After the WSDOT project team determines the need for further action, the CSO manager will contact the Attorney General’s Office with the pertinent information. Upon receiving the Attorney General’s recommendation, the CSO manager will contact the consultant regarding the alleged design error(s) or omission(s) and schedule at least one meeting between WSDOT and the consultant’s team. The CSO manager, project manager, and WSDOT executive will represent WSDOT at the meeting, and the consultant will be represented by the project manager and any other personnel (including subconsultants) deemed appropriate.

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\(^{1}\) Negligence is understood to be (1) the failure of the consultant firm/team to meet the standards of reasonable care, skill, and diligence that someone in the profession would ordinarily exercise under similar circumstances, or (2) there was a breach of contractual duty. For further information, see the professional chapters of the Revised Code of Washington (RCW), which include Chapters 18.08, 18.43, and 18.96.
E.1.4 Project Team Resolves Alleged Consultant Design Error or Omission

The meeting between the CSO manager, the project manager, the WSDOT executive, and the consultant will result in one of three possible outcomes:

1. **Mutual agreement: No consultant design error(s) or omission(s) occurred.** If WSDOT and the consultant agree that no design errors or omissions occurred, the process is stopped.

2. **Mutual agreement: One or more consultant design error(s) or omission(s) occurred.** If WSDOT and the consultant agree that design error(s) or omission(s) did occur, the WSDOT executive will assist the CSO manager or project manager in negotiating a settlement with the consultant. The settlement could result in the consultant doing a redesign or providing payment to WSDOT for costs incurred. Because the consultant may already be under contract to provide “design services during construction,” the consultant may have already been directed to proceed with a design solution. If this is the case, then the settlement could be a reduction in the original negotiated price in the contract authorization for the services. Alternatively, a reduction in the amount of money due to the consultant for the portion of the statement of work in which the error(s) or omission(s) occurred, that reflects the degree of the consultant’s responsibility, might be more appropriate. After WSDOT and the consultant agree on appropriate reimbursement, the existing contract is to be amended, or a new contract is to be assembled, documenting what was agreed to.

3. **No mutual agreement.** The consultant may need to review the documentation and their own project notes before making a decision regarding the alleged design error(s) or omission(s). If that is the case, another meeting should be scheduled as quickly as possible. If the consultant disagrees that design error(s) or omission(s) occurred, then all pertinent information should be provided to the WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer for a determination as to further action.

E.1.5 WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer Review

If no agreement has been reached with the consultant, the CSO manager will take the following actions:

1. The CSO manager will review all available information, including costs, and prepare a briefing document and recommendation for the Assistant Secretary Engineering & Regional Operations Chief Engineer will make a determination whether or not WSDOT will request reimbursement from the consultant for the legally recoverable costs incurred as a result of the alleged consultant design error(s) or omission(s).

2. The CSO manager, as part of the preparation for the Assistant Secretary Engineering & Regional Operations Chief Engineer’s briefing, will seek legal recommendations (as necessary) from the Attorney General’s Office.
3. If the Assistant Secretary Engineering & Regional Operations Chief Engineer determines that no further action will be taken, the Assistant Secretary Engineering & Regional Operations Chief Engineer will inform the CSO manager, who will then notify the responsible executive, the area consultant liaison, and the project manager in writing about the decision. The executive or the CSO manager will inform the consultant in writing about the decision. After notifications are complete, no further action is necessary.

4. If the Assistant Secretary Engineering & Regional Operations Chief Engineer determines that WSDOT will pursue further action with the consultant, the Assistant Secretary Engineering & Regional Operations Chief Engineer will notify the CSO manager, the project manager, and the project executive of the decision. The Assistant Secretary Engineering & Regional Operations Chief Engineer will direct the CSO manager to contact the Attorney General’s Office for further action(s).

The Attorney General will determine the course of action based on the information provided and discussions with the WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer.
F.1 Introduction

The following information is provided to guide both WSDOT and consultants through the preparation of the Consultant Performance Evaluation Report (see the CSO’s public website: www.wsdot.wa.gov/business/consulting). This report is an important part of the feedback process. It is also the primary means for developing communication standards and establishing expectations for performance at the onset of a project. Performance expectations must be addressed as part of the consultant selection process, to the development of the statements of work (SOWs), the negotiations, and through to the end of the consultant’s involvement in the project.

The completion of the performance reports by WSDOT is required by both federal and state statute and is mandatory for all consultant contracts in excess of $30,000. The performance reports are also required from individual WSDOT offices when they administer single or multiple task orders using Task Order contracts if the task order(s) equal or exceed(s) $30,000.

Note: The Consultant Performance Evaluation Report is not a comparison of consultants. It is an evaluation of the performance of a specific consultant on a specific project statement of work. The report records whether the consultant did or did not meet those performance standards established in the contract and generally accepted by the industry for the execution and management of the contract.

Diligence and objectivity in preparing the performance report is imperative to ensure the report is an effective tool for measuring, recording, and communicating performance. The performance feedback is to be submitted according to the intervals established herein.

F.1.1 Preparing the Report

For each contract of more than $30,000, Consultant Performance Evaluation Reports will be prepared by the project manager. Performance reports may also be prepared for contracts of $30,000 or less. Preparation guidelines are as follows:

1. A report will be prepared after final acceptance of the architectural and engineering contract work or after contract termination. Ordinarily, the person who prepares this report is the person responsible for monitoring contract performance.

2. A report may also be prepared after construction of the project is completed.

3. In addition to the reports in this section, interim reports may be prepared at any time.
4. If the project manager concludes that a consultant’s overall performance was unsatisfactory, the consultant will be advised in writing that a report of unsatisfactory performance is being prepared that will include the basis for the report. If the consultant submits any written comments, the project manager will include them in the report, resolve any alleged discrepancies, and make appropriate changes in the report.

5. The CSO manager will establish procedures that ensure fully qualified personnel prepare and review performance reports.

### F.1.2 Reviewing the Report

Each performance report will be reviewed to ensure it is accurate and fair. The reviewing official should have knowledge of the consultant’s performance and should normally be at an organizational level above that of the project manager.

### F.1.3 Distributing the Report

Each performance report will be distributed in accordance with agency procedures. The report is to be included in the contract file, and copies will be sent to the CSO for filing with the firm’s qualifications data. The CSO will retain the report for at least six years after the date of the report.

### F.2 Consultant Performance Evaluation Rating Scale

#### F.2.1 Measures of Performance

The following ratings are used to measure consultant performance:

1. **Above Standard**

   Consultant helps define work direction with timely questions and recommendations. Consultant requires little monitoring, relative to size and complexity of work, and demonstrates proactive project management. Performance often exceeds requirements or expectations in most work elements, with very little need for review comments on plans. Plans and other deliverables meet WSDOT expectations the first time with few comments or revisions. Consultant always responds well to feedback.

   Work product quality exceeds expectations. Agency coordination and public involvement are timely and well done. Overall work is under budget and/or ahead of schedule. Quality leadership principles and sound engineering judgment are used. Evaluation of alternatives and trial solutions is often innovative.

2. **Standard**

   Consultant almost always follows direction. Consultant requires routine monitoring relative to size and complexity of work. Performance meets requirements and expectations in most work elements, incorporating review comments into plans without additional iterations. Consultant accepts feedback well.
Work product quality routinely meets expectations, given minor revisions and monitoring. Agency coordination and public involvement are adequate. Work is generally completed on time and on budget. Good engineering practices and management are used. Evaluation of alternatives and trial solutions is adequate.

3. **Below Standard**

Consultant has difficulty following direction. Consultant may require close monitoring relative to size and complexity of work. Performance fails to meet requirements or expectations in several work elements, such as not fully addressing review comments. Consultant may not accept feedback well.

Work product may have errors or omissions. Consultant may require a high degree of monitoring to complete work. Consultant needs a plan for improvement, in order to be selected for additional projects.

**F.2.2 Corrective Action Plan**

When the rating for any criteria on the Consultant Performance Evaluation Report receives a below-standard rating, the consultant will work with the WSDOT project manager and area consultant liaison (ACL) to develop a corrective action plan to address the below-standard rating. The corrective action plan must address the deficiency and what measures lead to the rating; what steps the consultant will take, or has already taken, to resolve the deficiency and improve performance; and how performance will be monitored on future WSDOT contracts.

Performance compliance will be measured as followed:

1. **Pass**

   Rating used by the project manager and the ACL to indicate that the consultant has met or exceeded the performance expectation of the consultant services contract and is recommended to continue receiving contracts from WSDOT.

2. **Fail**

   Rating used by the project manager and the ACL to indicate that the consultant has not met the performance expectation of the consultant services contract and is not recommended to continue receiving contracts from WSDOT until additional action is taken. This is usually in the form of a corrective action plan. Two successive “Fails” on performance evaluations will constitute a “Poor Past Performance” rating in the CSO’s database and will lead to removal of the consultant from further consideration for WSDOT contracts for at least one year from the date of determination.
F.3 Instructions

Consultant Performance Evaluation Reports are an integral part of the contract process. This means that the WSDOT management team, including the ACL, needs to meet with the consultant management team as soon as possible after consultant selection, to discuss the requirements and responsibilities of the evaluation process.

When WSDOT provides a detailed statement of work (SOW) to the consultant so the consultant firm may prepare its cost proposal, the SOW includes a section referring to the evaluation process, which will be covered with the consultant prior to the beginning of negotiations. If WSDOT does not have a detailed SOW from which the consultant can prepare the cost proposal, the CSO process for joint development of the SOW will be followed, and the performance evaluation process will be covered during the first meeting.

Where task orders are referenced, they refer to the formal task order documents (TODs) used for work assignments under Task Order contracts or one of the category-specific contracts if TODs are used to authorize unrelated work efforts within the contract category. Project-specific or GEC-type contracts, managed through task order assignments, are not to have their tasks treated separately for the purposes of evaluation. The overall work of the contract is to be evaluated.

F.4 Types of Performance Evaluation Reports

The following types of evaluation reports are used when the evaluation is performed during the life of the contract.

F.4.1 Final Consultant Performance Evaluation Report

A final Consultant Performance Evaluation Report must be prepared immediately following the project completion or when a contract is terminated. Where the consultant is retained for design support during construction, a final performance report is to be written at the time the work is accepted for advertisement. The “design support during construction” portion, whether it is a part of the original contract or a separate contract, is to be evaluated as a separate item of work if any work was assigned after construction began. (See F.4.3 for information about a potential follow-up report after construction is complete.) If no actual work is done by the consultant during the design support phase, then no evaluation of this phase is needed. However, this should not preclude a postconstruction evaluation of the design firm.

The final performance report is part of the closing documents and will be completed following the contract or task order close-out process described in Appendix W, Task Order Documents. The final report will be sent to the CSO, the area consultant liaison, and the Regional Administrator. The final performance report evaluates performance for the duration of the project even though interim reports have been prepared.

Interim performance reports are prepared throughout the life of the project. An overall summary of the total performance, which includes consideration of interim reports and current data, will be included in the final report.
F.4.2 Interim Consultant Performance Evaluation Report

The frequency of interim performance reports is to be set during the initial project scoping/negotiation phase. Best management practices necessitate that the best performance feedback happens as the project progresses for both positive action and corrective action. Communication on performance as it occurs will allow the final evaluation to reflect an accurate performance assessment throughout the project life cycle.

Interim performance reports are to be prepared as follows:

1. If the contract or IDC task order is less than 18 months in duration, a final evaluation is all that is needed. For those contracts and IDC task orders with a duration beyond 18 months, the first interim report is to be prepared between 9 months and 12 months after notice to proceed, typically after the completion of negotiation of the contract or task order. (If an task order, that is not expected to go beyond 18 months, is subsequently amended to extend the duration beyond 18 months with an extension of 6 months or more, an interim evaluation is to be performed at the time of the amendment.)

2. At a minimum, prepare annually on the anniversary of the work starting date for all projects exceeding a duration of two years.

3. Prepare when the current project engineer or consultant manager will no longer be involved with the project, providing the project has been in progress for more than 25% of the assigned work duration.

4. Include all work from the start of the project, or from the date of the last interim report.

5. Prepare when a consultant’s total overall work has become less than standard. A corrective action plan may be necessary to ensure the required project performance is reestablished.

6. Identify the intervals in the project schedule.

An interim report is not to cover a period of more than one year, except as covered in item 1, above.

F.4.3 Special Consultant Performance Evaluation Report

A special report is prepared when a nonscheduled evaluation is needed, when a report is needed to facilitate a counseling session, or at the request of the consultant or WSDOT. Such a report will not be referenced in the final report.

A separate evaluation report may be performed, if deemed warranted by the Regional Administrator, State Design Engineer, and/or the State Construction Engineer, at the completion of construction of the consultant’s design. The consultant may also request an evaluation under this section. These evaluation reports are to be attached as addenda to the final evaluation performed as part of the design contract closeout.
F.5 Authentication and Review

This section documents the process for the review, verification of accuracy, and completeness of the Consultant Performance Evaluation Report by the rater, the ACL, and the executive reviewer. It also gives assurance that the report has been reviewed during its preparation for objectivity and the elimination of personal bias. The report will be prepared, reviewed, and endorsed as follows:

F.5.1 Project Manager

1. Prepare a draft of the Consultant Performance Evaluation Report based on data in project records for the type of performance report: final, interim, or special.

2. Schedule a meeting to review the draft report with the consultant. The review should have open, forthright, and courteous discussions concerning the rating areas. The consultant should be encouraged to call any performance considered exemplary to the project manager’s attention, so that it may be verified, recorded, and if appropriate, entered into the report.

3. After the review, finalize and sign the report, recommend a “Pass” or “Fail” for the contract, and forward the report to the area consultant liaison. (For the explanation and purpose of a “Pass” or “Fail” mark, see F.2.2.)

F.5.2 Area Consultant Liaison

1. Review the Consultant Performance Evaluation Report for objectivity, correctness, and documentation. Documentation will be essential in the event of an appeal or litigation. Sign the document and recommend a “Pass” or “Fail” for the contract.

2. Provide a copy of the report to the consultant, with an appropriate cover letter. The report may be delivered in person or by certified mail with return receipt.

3. Inform the consultant that an appeal of the rating to the ACL may be made in writing within 20 calendar days from the receipt of the report. Appeals received after 20 days have elapsed will not be considered.

F.5.3 Regional Administrator


2. Modify the rating, if appropriate, on the form and/or on additional sheets. Advise the consultant of any changes made.

3. Submit performance reports completed at the region level to the HQ Consultant Services Office (CSO). (Refer to the additional instructions attached to the Consultant Performance Evaluation Report.)
F.5.4 Consultant Services Office

1. Establish an internal performance review panel to review all Consultant Performance Evaluation Reports. The review will focus on the objectivity, correctness, fairness, and overall consistency of the reports.

2. Provide necessary feedback to the ACL and the project manager regarding the report.

F.6 Appeal of the Performance Report

If the consultant disagrees with the outcome of the evaluation and performance review, the consultant may appeal the outcome. The process includes the following:

1. The consultant is to appeal in writing and clearly explain the disagreement with the rating received on the performance report. The appeal is to be sent to the CSO manager within 20 calendar days of receipt of the evaluation. An appeal must state the specific basis for the appeal.

2. The CSO manager will investigate the appeal to determine whether the facts substantiate the consultant’s basis for the appeal. If the basis for the appeal is justified, the report may be modified by striking those portions of the originally prepared report, modifying the relevant element, and changing the narrative (as appropriate) on separate sheets. The CSO manager’s response to the consultant will be made by certified mail, return receipt requested, within 20 days of the receipt of the appeal. The manager will forward a copy of the appeal and response, including copies of all data used to substantiate any action taken with regard to the consultant’s appeal, to the Regional Administrator and the State Design Engineer.

3. A Consultant Performance Evaluation Report is to be considered preliminary until all reviews and appeals have been accomplished and the report has been reviewed by the internal review panel. The panel will then approve the report as final.

4. Consultant Performance Evaluation Reports are to be kept on file by the CSO for a period of six years from the date of completion.
F.7 Conditional Qualification

Conditional qualification of a consultant may be affected when the overall performance of that consultant has become “below standard,” and upon recommendation of the Regional Administrator to the WSDOT Secretary. A consultant placed in “conditional qualification” status may be restricted in receiving additional contracts for highway projects, or other sanctions may be placed in effect (see the “Fail” definition in F.2.2).

A consultant may be placed in conditional qualification status when:

1. An overall total performance rating of “below standard” has been given on a final performance report.

2. A firm’s performance is reported as below standard in either “schedule,” “technical quality,” or “cost/budget” on an interim report for a current project, and the Regional Administrator has requested that the CSO manager place the firm in conditional qualification status.

After evaluation of the circumstances, the CSO manager will advise the consultant firm of its having been placed in conditional status and explain the consequences of such action. The consultant will be advised of the CSO’s preparation of interim performance reports while in that status.

Interim performance reports will be prepared by the project manager at 30-day calendar intervals to record a consultant’s performance while in conditional qualification status. If overall performance has been brought to standard after two consecutive 30-day interim reports have been prepared, no further interim reports need be prepared, unless specifically requested by the consultant or other circumstances require their preparation. In the event the consultant requests completion of an interim report, the date of the report will be the date of the consultant’s request.

F.8 Public Disclosure of Performance Reports

A Consultant Performance Evaluation Report is to be considered a preliminary draft until all reviews and appeals have been accomplished and the report has been reviewed by the internal review panel. After the report is finalized in this manner, the report, appeals, correspondence, and other related data may be subject to public disclosure. Performance reports and related data will be released to individuals, other than the rated consultant, only through proper requests made to the Public Disclosure Office at WSDOT Headquarters.
Appendix G
Consultant Contract Claims and Claims Procedures

G.1 Introduction

Generally speaking, claims occur as a result of poor communication between the WSDOT contract management staff, the consultant’s team, and the contract officer. Too often, the contract officer, usually the area consultant liaison (ACL), has not been included in the process.

Most contract claims are based on requests for additional payment above that covered by the contract. There are two circumstances that usually lead to this request:

• The first is when the consultant’s understanding of the contract expectations turns out to be different than that of the state.

• The second is when the consultant has been asked, or believes they have been asked, to perform work outside the statement of work (SOW).

The request turns into a claim when the WSDOT project manager initially disagrees with the request, or sufficient time has passed to preclude the project manager from following the normal change management plan.

There are sufficient processes in place from the early acquisition stage to the end of the contract to avoid the necessity for a claim.

• In the first circumstance, sufficient time should be taken during the SOW development and negotiations phase to ensure both sides understand the details of the work plan. The Managing Project Delivery (MPD) process for SOW development was specifically developed to provide for solid understanding of the work details. If the MPD process is not used, then sufficient time should be spent during negotiations to ensure everyone is clear about the project expectations.

• In the second circumstance, consultants have an obligation to contact the project manager and the ACL whenever they feel they have been asked to do something outside the work plan as negotiated. Consultants should not perform additional work, or changes to the SOW, without first reaching agreement with WSDOT regarding additional payment.

WSDOT project management has an obligation to be clear and concise regarding instructions to consultants. When asking a consultant to redo work, or when WSDOT is returning work as incomplete or needing improvements, the department needs to be clear to the consultant about whether they believe this is covered under the contract or is a change to the SOW. Whenever there is a question regarding the contractual obligations, the ACL, or the HQ Consultant Services Office (CSO) if the ACL is unavailable, should be contacted and brought into the process.

Consultants should not proceed with work they believe to be in addition to, or that makes changes to, the SOW without a written commitment from WSDOT covering any additional costs the consultant believes will be due.
Claims should not occur on architectural and engineering contracts. However, when the occasion occurs, the following instructions should be followed.

- A claim for additional payment of under $50,000 is covered in G.2.
- A claim for additional payment above $50,000 is covered in G.3.

**G.2 Consultant Files a Claim of Under $50,000**

For claims under $50,000, the following process is to be applied:

- For claims under $50,000, but more than $5,000, the ACL is to contact the CSO manager and discuss the situation. The CSO manager will determine whether the claim warrants Headquarters’ involvement. If not, the ACL and the project manager will negotiate a fair and reasonable settlement.
- For claims under $50,000, but more than $5,000, where the project personnel and the consultant cannot reach a fair and reasonable settlement, the consultant can request CSO involvement. If this occurs, the process will then move to that described in G.3.
- Claims under $5,000 will be negotiated with the consultant for reasonable cost by the ACL and the state’s project manager.

**G.3 Consultant Files a Claim of $50,000 or more**

**G.3.1 Consultant Notifies WSDOT of Claim**

If the consultant has determined that they were asked to perform additional work outside the contract SOW, the consultant may initiate a claim for additional compensation. There may also be issues regarding time extension, the end date of the contract, or indefinite-delivery contract task orders.

To initiate the process, the consultant will file a written claim with the WSDOT project manager. The consultant claim must include:

- An explanation regarding why/how the additional work was outside the original project SOW.
- The date(s) of the additional work performed outside the project SOW.
- A summary of all costs for each firm included in the claim.
- Copies of any correspondence that the consultant believes directed them to perform the additional or changed work, together with any negotiation notes or other documentation showing clearly their understanding of the work expectations from the original negotiations.

**G.3.2 WSDOT Reviews Consultant Claim**

The project manager will review the consultant claim and meet with the ACL. When necessary, they may also meet with the appropriate region or project executive. The ACL will contact the CSO and brief the manager on the circumstances. A determination will be made regarding whether the ACL and the WSDOT project manager are to handle the claim or whether the CSO will be directly involved. For claims over $50,000, the CSO manager will request that all substantive documentation be sent to the CSO. After reviewing the documentation, the manager will proceed with further investigation, accept the claim, schedule
negotiation with the consultant, or submit the claim to the Assistant Secretary Engineering & Regional Operations Chief Engineer for determination.

Note: If the project includes federal funding, under certain circumstances the Federal Highway Administration (FHWA) may also need to be notified. The CSO is to be contacted regarding the necessary steps that may be involved.

G.3.3  Project Manager Prepares Supplement or New Contract

If the project manager, ACL (or executive), and FHWA (if applicable) agree with the consultant’s claim, or a negotiated settlement is reached, the ACL will prepare a contract request form, including backup documentation, and send it to the CSO. If there is still time on the contract, the request will be for a supplement (or task amendment). If the contract time has run out, a new “sole source” contract (see Chapter 430) will need to be executed. The reason and title need to address “claim resolution” for the project.

When approved, the ACL will prepare the supplement, task amendment, or new contract and submit it to the consultant for execution. After the contract is fully executed, the consultant will submit a final invoice, and the project will prepare a voucher for reimbursement to the consultant for the final agreed-to claim amount. The project manager is to provide a reminder to the consultant that the claim payment is subject to audit.

At this point, no further action is needed regarding the claim procedures. If the new or supplemental contract is for Professional Services, the CSO manager will submit the consultant claim request and support documentation to the Department of Enterprise Services for approval.

If, however, WSDOT disagrees with the consultant’s claim, then G.3.4 is the next step.

G.3.4  ACL or Project Manager Prepares Support Documents

At this point, if WSDOT disagrees with the consultant’s claim, the ACL will prepare a summary of all factors considered to date for the CSO manager and forward to the CSO all documentation regarding the claim, including:

• A copy of the consultant claim filed with the project manager.
• A summary of overall costs based on the payment method and labor rates approved for the time frame of the actual work, for each firm included in the claim.
• Copies of project correspondence related to the claim.
• A description of why WSDOT disagrees with the consultant claim.
• Recommendations for resolving the claim.
• A summary of lessons learned from the process.

The CSO manager will review all documentation for completeness and then submit it to the WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer.
G.3.5 WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer or Designee Reviews Claim

The WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer will review the support documentation and either approve or deny the consultant claim. If the project includes federal funding, the CSO manager or the Assistant Secretary Engineering & Regional Operations Chief Engineer will forward a copy of the consultant claim, along with the WSDOT recommendation, to FHWA for its consideration and approval.

The WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer will advise the Secretary of Transportation in cases where consultant claims are highly publicized, may be of a sensitive nature, or may have significant economic impact.

If the consultant disagrees with the decision of the Assistant Secretary Engineering & Regional Operations Chief Engineer, the matter will be referred for determination to the Secretary of Transportation, whose decision in the matter shall be final and binding on the parties. However, if an action is brought challenging the Secretary’s decision, that decision shall be subject to *de novo judicial review*.

G.3.6 Manager Informs WSDOT Staff and Consultant of Decision

The CSO manager will prepare a written summary of the final outcome of the consultant claim for all involved. The summary will include the basis for the decision and the final claim amount. The project ACL or the CSO manager will notify the consultant in writing regarding the final claim decision, depending on where the resolution occurred. If the decision was in favor of the consultant, then all documentation will be returned to the CSO for preparation of contract documents.
H.1 Payment Methods

H.1.1 Lump Sum (LS)

This method of compensation is appropriate for project-specific and project support category-specific agreements, provided the scope of work (quantity and type) can be clearly defined. It requires the WSDOT engineer’s estimate detailing the hours required for each type of work, as well as the engineer’s opinion of a reasonable hourly rate, as part of the documentation justifying the final agreed-to lump sum price. The WSDOT estimate is prepared, signed, and dated by department personnel who are qualified and familiar with the proposed type of work and is provided as part of the negotiations documentation.

The contract is negotiated with the consultant. If the project team, including the area consultant liaison (ACL), is reasonably sure that the statement of work (SOW) is complete and sufficiently detailed and that the consultant understands the project, then a lump sum contract represents a good approach for both the consultant and the state. This is especially true if the consultant’s proposal is close to or below the WSDOT engineer’s estimate of cost.

- The benefit to the consultant for using the lump sum payment contract is that if the consultant performs the work more efficiently and economically, the consultant is paid the full agreement amount and potentially makes a larger percentage of profit.
- The disadvantage to the consultant is if their costs exceed the estimate, the compensation does not change.
- The benefit to the state is reasonable pricing for the work with less administrative expense.
- The disadvantages are the potential for disagreement regarding what was understood about the SOW and, if changes occur during the progress of the work, the effort to determine the actual percentage of completion for fair compensation.

Lump sum contracts should not be used on long-term work, especially Environmental Impact Statements. Any project that has a relatively high potential for changes in the midst of progress, or where the budget is approved on an intermittent basis, will not work well for Lump Sum.

Where the work is well defined, lump sum payment can work well on Plans, Specifications, and Estimates (PS&E) efforts that are shorter term and where there is great pressure to meet deadlines. Lump sum payment can act as an incentive to a contractor to accomplish work efforts in a short time frame, provided the state does not try to control the work effort too closely.
Lump sum contracts are negotiated to a firmly fixed price and are not subject to audit, provided there are no major changes during the progress of the work. However, the responsible ACL must provide sufficient documentation to the CSO regarding the process used to arrive at a lump sum amount. This will include the department’s detailed estimate of costs and the negotiation notes that support the lump sum amount as a reasonable cost to the department.

Progress payments will be made according to percentage of work complete and the percentage of work complete will be outlined in the invoice through a progress report and an earned value chart. Agreement as to how often the consultant will receive payment will be covered in the negotiations and detailed in the agreement.

In accordance with RCW 39.80.050, if the negotiation team is having difficulty reaching a reasonable cost to the state, the team may offer to contract for the services under the lump sum payment method, at the engineer’s estimate amount, as part of the team’s last and final offer.

Supplements to a lump sum agreement are rare and difficult to justify, unless significant unanticipated additional work is necessary for completion of the project. Supplements must be initiated through a request memo. The ACL is encouraged to make contact with the CSO manager as soon as possible when the project or the consultant determines a change has occurred or a supplement is requested. Under these circumstances, the risk of a claim is high.

H.1.2 Cost-Plus-Fixed-Fee (CPFF)

The CPFF method of compensation is used when the extent of work and the labor and other expenses required for project completion cannot be fully and accurately estimated for each separate work element in advance.

Like the lump sum payment method, there are certain circumstances where the CPFF method can be an incentive for the consultant. However, there are also circumstances where the CPFF method can be very difficult to work with. Work efforts where there is a high probability of change to the deliverables, additions to the work effort, or fluctuations in the progress schedule (not anticipated at the negotiations) will send all parties back to the negotiation table to recalculate the estimate and the fixed profit.

Trying to determine the percentage of profit due on a statement of work (SOW) that has changed during the progress of the project is a difficult process. The following should be considered when using the CPFF method:

- The benefits to the consultant are: (1) having the labor costs (including Indirect Cost Rate) covered, even if there are fluctuations in the original anticipated effort required to complete the deliverables, (2) it will potentially take less effort, if the consultant is more efficient, and (3) the ratio of profit earned to labor cost will go up.
- The disadvantage is the potential for a “blown estimate,” which requires a larger labor effort without additional profit. The CPFF method is an incentive for the consultant to accomplish the work as described and to manage scope creep.
• The benefit to the state is the ability to move a project forward, especially if
time is a major issue. Profit is fixed and, if the work requires less labor than
anticipated, the state benefits in lower costs. If the work requires more labor
than anticipated, the additional labor costs less because no additional profit
is involved.

The term “order of magnitude” is an important one in the CPFF payment method
and should be discussed with the consultant and any potential subconsultants that
are paid the same way. Order of magnitude for the purposes of CPFF means that
the magnitude of the effort required to accomplish the various elements of the
SOW may fluctuate without changing the profit (fee), which has been fixed for
the contract.

An example of order of magnitude would be where the consultant and the state
project managers agreed to meet 20 times for progress updates during the design
effort. The estimate of cost during the negotiations may have assumed two people
from the consultant’s team would attend each meeting, with a total of four hours
for each person at each meeting. As work progressed, it might have been necessary
to have 26 meetings, with three people attending sometimes and only one person
at other times. The original estimate of 160 hours would end up being 196 hours.
The consultant would be reimbursed for the labor and Indirect Cost Rate costs at
the approved salary and Indirect Cost Rate in the agreement. The fixed fee (profit)
remained unchanged and was paid out at proportional monthly percentages.

Note: An important administrative issue that ACLs need to discuss with project
personnel who are administering a CPFF contract is the method of payment of the
fixed fee. The fixed fee is exactly that: FIXED. The fixed fee amount paid to the
consultant with each monthly progress payment has no relationship to the amount
of labor billed for that month. It is required that the progress report for each month
include an earned value chart for the determination of the fixed fee percentage to
be invoiced.

The Indirect Cost Rate for Cost Plus Fixed Fee agreements is adjusted on an annual
basis for all firms on the contract. The applicable approved audited Indirect Cost
Rate from the CSO is used to adjust the previous year’s indirect charges based
on the labor invoiced. Indirect Cost Rate can move up or down during a given
agreement’s life span, and discussions during negotiations should cover how these
adjustments will be accommodated. The requirement for actual costs for Indirect
Cost Rate will also require that the contract remain open a little longer than usual
for a project to allow for a final Indirect Cost Rate adjustment.

During the negotiations, a determination for progress payments will be made that
ensures the full profit amount will not have been paid out prior to the work being
completed. For further details on contract administration, see Chapter 500.
H.1.3 **Negotiated Hourly Rate (NHR)**

Contracts where changes are anticipated during the progress of the work, such as Environmental Impact Statements (EIS), or where work is assigned as the budget is approved should use the negotiated hourly rate method of payment. This payment method is best suited to EIS and task order contract costs. An all-inclusive hourly Actual Not to Exceed billing rate (based on maximum direct labor) is determined for all classifications within a firm. The billing rate is made up of direct salary, fringe plus Indirect Cost Rate, and profit.

The ACL or a designee should obtain the most recent applicable approved audited Indirect Cost Rate rate from the CSO. The negotiated Indirect Cost Rate rates, acceptable wage rates, and some in-house reimbursable costs are normally established based on recommendations from the WSDOT Internal Audit Office. The CSO reserves the right to negotiate contract costs whenever necessary. The fee percentage is also negotiated. The Actual Not to Exceed hourly rates, when negotiated, are not subject to adjustment during a post-agreement audit.

With the negotiated hourly rate, there is no incentive for consultants to keep costs down, so WSDOT project management must be diligent in managing the work schedule and not approve time extensions or additional labor hour costs to the project or work effort without negotiations that include the ACL and approval from the CSO.

H.1.4 **Task Order Negotiated Hourly Rate (TONHR)**

On Call Task Order contracts use the task order document as the order delivery method. Negotiated hourly rates are established for work that is projected to be needed by the state prior to being fully defined. Under normal circumstances, task orders are subject to the Second Tier Competition Process (see Appendix Y). When a work assignment has been determined and estimated by WSDOT, this Second Tier process is used to select the firm for the task. After final selection, negotiations for final costs occur, and a task order document (TOD) is prepared.

The project manager, with the assistance of the ACL and potentially the CSO, negotiates the parameters for the task order in terms of time, scope of work, staffing, hours, and maximum amount payable. Any change to those conditions may necessitate a TOD amendment. Each TOD may be set up for different organizations, work orders, projects, or portions of projects, based on the parameters in the original solicitation and the Second Tier process. An electronic version of the TOD is available through the CSO and is assigned by request.
Appendix I

I.1 Introduction

This appendix provides descriptions of the various types of architectural and engineering (A&E) contracts available for use in project or program delivery.

Covered in this section are the following types of A&E contracts:

• Project-Specific
• Project Support Category-Specific
• On-Call
• Design Support During Construction (formerly On-Call During Construction)
• Disputes Review Board

I.1.1 Contract Boilerplates

Any contracts not written on “boilerplate forms” approved by the Attorney General’s Office (AGO) must be individually reviewed and approved as to form by the AGO.

• WSDOT policy is that no agreement under the purview of the HQ Consultant Services Office (CSO) will be assembled or authored on anything other than CSO-issued boilerplate contracts without the express written permission of the CSO manager.

Agreement supplements are generally written specific to the contract work or contract terms being modified and are subject to the review and approval of both the CSO and the AGO.

For A&E work, the direct involvement of the CSO and the appropriate area consultant liaison (ACL) is necessary. Approval by the CSO manager is required before any authorization or alteration of work involving A&E contracts can go forward. The only exception occurs under emergency conditions, as specified in Chapter 600.

I.2 Determination of Contract Type

The CSO manager will make the final decision on the type of contract to be used based on information provided by the project, the responsible ACL, and through discussions with project management.

I.3 Project-Specific Contracts

Generally, whenever the resources of a consultant are required in relation to a phase of a project or the delivery of a project ready for construction advertising, the work requirement is project-specific. Project-specific work includes route development studies, Environmental Impact Statements (EIS), preliminary design or design, or any other effort leading to a construction project that involves multiple A&E disciplines. It is noted that, if a project is expected to exceed $1,500,000 in total project design cost, a project specific contract will be required. Indirect delivery
contracts are not available for projects of magnitude greater than $1,500,000 total project cost. There is no lower limit below which a project specific contract is not appropriate, and any project may use a project specific contract.

Project-specific contracts could range from a small roadway design for pavement replacement to a full corridor program leading to multiple contracts and design efforts for the EIS process, such as those of the former Urban Corridors, Pierce County/Tacoma HOV, or the Columbia River Crossing. In those cases, the project-specific contracts were referred to as General Engineering Contracts (GECs). The firms under contract were referred to as General Engineering Consultants.

The solicitation/selection processes (see Section 410.03), development of statements of work (SOWs) and negotiations (see Section 410.04.02), and contract awards (see Section 410.03.05–08) are covered herein. The importance of understanding that material, as well as the timely involvement of the appropriate ACL and the CSO, cannot be overemphasized. Problems with delivery of consultant services begin with the lack of planning and the late involvement of the CSO.

The CSO manager is responsible for reviewing and updating boilerplate contracts and the necessary terms and clauses required by state and federal regulations. Boilerplates for project-specific contracts are developed in coordination with the Washington State Attorney General’s Office (AGO), the Federal Highway Administration, the WSDOT Risk Manager, and the American Council of Engineering Companies of Washington.

Solicitations will cover the project’s boundaries in terms such as “from milepost to milepost” or other appropriate descriptive language that clearly identifies the project limits. Items that also need to be included in the solicitation and ultimately in the contract are: anticipated start and completion dates; an outline or general description of the deliverables; anticipated cost range based on the state’s engineering estimate; and appropriate restrictions, clauses, and methods of payment.

Changes that occur during the course of the contract that require adjustments to the statement of work (SOW), estimated costs, and/or time of completion will be done by supplementing the contract and must be done through approval of a request memo. No additions to the scope of the project (this does not refer to the SOW) or work outside the project boundaries will be added to the contract.

Project-specific contracts will include the detailed SOW as an exhibit to the contract, as agreed to during the negotiations. The contract will also have the budgetary estimate of costs for the prime and all subs as agreed to during the negotiations. In coordination with the AGO, the CSO will determine, and include in the boilerplate contracts, other necessary exhibits, attachments, and inclusions. All contracts and contract supplements, task order documents, and task order amendments will originate from the CSO and the CSO’s database.
Under project-specific contracts, there are several methods of contract payment. Depending on the needs of the department, the choices are cost-plus-fixed-fee (profit), lump sum, or negotiated all-inclusive hourly rate. The payment method is fixed for the life of the contract and each one has different implications for the state. These payment methods are covered in Appendix H, Contract Payment Methods.

### 1.4 Category-Specific Contracts for Project Support

While project-specific contracts anticipate contracting for whole phases of work in pursuit of project or programmatic delivery, category-specific contracts for project support anticipate work efforts in specific categories to fulfill the needs of the department in delivering a project or program. Where project-specific usually anticipates multiple disciplines under one contract, category-specific identifies a single, more specialized work discipline.

Each year, all support groups will poll anticipated or ongoing projects for their anticipated needs for architectural and engineering (A&E) professional services, beyond those already under contract. Further, they will have discussions with program management regarding anticipated project starts for the coming year where category-specific services may be required. They will report those projected needs to the CSO manager by the date established by the manager so that projected category needs can be announced publicly in compliance with this section.

To the degree possible, the CSO will work with the project delivery teams to logically break up work to reduce the emphasis on “capacity to deliver” as a major selection factor. This will allow for more direct competition of specialized key personnel within firms. The purpose is to provide equivalent participation by disadvantaged and smaller firms in accordance with RCW 39.80.040 and 49 CFR 26.

Where category work is needed for more than one project in close proximity, such as a corridor project, a category-specific contract can be used as long as there is continuity to the work and the effort and the work can be clearly defined. To the degree possible, this should coincide with state and, if necessary, federal fiscal funding cycles.

Based on the needs in the various categories identified in the annual review, the CSO manager, the ACLs, and the personnel of the various support groups and projects will meet to determine the projected needs of the state for work starts for the 12-month period beginning each July 1 through June 30 of the following year.

To the degree possible, all work that logically can be identified as project-specific or category-specific in direct support of a project should be scheduled for announcement in the appropriate time frame. For those anticipated or projected needs that cannot be readily quantified, or where funding is not yet clear, one or more of the indefinite-delivery vehicles should be considered.
I.5 On Call Contracts

An on-call contract is a contract form for the delivery of category-specific consultant services. Solicitations and acquisitions will be based on the anticipated needs for services in a specific area: region or statewide. Acquisition will be based on competitive negotiations as specified in 23 CFR 172.

Depending on WSDOT’s needs, one or more contracts may be awarded for each on-call solicitation.

The use of the on-call contract form is not in any way intended to preempt, supersede, or replace the processes of A&E contracting. Open competition based on qualifications and past performance must be met.

The on-call contract may be used to acquire services when the exact time or exact quantity of future services is not known at the most appropriate time to award contracts. By planning ahead, issues that lead to emergency or sole source contracts can be avoided.

Each contract will clearly state the limits of the work to be authorized in dollar amounts and time of performance.

I.6 Design Support Services During Construction

When the services of a design firm are required in order to deliver a project ready for advertisement for construction, there is often the need to have the firm answer questions regarding some of its design elements. These questions may come up during the advertisement period, at bid opening, or any time during the progress of construction.

Change order requests, whether from the contractor or the project, that are not design errors, would require the consultant to quickly respond to potential impacts on other design elements, and thus would necessitate additional work assigned to the firm. Most often the consultant would need to respond quickly to avoid delay costs to the contract. If the firm is not under contract, then it would be nearly impossible to get a quick response.

The department has generally asked the firm responsible for the contract design to be available during the bid period, to answer questions or to provide addendums to the advertisement when necessary. This has usually been extended into the contract period. Every solicitation for design services, and in certain circumstances, where category-specific services are provided as part of the PS&E design effort, should have a provision reserving WSDOT’s right to contract the design firm for support services during the construction period. The “design support during construction contract” is a type of requirements contract. The design support during construction contract retains the services of the “Engineer/Designer of Record” through the construction phase.

The original design contract should also cover the provisions for a separate contract as part of the award for the extended services. The contract for those services should clearly state that the contractor is responsible for any design errors from the design effort under the previous design contract, without cost to the state.
There are several reasons for the separate contract:

- The design effort may have been lengthy and needs to be concluded for auditing and any cost adjustments that need to be made.
- Often a CPFF payment method or a lump sum payment method is used for design contracts. Those types of payment methods are not appropriate for the follow-on design support during construction contract.
- Work can be assigned and authorized under limits, with negotiations occurring quickly to keep the contractor moving without delays.

If the amount of work anticipated is small, then written notices to proceed should be authorized by the project office. The CSO and the WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer’s designee will establish the dollar threshold authorized to the project annually or for the full project duration. This will be covered in the agreement.

Larger amounts can be initiated by letter or, if conditions warrant it, by e-mail. E-mail and letter authorizations should be acknowledged by the consultant and subsequently followed up with an actual statement of work and negotiated budget. These should be authorized through the CSO in coordination with the State Construction Engineer or Assistant Secretary Engineering & Regional Operations Chief Engineer, as provided in the department’s delegation of authority. Copies of all documents and negotiation notes, discussions regarding potential design errors, and other pertinent contractual exchanges between the consultant and the project office should involve the ACL and be subsequently sent to the CSO for its files.

The length of the design services during the construction contract should be at least as long as the construction contract, and a determination should be made as to whether the support services should involve an administrative role that would require budgetary hours during the contract term.

**Note:** Designers cannot provide construction oversight on a project for which they provided designs.

### I.7 Disputes Review Board Agreements

#### I.7.1 Introduction and Legal References

The purpose of this section is to provide procedures for the department to assemble a Disputes Review Board (DRB) for specified construction projects. All DRBs are for architectural and engineering (A&E) services agreements. The establishment of a DRB for a specified construction project is determined by the inclusion of the General Special Provision (GSP) 09111.GR1, “Disputes and Claims,” and Standard Specifications Section 1-09.11, “Disputes and Claims,” into the contract documents.

The DRB agreement process is regulated by Chapter 39.80 RCW, Contracts for architectural and engineering services.
As outlined in the *Standard Specifications*, there will be three members of every board: one representative hired by the state, one representative hired by the contractor, and one representative hired jointly. The third board member is selected by the state’s representative and the contractor’s representative, acting as a selection board and utilizing the CSO database of qualified potential third members.

Following the A&E selection procedures covered in **410.03**, the CSO manager will finalize negotiation for rates (if not already done) and proceed with execution of the third member’s contract.

### I.7.2 Agreement Process

On an annual basis, the HQ Consultant Services Office (CSO) will meet with the HQ Construction Office to review and determine the areas of prospective expertise for DRB services, based on the projected contracts to be let for that year. Discussions will include determining whether to issue indefinite-delivery contracts (IDCs) or category-specific contracts for project support. For the category-specific contracts, the HQ Construction Office will prepare a request memo for each contract needing a state member DRB, which the CSO will advertise specific to the construction project.

For the DRB indefinite-delivery contracts, the HQ Construction Office will prepare a single request memo identifying the specifics of the services needed and determining whether a single award or multiple awards will be made. In addition, the CSO will prepare and announce the annual Request for Qualifications and performance data updates for those consultants interested in being considered for work as either a state member DRB or third member DRB.

### I.7.3 Advertisement, Review, and Selection

In coordination with the HQ Construction Office, the CSO will develop the advertisement and scoring criteria to be used in the selection process following the guidance in **Appendix U, Solicitation/Selection Process**.

There are certain limitations to the Disputes Review Board’s (DRB’s) selection process. For the Statement of Qualifications (SOQs), there will be one submittal per qualifying individual, per firm, per solicitation, whether specific to each potential project or to the IDC (for example, one submittal for John Doe of ACME Engineering for the state member; one submittal for John Doe of ACME Engineering for the third member; and one submittal for Jane Doe of ACME Engineering for the third member). Details will be provided in the solicitation. Specific submittals for projects and IDCs must also include a two- to three-page résumé as a separate PDF document.

The CSO will assemble a selection board that will follow the process described in **410.03** for selection of contract awards. The following will be represented on the review board.
The State Member SOQ Review Board will be made up of:
- HQ CSO – One representative
- HQ Construction Office – Two representatives

For the third member short list each year, the CSO will coordinate and assemble the selection board for third members. This should occur subsequent to the annual announcement requesting Statements of Qualifications and updates to the database. This selection board will review all current information and SOQs received over the year since the last review and develop a short list of best qualified candidates.

The Third SOQ Review Board will be made up of:
- HQ CSO – One representative
- HQ Construction Office – One representative
- Association of General Contractors – One representative

Under the provisions of the short selection process (simplified acquisition process), the board will develop the short list and provide the roster to the CSO manager. The CSO manager will provide the list of names, together with the qualifying data and résumés, to the state member and the contractor’s member when selected for each DRB.

I.7.4 Agreements and Task Orders

Contracts will be negotiated and entered into with the top-ranked firm(s) per the determination of contract type and will be specified in the request memo. All agreements will be negotiated hourly rate agreements.

These category-specific contracts will be assigned to the appropriate project for administration. IDCs will be managed in the CSO with task order documents (TODs) issued as requested at the time of need.

All task orders will be issued in accordance with IDC or task order (see Appendix W), with the exception that the task order forms are specific to DRB. The CSO can be contacted for the appropriate forms. Any DRB task submitted on the standard TOD is not a legal document for this type of work and is in noncompliance with the master agreement.
J.1 Solicitation for Statements of Qualifications

RCW 39.80.040 states that, in the procurement of architectural and engineering (A&E) services, agencies shall encourage consultant firms to submit annual Statements of Qualifications (SOQs) and performance data and evaluate the current Statements of Qualifications and performance data on file.

The Brooks Act, 40 USC 1103(b), also states that agencies shall encourage consultant firms to submit annual statements of qualifications and performance data and maintain that data on file for use in selection of firms for work.

Under the Brooks Act (see Appendix C), state DOTs are to keep the qualifications of architectural and engineering firms on file. They should also review these files on an annual basis and update them as necessary. Agencies using the services of A&E firms are expected to actively encourage the firms to update the information they have on file with the agency.

The HQ Consultant Services Office will maintain a database that meets the requirements of the Brooks Act and the Disadvantaged Business Enterprise (DBE) Program Plan approved through the Federal Highway Administration. On an annual basis, the CSO manager will publicly announce, through publications in the Seattle Daily Journal of Commerce, the CSO website, and other appropriate media, the anticipated needs for consultant services. The CSO manager will encourage firms to submit their consultant qualifications information and statements of interest in being considered for WSDOT contracts.

Submissions will be in a media format as specified by the CSO and described in the public announcement. Firms already in the database should also be encouraged to update their information (see J.2).

The data to be maintained are more general in nature, addressing the firms’ qualifications in the areas in which they practice their professions. The data collected should describe the overall capabilities and different types of projects for which the firm is qualified. Past performance on specific projects is also to be maintained and updated as appropriate. This is both a federal and a state requirement for A&E contracting.

The same data should be collected from firms as part of their response to project-specific solicitations, if they have not submitted the data previously and/or their current information is not up to date. It is not the intent for firms’ general data, collected at this point, to satisfy solicitation-specific Requests for Qualifications. This information, together with the solicitation-specific information, will be used for screening and determining which firms to hold discussions (interviews) with.

49 CFR 26 requires states to maintain a database of DBE firms that have expressed an interest in contracting with the government. WSDOT is required to maintain: a method capable of tracking and reporting DBE availability based on their North American Industry Classification System (NAICS) codes; contracts or subcontracts
awarded to DBE firms where federal funds are involved; DBE goal setting on awarded contracts; and attainment of goals on completed contracts where federal funds are involved.

Under the Brooks Act, the selection process starts with the evaluation of qualifications and past performance data. Keeping this information current is vital to meeting the intent of the Brooks Act and being in compliance with state and federal regulations. The CSO is responsible for maintaining this database for WSDOT.

Information that should be updated at least annually includes:

- Addresses and contact information for the main and each branch office that may be doing business with WSDOT.
- Ownership and business status.
- Employee qualifying information, categories, number of employees in each category, and location (main or branch).
- Overhead (OH) and salary rate information. Firms are to provide OH information within 180 days of fiscal close.
- Any contract awards since the last update.
- Performance evaluation information on completed contracts.

The CSO manager will publish the process for firms to submit their annual SOQs and any other data requirements necessary to meet the obligations of this section on the CSO’s public website (www.wsdot.wa.gov/business/consulting).

In Appendix B, A&E Legal Bases, there is discussion regarding the legal obligation for WSDOT to publicly announce all requirements for consultant services in advance of those needs. The discussion goes on to cover the RCW provisions for satisfying the requirements of those announcements. There are two options provided by the Legislature: one is to announce each specific requirement as the need is determined, and the other is to announce WSDOT’s projected requirements annually.

The CSO will develop separate forms for firms to use in submitting their general qualifications and past performance data, and in submitting applications to be considered for specific projects or categories of work being announced through solicitations.

- One form will provide for submission of a firm’s general qualifications and past performance history and will be used to update existing data annually, if applicable.
- Another form will provide for specific qualifications in response to solicitations advertised by the department, covering not only the firm’s specific application to the project or category of work announced, but also to allow for the inclusion of potential subconsultants and their applicable qualifications.

Both forms are easily accessible by contacting the CSO staff or accessing the CSO’s Intranet website (wwwi.wsdot.wa.gov/consulting).
J.2 Annual Qualifications and Past Performance Update

As discussed in Chapter 410, WSDOT is required to encourage firms interested in doing business with the state to submit, or update, their qualifications, performance evaluations, and recent contract awards so the state can update the firm’s data in the qualifications database. The CSO manager will establish the process for annual updates and post the process on the CSO’s public website (www.wsdot.wa.gov/business/consulting).

Details regarding the needed information will be provided in the instructions and will include updates of a firm’s audited or approved overhead rates. For firms already in the database, update notices will be sent by e-mail or by a phone call to the firm’s designated contact person. As often as possible, notices should coincide with the end of a firm’s fiscal year. While the process for notification may be an annual one, the CSO will accept updates throughout the year if they are provided.

J.3 Simplified Acquisition (Small Purchase) Statements of Interest

The CSO manager may publish a request for statements of interest from consultants who want to be considered for small purchase contracts under simplified acquisition. Consultants should provide SOQs, past performance evaluations, and other pertinent information, along with a letter stating their interest in being considered for small purchase contracts.

Consultants who are already in the small purchase database should update their information at this time if they haven’t done so on a regular basis.

The public announcement will clearly state that no contracts are being awarded directly as a result of this request; that there is no guarantee that any contracts will be awarded; and that the information will be maintained in the database until such time as the consultant requests that it be removed, or three years pass without an update to the information by the consultant.

The statement of interest in small purchase contracts should state that the consultant understands the limits of simplified acquisition, as specified in U.1.3 and U.2.7.

As an alternative to the letter-style statement of interest, the CSO manager may create a “fill in the blank” form that allows interested consultants to provide the requested information and acknowledge the limitations of the simplified acquisition process. The public announcement requesting statements of interest will notify consultants that the form will be available on the CSO website if they would like to use it rather than a letter for their statements of interest.
Debriefing Procedures and Disclosure of Consultant Information

K.1 Debriefing Procedures

The purpose of debriefing is to provide information to the consultant regarding any apparent weaknesses or shortfalls in the process. In addition, debriefings provide consultants the opportunity to assure themselves that the criteria published in the solicitation or used during the interviews was the basis of the final decision and learn how they might improve for future solicitations.

Debriefings will be done in accordance with the following:

1. Debriefings of successful and unsuccessful firms will be held after final selection has taken place. Debriefings will be conducted in writing, by phone, or in person. The manner of debriefing will be specified in the solicitation announcement.

2. A proposer, upon written request received by the agency within three days after the date on which that proposer has received notification of contract award, will be debriefed and furnished the basis for the selection decision and contract award.

3. Debriefing will occur within five days after the proposer has requested it.

4. The CSO manager, or a designee, will normally chair any debriefing session held. Individuals who conduct the evaluation will provide support.

5. Debriefing information will include:
   a. The state’s evaluation of the strengths and significant weaknesses or deficiencies in the proposer’s proposal, if applicable.
   b. Reasonable responses to relevant questions regarding whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

6. An official summary of the debriefing will be included in the contract file.

Debriefing will not include point-by-point comparisons of the debriefed offeror’s proposal with those of any other offeror. Also, firms will not be provided with copies of scores, proposals, or their rankings in relation to other firms. Debriefing will be consistent with Washington’s Public Disclosure Act (RCW 42.56) and the Freedom of Information Act (5 USC 552).

Under no circumstance will a consultant, whether an individual or a firm, be provided with, or granted access to, another firm’s solicitation proposal/submittal, without the consultant first submitting a formal request under the state’s Public Disclosure Act.
K.2 Release of Consultant Information

The following pertains to the release of information regarding firm selection:

- After final selection has taken place, the contracting officer may release information identifying only the architect-engineer firm with which a contract will be negotiated. If negotiations are terminated without awarding a contract to the highest-rated firm, the contracting officer may release that information and state that negotiations will be undertaken with the next-highest-rated architect-engineer firm. When an award has been made, the contracting officer may release award information by posting it on the CSO website (www.wsdot.wa.gov/business/consulting).

- Preaward notices of exclusion from competitive range: The contracting officer will notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice will state the basis for the determination and that a proposal revision will not be considered.

- Postaward notices: Within three (3) days after the date of contract award, the contracting officer will provide written notification to each offeror whose proposal was in the competitive range but was not selected for award or had not been previously notified.

In no event will an offeror’s cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

Any requests for disclosure of public documents, or requests that might be labeled Freedom of Information Act requests (the federal law people are familiar with), will be forwarded to the WSDOT Records and Information Services Office (Public Disclosure) for handling in accordance with Secretary’s Executive Order E 1023.
L.1 Introduction

For A&E contracts, cost factors will be part of a firm’s proposal and will be subject to negotiation. Regardless of the payment method or contract type used, the same elements go into determining cost factors that, when applied to the hours negotiated for deliverables, make up reasonable costs to the state.

Eligible cost factors are covered in detail in Federal Acquisition Regulation (FAR) 31. The following are costs generally associated with items invoiced on projects.

L.2 Direct Labor

Direct labor is the labor rate paid directly to personnel working for the consultant or the subconsultants, and it is negotiable if the department determines the rates are unreasonable for the labor class. This is especially true when executive-level personnel are directly billing to a project, whether on the estimate of cost or on monthly invoices. Direct labor is billed at actual cost.

Salaried employees in management or executive levels normally have fixed monthly incomes with varied work schedules, meaning the number of hours actually worked are often more than, but could be less than, 40 hours per week. That makes it impossible to determine an actual hourly rate. The consultant must be able to demonstrate that the employee is paid a consistent hourly rate and that company/project bonuses and/or disincentives do not factor into that rate, in order for that rate to be directly billable to the project. Otherwise, their costs are recovered in overhead.

L.3 Fringe and Overhead

When an employee for a consultant is sick or takes leave and receives compensation for that day from the consultant, it is not billable to the project. Costs to the employer for Social Security, medical coverage provided by the employer, retirement contributions made by the employer, and other employer taxes associated with the employment of the employee are all part of the employee’s compensation package. They are known as fringe benefits and are not eligible for direct billing to the project. Those costs are recovered as part of the overhead attributed to the labor costs.

The company’s other costs, including executive management salaries, insurance, rent, and a number of other factors covered in FAR 31, are recovered in overhead as well. These costs are referred to as general and administrative costs. They are recovered as a percentage of each labor hour billed to the project, and the percentage is determined and adjusted on an annual basis. For more details on determining these costs and for further adjustments that must be made to the cost-plus-fixed-fee (CPFF) billing method, see Appendix H, Contract Payment Methods.
L.3.1 Fee (Profit)

The fee is the profit portion of the costs associated with a project or work effort that encourages a “for profit” company to take the risks and carry the associated burdens of providing services to government and the private sector.

At the federal level, profit is determined for architectural and engineering (A&E) services as a percentage of the combined labor and overhead hourly costs. However, it is WSDOT’s position that using both the labor and overhead to calculate profit could encourage overhead costs to “creep.” WSDOT calculates the profit as a percentage of the labor costs directly attributable to the work effort involved.

- For the CPFF payment method, the amount that is “fixed” for the project or work effort is first determined by applying this percentage to an estimate of the project or work effort costs and then fixing the profit amount as a lump sum profit for the work.
- For all negotiated hourly rate contract types, the fee is included in every hour worked.
- For lump sum agreements, the fee is part of the negotiated lump sum total price.

For all A&E contracts, profit shall be negotiated separately and in accordance with 49 CFR 18.36(f)(2), which reads as follows:

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed (see 49 CFR 18.36(f)(1)). To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor’s investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

There may be times when an incentive or disincentive on a project or work effort may be beneficial to the department. This could be for any number of reasons. Incentives must be determined prior to advertising the project or work effort and approved by executive management. Incentives and disincentives are a potential additional profit or a profit penalty to the firm or project team.

L.3.2 Direct Nonsalary Costs

On many work efforts or projects, there are costs not associated with labor, including expenses such as travel, hotel rooms, temporary housing, printing, and other types of materials and/or expenses directly associated with the work effort. These costs, when they can be directly related to the project, are billable to the project. They are to be billed at cost, without any profit or markup. Travel costs are managed for WSDOT by DES and the SAAM Manual, and will be reviewed and reimbursed to the consultants accordingly. Anticipated direct nonlabor costs should be covered in the estimates and at the negotiations. Unanticipated costs need to be discussed with the WSDOT project manager, and written approval must be obtained whenever possible before the costs are incurred.
M.1 Federal Ethics Requirements

49 CFR 18.36(b) establishes a requirement for all recipients of federal-aid funds regarding an ethical approach to conducting government acquisitions.

In addition, the above citation places emphasis on contractor behavior in business transactions with the state, including:

- A mandatory duty is established for the contractor to disclose procurement, fraud, and overpayments, or risk debarment or suspension. The contractor must report fraud, conflicts of interest, bribery, and illegal gratuities in connection with the award or performance of a state contract.
- Contractors are encouraged to have a written code of business ethics and conduct. In addition, the contractor should have an ongoing ethics and compliance training program for principals and employees, as well as a system of internal controls to detect fraud and improper conduct. These items are mandatory for firms whose contractual operations include co-location with WSDOT personnel.
- Past contractor performance, considered a key criterion in awarding new contracts, should include the contractor’s record of integrity and business ethics, including their efforts to implement an effective ethics and compliance program.

While transparency and accountability are goals when managing information related to government business transactions, there are specific prohibitions on divulging information during the acquisition solicitation cycle in order to protect the integrity of the process. Contracting officers are required to maintain a high level of business security, especially when preparing estimates or cost analyses and scopes of work to be acquired that require proprietary information from outside WSDOT. During the solicitation phase, contracting officers are expected to protect information that would provide undue or discriminatory advantage to private or personal interests; information received in confidence from an offer; or any internal agency communications regarding the solicitation process, including technical reviews and recommended actions.

All requests for proprietary or confidential information regarding an HQ Consultant Services Office (CSO) solicitation must be forwarded to the CSO manager, who will coordinate a response through the WSDOT public disclosure process (see Section 650.02.02 for further details).
M.2 Washington State Ethics Requirements

Chapter 42.52 RCW, the Ethics in Public Service Act, covers a variety of topics related to state employees’ roles and responsibilities in conducting official business. It is accompanied by a legislative declaration (RCW 42.52.900) regarding the importance of ethics in government.

The provisions that are most applicable to activities performed in the acquisition and contracting for goods and services include:

1. **Financial interests in transactions.** RCW 42.52.030 prohibits state officers and employees from having a beneficial interest in a contract or other type of acquisition that may be made by, through, or under the supervision of the officer or employee. It also prohibits the acceptance of any compensation, gratuity, or reward from any other person beneficially interested in the contract.

   • Also related to this topic are RCW 42.52.020, which prohibits state officers or employees from having an interest, financial or otherwise, direct or indirect, or engaging in a business or transaction or professional activity, or incurring an obligation of any nature, that is in conflict with the proper discharge of their official duties; and RCW 42.52.070, which prohibits state officers or employees from using their position to secure special privileges or exemptions for themselves, members of their families, or others.

2. **Assisting in transactions.** RCW 42.52.040 prohibits, except in the course of official duties, state officers and employees from assisting another person in a transaction in which they participated or for which they had official responsibility within a two-year period preceding such assistance. It also prohibits state officers and employees from sharing in compensation received by another person (or by a business entity in which they have an interest) for such a transaction.

3. **Employment following public service.** RCW 42.52.080 prohibits a former state officer or employee, within one year from the date of termination of state employment, to accept employment or compensation from an employer if:

   • They were engaged during the preceding two years in the negotiation or administration of a contract(s) with a total value greater than $10,000 with that employer.

   • They were in a position to make discretionary decisions affecting the outcome of negotiations or the nature of contract administration.

   • The duties of the employment include fulfilling or implementing the provisions of such contract(s).

Other prohibitions on future employment of former state officers and employees are that the employee may not:

• Have a beneficial interest in a contract expressly authorized or funded by an action in which the employee participated within a period of two years following termination of state employment.
• Accept an offer of employment or compensation if it was reasonably believed to be intended to influence, compensate, or reward the performance of an official duty during the course of state employment.

• Assist another person at any time subsequent to state employment in any transaction involving the state in which the former state officer or employee at any time participated during state employment.

4. **Compensation for outside activities, gifts, and other types of private gain.** RCW 42.52.110-170 includes guidelines regarding state officer or employee activities in the following areas. The guidelines:

- Prohibit compensation, gifts, awards, or gratuities for performing, omitting, or deferring the performance of an official duty.

- Define circumstances under which a state officer or employee may or may not receive compensation for outside activities, including activities related to a beneficial interest in a contract(s), and provide for situations in which such events are subject to Executive Ethics Board review and advice.

- Define circumstances under which a state officer or employee may or may not receive honoraria and gifts.

- Place restrictions on the use of any person, money, or property for private gain.

5. **Maintaining confidential information.** RCW 42.52.050 prohibits:

- A state officer or employee from accepting employment or engaging in any activity that would require or induce him/her to make an unauthorized disclosure of confidential information acquired in the course of carrying out his/her official duties.

- The disclosure of confidential information—unless the disclosure has been authorized by statute or by the terms of the contract involving the state officer’s or state employee’s agency and the person or persons having the authority to waive the confidentiality of the information—or otherwise using it for personal gain or the gain or benefit of another.

- The intentional concealment of a record, or intentional failure to release a record, that the state officer or employee knew was required to be released under public disclosure.

Chapter 42.52 RCW applies to all state employees contracting on behalf of the state. All WSDOT employees are required to state in an annual ethics law review whether they have contracting authority and whether they have any beneficial interest in an outside business that could present a potential conflict of interest. All WSDOT employees are also required to complete ethics training once every three years and be knowledgeable of the statutes and rules governing professional conduct.
RCW 42.52.320 establishes the roles and responsibilities of the Executive Ethics Board, which has the authority to investigate complaints regarding potential ethics violations of state officials and state employees in agencies within the executive branch, issue advisory opinions, and enforce penalties. Reports or complaints regarding potential ethics violations may be filed directly with the Executive Ethics Board or may be filed through the Whistleblower Program managed by the State Auditor’s Office.

Individual state employees or former state employees may also refer their own requests for informal opinions to the Executive Ethics Board prior to determining a personal course of action. State employees and former state employees are ultimately responsible for compliance with Washington State ethics laws.

The WSDOT Internal Audit Office is tasked with providing assistance in reviewing questions and clarifying issues relating to the State Ethics Law for WSDOT employees. The Internal Audit Office works closely with the Executive Ethics Board on requests for ethics advice or formal advisory opinions for state-related issues. It also investigates complaints of alleged ethics violations.

Chapter 18.43 RCW covers topics such as accepting gifts or other considerations to influence the award of professional work; being willfully deceptive or untruthful in professional work products; and having a financial or other business conflict of interest in the performance of a contract and failure to disclose such conflict. This statute establishes the Board of Registration that registers and certifies engineers and land surveyors. The Board has the authority to investigate violations and impose disciplinary action for unprofessional conduct. Guidelines and prohibitions on the unprofessional conduct of engineers and land surveyors are provided in Chapter 18.43 RCW; RCW 18.235.130; and WAC 196-27A-020.

On a more general level, RCW 18.235.130 covers acts and conditions that constitute unprofessional conduct, including any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person’s profession or operation of the person’s business.

WAC 196-27A-020 provides rules of professional conduct for registered engineers and land surveyors, including obligations to the public, to employers and clients, to other members of the profession, and to the Board of Registration.
N.1 Introduction

Understanding how the various elements of federal and state regulations work together helps clarify how a detailed and workable statement of work (SOW) is achieved. It has been past policy and is a current WSDOT business practice to adhere to federal guidelines regarding architectural and engineering contracts when they are equivalent or more restrictive so that the state will be in federal compliance should it choose to seek federal participation midcourse in the design phase of a project.

N.1.1 Statements of Work

In the public announcement of a project, the state provides, in as few words as possible, the general scope and nature of the project. With regard to statements of work (SOW), as seen in RCW 39.80.040 and in the solicitations process (see Appendix U), firms identified as the most qualified in the initial evaluations should be engaged to discuss “anticipated concepts” and “alternative methods” in their approaches to the project as part of the interview process.

Historically, interviews have been used to give consultants opportunities to explain their understanding, concepts, and approaches to the project. Care must be taken to ensure there is no implied design competition, which requires specific approvals and usually involves a stipend or monetary reimbursement for participation.

It is anticipated that the top-rated firm selected for negotiations, based in part on its innovative or alternative (to the usual) approach, would provide the more detailed SOW as part of the Request for Proposal (RFP) going into negotiations.

Federal Acquisition Regulation (FAR 31) covers the allowable and nonallowable costs associated with direct or indirect project costs billable by a firm. FAR 31.205–18 covers “bid and proposal” costs. Bid and proposal costs are considered the costs of doing business and are allowed in a firm’s overhead computations. Neither the costs associated with putting together a budget estimate, nor the costs associated with negotiating the contract with the state, are allowed as a direct reimbursable to the consultant on the project.

N.1.2 Statement of Work and Budget Negotiations Using the Managing Project Delivery (MPD) Process

In the last half of the 1990s, WSDOT and the consultant community were spending a large amount of time, resources, and money on claims and disagreements related to design contracts. Many of the issues centered on SOWs and the expectations of the state and consultants. In an effort to eliminate those costly disagreements, both sides got together to work out a systematic approach that would eliminate the problems associated with reaching a consensus.
From this effort came the “MPD” process for scoping. MPD was terminology derived from the larger Managing Project (or Program) Delivery business system popular in the business community at the time. The process was developed jointly through a chartered group made up of WSDOT and consultant personnel. This group, known as the WSDOT/CECW Project Delivery Group, was sponsored by an executive committee jointly made up of WSDOT executive management, the Environmental and Engineering Services Division, and executive-level members of the Consultant Engineers Council of Washington (CECW). The CECW is now known as the American Council of Engineering Companies (ACEC), Washington State Chapter.

Short of contracting with a firm to write statements of work (SOWs) for the state, the MPD process is the only legal format for a consulting firm receiving cost reimbursement for developing SOWs. If the state were to contract with a consultant separately to develop SOWs, the firm would not be eligible to participate in the contract, just as a consultant hired to develop Plans, Specifications, and Estimates for construction cannot participate in the construction contract. Full details of the MPD process are included as Exhibits N-1a and N-1b.

A brief explanation of the MPD process is as follows:

The advertisement for the Request for Qualifications (RFQ) should state whether the MPD process will be followed for the statement of work or not. During the pre-solicitation meeting between the project and the HQ Consultant Services Office (CSO), the decision should be made whether to use MPD for developing the full SOW or to have the consultant firm develop and submit the SOW as part of its proposal package. The proposal package is submitted to the state upon issuing the Request for Proposal (RFP) after the firm has been notified that it is the top-rated firm.

The basis for the decision should be made according to the difficulty and complexity of the work; the approaches to the project by the department; whether or not the state anticipates varying alternatives to the approach to the work; and whether or not innovation is a major component to the final selection. This decision should involve executive management for contracts anticipated to need the MPD process, as there are budgetary and time issues that may need to be resolved.

Regardless of which method is used, a sufficient amount of time should be allowed for the firm to prepare for the first meeting. Usually, this will be two to three weeks from the time the firm is notified of having been selected. If the MPD process is used, a contract must be entered into for the SOW development phase. If it has not already been done, the firm’s billing rates need to be negotiated/approved for this contract.

Strong consideration should be given to a lump sum (see Appendix H) payment method for the SOW development phase. This provides a significant incentive for the firm to come prepared to work to reach consensus in the negotiation process. The purpose for using the MPD process is to develop a SOW that is clear, concise, well thought out, and workable, with little disruption caused by changes to the SOW from omissions or errors. A well-developed SOW means lower cost(s) to the state and timely project completion.
Under the MPD process, the SOW development contract should close when the SOW is sufficient for the state and the consultant to develop independent estimates. Further adjustments to the scope will be considered part of the negotiations and will not be reimbursable to the consultant.

After development, the firm will include the SOW in its proposal package.

Working together on the SOW provides a statement of work that is better defined and less likely to be misunderstood by any of the parties to the contract. The process needs to be conducted by the CSO working together with the state’s project team and the consultant’s project team. The consultant’s team, working together with the state’s team, is providing a service to the state that the state would normally provide on its own. This is the justification for payment to the consultant.

When the MPD process is used in lieu of the state furnishing a statement of work for A&E services, the CSO will organize and conduct the meetings based on the project’s input. That input will be to provide sufficient information for the CSO to arrange for the presence of the appropriate team members during the process. All parties will agree to and follow the flowchart and narrative provided in Exhibits N-1a and N-1b.

The contract for compensation for the SOW development must cover the issues regarding the SOW not being a guarantee of any further work. If the state and the consultant do not come to terms, the contract can be concluded without further expectations on the part of the consultant. No compensation can be made for time spent in actual negotiations.

After successful negotiations have concluded, a contract for the services should be completed and executed by both parties. Notices should then be sent to any firms still waiting and to those firms desiring debriefing. A notice to proceed should accompany the final executed original sent to the consultant.

When negotiating or while using the MPD process, special attention should be paid to the issue of subconsultants.

Because selection of firms is based upon qualifications, the extent of any subcontracting is an important negotiation topic. Changes to team members should not occur if subconsultants were included as part of the solicitation and selection process. If subconsultants were not part of the solicitation and evaluation process, and are not proposed until the negotiations, then subconsultants will be fixed at execution of the contract.

Other items that should be covered in the scoping or negotiations are use of recovered material and energy efficiency, which should also have been covered in the selection criteria in the Statement of Qualifications (SOQ) and RFP.

In accordance with 40 USC 1103, the CSO should hold discussions with at least three of the most highly qualified firms regarding concepts, the relative utility of alternative methods, and feasible ways to prescribe the use of recovered materials and achieve waste reduction and energy efficiency in facility design (see 49 CFR 18.36(i)(12 & 13)).
The lead negotiator needs to keep in mind the possibility that the firm rated most qualified may have been ranked number one based on its unique or alternative approach to the project or application of energy-saving technology. The contract officer should become familiar with the selection board’s documentation. The negotiated labor rates, costs, and fees may be affected by the consultant team’s unique concepts.

The appropriate information on use of the MPD process should be included in the record of negotiation and should be signed by the CSO manager before placing in the Project File.

N.1.3 **Statement of Work and Budget Negotiations Without Using the MPD Process**

If the MPD process is not going to be used, the CSO or the appropriate area consultant liaison (ACL) will arrange for the negotiations to be started.

Negotiations and finalization of the SOW are based on the consultant’s response to the RFP. The RFP is issued to the consultant after the final ranking of firms is approved by the CSO manager. If the MPD process is not used, the consultant is not paid for the SOW development or the negotiations process. This is considered a part of the consultant firm’s bid and proposal costs, which are recoverable in its annual overhead.

Care must be taken by the CSO to ensure the synopsis of the work effort expected is of sufficient detail for the consultant to develop the SOW without many changes during the negotiations.

49 CFR 18.36(f)(1&2), which covers government cost estimates for architect-engineer work, states that a cost analysis of the consultant’s proposal for architect-engineer services shall be done by the contracting officer. As a starting point, an independent estimate shall be prepared by the state prior to receiving proposals for each proposed contract or contract modification expected to exceed the simplified acquisition threshold. The cost analysis shall be done in compliance with 48 CFR 31.205-6(b)(2).

The appropriate ACL or the CSO manager’s representative will lead the negotiations, with support from the project personnel. A meeting should be held between the project, the CSO, and the ACL prior to the negotiations to establish the goals and expectations of the state.

After negotiations reach agreement and an award has been made, notifications will be sent to the submitting firms regarding the award, along with the award information. Information will include the contract amount, the name of the firm awarded the contract, and information regarding debriefing, if not already provided.
Appendix N Negotiations, Statements of Work, and Managing Project Delivery

June 2015

Negotiations Flowchart – Deliverable: A Signed Contract

MPD: Negotiations Flow Chart

Exhibit N-1a
Managing Project Delivery Negotiation Steps

Step 1: Project Definition

Who: Regions establish a Project Definition Team for each project and assign a project manager to lead and coordinate the project.

What: The WSDOT Project Definition Team establishes the following expectations at the project definition stage:

1. Project Title
2. Preliminary Team Chartering elements
   - Project vision
   - Team mission
   - Boundaries
   - Goals
   - Measures of success
3. Preliminary customers and stakeholders
4. Project Work Plan that includes preliminary:
   - Scope
   - Work Breakdown Structure (WBS)
   - Schedule
   - Delivery date for product(s)
   - Budget
5. Endorsement from WSDOT’s authorized representative

Outcome: Defined project expectations. When the project is defined and approved, the Project Definition Team can determine whether or not a consultant is needed.

Decision Point Diamond: The department determines whether a consultant’s services will be needed for the project.

MPD: Negotiation Steps

Exhibit N-1b
Step 2: Consultant Selection

Who: The project manager works with the HQ Consultant Services Office (CSO) to select a consultant to provide services for all, or part, of the project.

When: After the region’s Program Management Office verifies funding for the project and after the manager of the CSO approves the request to select a consultant.

What: Follow the Advertisement, Selection, and Award procedures in the WSDOT Consultant Services Manual.

Outcome: Consultant is selected for the project.

Step 3: Execute Phase 1 Scoping Agreement

Who: The HQ Consultant Services Office (CSO) prepares a Phase 1 Scoping Agreement with the consultant and obtains approval from the CSO manager.

When: Process this step as soon as possible after the consultant has been selected for the project.

What: The Phase 1 Scoping Agreement is used to establish reimbursable billing rates for Steps 4 through 8 of the negotiations procedures.

The consultant’s and subconsultant’s billing rates for Phase 1 include only direct labor and overhead costs. Billing rates are established when the CSO obtains from the consultant, and any subconsultants, the rates for those individuals and/or job classifications that will be working on Steps 4 through 8 of the negotiations procedures.

Profit will not be paid to the consultant for Phase 1. The department will pay only reimbursable costs based on the Phase 1 Scoping Agreement. Before any work begins, the Assistant Secretary for Environmental and Engineering must approve the Phase 1 Scoping Agreement.

Outcome: A signed agreement for the Phase 1 scoping process between WSDOT and the consultant.

MPD: Negotiation Steps

Exhibit N-1b (continued)
Step 4: Develop Negotiation Work Plan

Who: WSDOT and the consultant form a Core Group to develop the Negotiation Work Plan. It is recommended that a facilitator, who is proficient in the application of Managing Project Delivery procedures, be used.

The WSDOT participants are usually the WSDOT project manager, an assistant, and possibly other personnel whose expertise is needed. The HQ Consultant Services Office normally has a representative available for this process.

The consultant participants are usually the consultant project manager and team leaders from each of the subconsultants.

When: This process should occur immediately after the Phase 1 Scoping Agreement has been signed.

What: The Core Group performs the following functions:

- Select the Negotiation Team members.
- Develop the procedures for the negotiations.
- Determine a preliminary schedule for the negotiations.
- Outline the responsibilities of the Negotiation Team.

The role of a facilitator should be to guide the team toward a means of developing a priority listing that provides a clear definition of team member responsibilities.

Outcome: A Negotiation Work Plan, which includes a schedule (through Step 13) and the responsibilities of each member of the Negotiation Team.

Step 5: Determine the Agreement Scope of Work Team

Who: Negotiation Team members selected in Step 4.

When: After Step 4.

What: Determine the WSDOT and consultant members for the Agreement Scope of Work Team. This team usually consists of technical staff from WSDOT and the consultant; it may also include customers and/or stakeholders, and is representative of the full project development team that is yet to be convened (see Step 14.)

The Negotiation Team will determine the Agreement Scope of Work Team’s preliminary responsibilities and schedule.

Outcome: The result is an Agreement Scope of Work Team with specific scheduled duties and responsibilities.
Step 6: Define Chartering Elements for the Project Delivery Team

Who: The participants are the Agreement Scope of Work Team (representative of the full Project Delivery Team). It is recommended that a facilitator, who is proficient in the use of Managing Project Delivery procedures, be used.

When: Development of chartering elements for the Project Delivery Team will be initiated at the team’s first meeting.

What: Chartering elements for the Project Delivery Team, including the following:
- Develop a project vision, team mission, boundaries, and goals for the project.
- Identify the preliminary customers and stakeholders for the project.
- Define roles and responsibilities for the Project Delivery Team.
- Develop measurements of success and a change management framework for the project.

Outcome: The result will be documentation of the team’s chartering elements as defined in the “What” section above.

Step 7: Develop the Project Work Plan for the Agreement

Who: The Agreement Scope of Work Team consisting of WSDOT and consultant representatives and a facilitator.

When: The development of the Project Work Plan should occur after the team’s chartering elements have been prepared and before hours and dollars are discussed for the project.

What: The Agreement Scope of Work Team will develop the following for the project:
- A Project Work Plan that includes a Work Breakdown Structure and all deliverables.
- Expectations for the project.
- A Project Schedule.
- A Disadvantaged Business Enterprise (DBE) preliminary requirement for the project, if federal funds are included in the project.

Dollars and hours are not discussed during this step of the process.

Outcome: Agreement Scope understanding as captured in the above “What” elements.
Step 8: Prepare the Agreement Scope of Work

Who: The Agreement Scope of Work Team consisting of WSDOT and consultant representatives.

When: This process may go through several iterations before it is finalized by the team and before hours and dollars are discussed for the project.

What: The Agreement Scope of Work Team will determine the following:
- Define the project’s expectations.
- Explain the level of detail expected for each of the work elements of the project.
- Outline the methodology used to perform the work; address and resolve clarifications.
- If there is federal participation, the team is required to define the DBE requirement participation percentage and ensure this requirement is met by following the appropriate methodology defined in the WSDOT DBE Participation Plan.

Dollars and hours are not discussed during this step of the process.

Outcome: A document describing the collaboratively developed Agreement Scope of Work.

Important Note: Payments are terminated for the Phase 1 scoping process at the conclusion of this step of the process for the consultant and subconsultants.

Step 9: Determine the Type of Agreement

Who: Usually, WSDOT’s project manager, a representative from the HQ Consultant Services Office, and the project manager for the consultant. There may be additional members on the team who could be determined on a case-by-case basis.

When: This step usually occurs following the iterations for the project’s scope of work. However, it could be completed simultaneously with that process.

What: The team agrees on the type of agreement.

Outcome: The agreed-upon type of agreement.

Decision Point Diamond: Was there joint endorsement of the Agreement Scope? If yes, proceed to the next step of the process. If no, please return to Step 7, “Develop the Project Work Plan for the Agreement.”
Step 10: Independent Estimates of Hours and Costs

**Who:** This may include members from the Negotiation Team and/or members from the Agreement Scope of Work Team. WSDOT and the consultant each form independent teams for this step.

**When:** Immediately following the joint endorsement of the Agreement Scope, including completion of Step 4 (Work Plan), Step 5 (Scope of Work), and Step 9 (Determine the Type of Agreement).

**What:** Each team prepares the following proposals for the independent estimates of hours and costs:
- Categories of work elements.
- Categories of personnel who will be assigned to the project.
- Number of hours for each category of employee and the work element each individual will be working on.
- Direct labor rates for each proposed category of employee.
- Supporting documentation for the direct labor rates.
- Overhead rates, including justification.
- Reimbursable costs for the project.
- Profit for the project.

It is important that WSDOT verifies funding is available based on the department’s independent estimate of costs for the project.

**Outcome:** Comprehensive independent project estimates by WSDOT and the consultant, which are the basis for negotiations.
Step 11:  Face-to-Face Negotiations

**Who:** The Negotiation Team consisting of selected members from WSDOT and the consultant team. Usually, the WSDOT project manager and an area consultant liaison will represent the department. The prime consultant’s project manager and subconsultant’s task managers usually represent the consultant team. However, there may be a need for a financial representative from the prime consultant.

**When:** Immediately following Step 10.

**What:** Independent estimates are compared, differences are negotiated, and both sides reach a consensus regarding those items included in Step 10 of the process.

**Outcome:** Level of effort and cost for the project.

**Decision Point Diamond:** If consensus is reached on the agreement, proceed to the next step of the process. If consensus cannot be reached with the consultant, proceed to Step 2, Consultant Selection.

Step 12:  Validate Funding and Resources

**Who:** The department’s project manager and/or area consultant liaison will validate funding with the appropriate program management office and requesting authority for the project.

**When:** Following Step 11. Based on the results of validating the funding for the project, there is a possibility of revisiting Steps 7 through 11 of the process.

**What:** Verify that adequate funding and resources (people, equipment, and money) exist for the project, and/or develop a funding and resource strategy if adequate funds are not available for the project.

**Outcome:** Funding has been validated and/or a funding and resource strategy has been developed for the project.

**Decision Point Diamond:** If the project is within budget, proceed to the next step of the process. If there is not adequate funding for the agreement as negotiated, attempt to obtain additional funding; redefine the project and/or rescope the consultant portion of the project. (Return to Step 7.)
Step 13: Agreement or Supplement Review, Execution, and Notice to Proceed

**Who:** Reviewers: The HQ Consultant Services Office (CSO) and the department’s designated Assistant Attorney General. Executors: For WSDOT, the Assistant Secretary for Environmental and Engineering Programs or a designee. For the consultant, the individual with evidence of signature authority.

**When:** Following Step 12.

**What:** Reviewers recommend whether the department should approve the agreement or agreement supplement. The department and the consultant execute the agreement or agreement supplement. The CSO, or area consultant liaison, issues a “notice to proceed” letter to the consultant and the project manager.

**Outcome:** A signed agreement or agreement supplement and a notice to the consultant to proceed with work on the project.

Step 14: Charter the Project Delivery Team

**Who:** The full Project Delivery Team chartered for the project.

**When:** The charter for the Project Delivery Team will be developed after the notice to proceed has been given to the consultant.

**What:** Using the chartering elements, work plan, and scope of work developed in Steps 6, 7, and 8, charter the full membership of the Project Delivery Team. This should include the following elements:

- Develop the vision, team mission, and goals for the project.
- Identify the customers and stakeholders for the project.
- Develop measurements of success and a change management framework for the project.

**Outcome:** A signed charter for the Project Delivery Team.
Appendix O  Noncompetitive Negotiations

O.1 Legal References

Following are the federal and state laws and regulations upon which Chapter 430 and this appendix are based. The portions of the federal and state laws that specify emergency conditions are covered separately in Chapter 600.

O.1.1 Federal Regulations

23 USC 112, Letting of contracts
23 USC 106, Project approval and oversight
49 CFR 18.36, Common grant rule for states
23 CFR 172.5(3), Methods of procurement. The regulation states that noncompetitive negotiation may be used to procure engineering and design-related services on federal-aid participating contracts when it is not feasible to award the contract using competitive negotiation, equivalent state qualifications-based procedures, or small purchase procedures. Contracting agencies shall submit justification and receive approval from the Federal Highway Administration (FHWA) before using this form of contracting. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

• The service is available from only a single source.
• There is an emergency that will not permit the time necessary to conduct competitive negotiations.
• After solicitation of a number of sources, competition is determined to be inadequate.

O.1.2 Washington State Laws

Chapter 39.26.130 RCW, Emergency Purchases
Chapter 39.80 RCW, Contracts for architect and engineering services
RCW 39.80.010, Legislative declaration

“The legislature hereby establishes a state policy, to the extent provided in this chapter, that governmental agencies publicly announce requirements for architectural and engineering services, and negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.”

RCW 39.80.060, Procurement of architectural and engineering services – Exception for emergency work (see Appendix D for full text)
O.2 A&E Sole Source Justification and Procedures

WSDOT attempts to be in compliance with federal regulations, whether specific projects have federal funding or not. Under certain circumstances, when consultant services are acquired for architectural and engineering (A&E) work on or related to a specific project, the state has to be in compliance whether federal funds are involved or not.

23 CFR 172 identifies four “alternative” methods for obtaining the services of consultants for A&E work. Three of the four are competitive negotiation, small purchases (falling under the definition of the simplified acquisition threshold), and noncompetitive negotiation. The fourth relates to a state having laws “on the books prior to June of 1998” that define a method as an alternative to the Brooks Act. If a state does not have a legislated “alternative” method on the books prior to 1998, they are to be in compliance with the Brooks Act, 40 USC 1101–1104. This means that any of the other three methods chosen by the state must also meet the requirements of the Brooks Act.

WSDOT currently uses two methods for consultant acquisition for A&E work as specifically covered under state law in Chapter 39.80 RCW: competitive negotiations and noncompetitive negotiations. The state did not have a law providing for an alternative method of acquisition prior to June of 1998; state law supported the language and intent of the federal regulations ultimately codified in 40 USC 1101–1104.

The method(s) chosen must be clearly identified with specific written processes covering the items in 23 CFR 172.9 and must be submitted to the FHWA for approval prior to entering into contracts for A&E services on federally funded projects. The Consultant Services Manual covers those written procedures. FHWA approval of this manual satisfies the requirements of 23 CFR 172.9 and, in part, meets the provisions for approval of the state’s Stewardship Agreement.

Note: The second method, small purchases (or simplified acquisition), is covered in 400.01 and subsequent subsections of Chapter 410.

This appendix covers the third method, noncompetitive selection, which includes emergency A&E contracts under the federal regulations. The intent of the emergency contracts chapter (see Chapter 600) is to cover both A&E and personal services contracts that must be instituted immediately to protect public safety and/or public property. For further information regarding other state regulations pertaining to non-A&E emergency contracting, see Chapter 600.

O.2.1 Emergency Situations

Emergency situations are briefly covered here because an emergency is one of the three federal provisions allowing for noncompetitive acquisition of A&E contracts. However, the processes for emergency contracts are covered in Chapter 600.

It is fairly simple to determine which situations pose an immediate threat of loss of life, bodily injury, or loss or damage to physical property. Accidents, earthquakes, severe weather events, and other natural disasters can all pose an immediate threat to the public or to publicly owned property. However, there are circumstances when an emergency exists, but is not so readily apparent. That is why the WSDOT
policy statement regarding acquisition through noncompetitive negotiation requires executive-level determination as to whether or not a circumstance constitutes an emergency.

O.2.2 Noncompetitive Acquisition Considerations

Short of an immediate emergency (as defined above), based on federal and state regulations, one of the three following situations will exist to justify a noncompetitive acquisition. In 410.02, the requirements for a request memo are covered. The request memo needs to address the existence of one of these three circumstances and provide documentation supporting the assertion.

1. **The service is available from only a single source.**

   For the majority of WSDOT A&E work, there are a number of legitimate firms capable and willing to do whatever work the department needs. Usually, the issue is finding the most qualified firm at a fair and reasonable cost. WSDOT has a legally prescribed process for making that determination through open competition. The federal laws and state laws referenced above are clear regarding this issue.

   Legislators, engineers, and the public understand that well-publicized, open competition for consultant services provides lower costs, innovation, and better quality in design and construction.

   Failure to plan far enough ahead to meet the requirements of the law, or continuing to use the same firms over and over stifles competition, discourages participation, and leads to problems and higher costs in the design effort and in construction. Ultimately, the quality of the finished product is compromised and the public suffers.

   However, there are occasions when there is only one firm capable of providing a very specialized service, or only one firm available to provide a necessary service.

   For the **service to be available from only a single source** requires that a firm be the only one that can provide the services. For this condition to exist, the work process would typically be very specialized and highly technical. When time allows, the only way to ensure there is no other firm with the same or similar capabilities is to solicit submittals and allow firms to present their approaches to the work. If there is only one that has the qualifications, then this would fall under circumstance 3 below.

   When there is no time to provide for a full solicitation, or there is a firm that holds a patent or a trademark, or has developed a specialized process, then the sole source determination may be documented and justified.

2. **There is an emergency that will not permit the time necessary to conduct competitive negotiations.**

   The reference to an “emergency” is meant to be specific to actual emergencies as covered by Chapter 600, Emergency Consultant Contracts.

   When not providing for full and open competition, the contracting officer will solicit offers from as many potential sources as is practicable under the
circumstances. Adequate documentation and justification will be provided to the HQ Consultant Services Office (CSO) for any solicitation or selection where less than full and open competition was used.

The project management involved and the area consultant liaison (ACL) should follow the provisions in Chapter 600 and provide the appropriate documentation to the CSO as soon as reasonably possible. Emergency contracts must be reported to the Department of Enterprise Services within three (3) business days of initiating the emergency procurement, using the DES Sole Source Contract Database.

3. **After solicitation of a number of sources, competition is determined to be inadequate.**

For certain types of work and at certain times within economic cycles, there may be only one or two firms that respond to solicitations. Under these situations, this item becomes self-explanatory. If a Request for Qualifications (RFQ) has been appropriately advertised, and attempts have been made to find sufficient competition without success, the CSO manager may determine and make a public announcement that inadequate competition exists.

An emergency is then presumed to exist, and a firm that the contracting authority determines sufficiently meets WSDOT’s requirements and has sufficient qualifications to do the work may be sourced without further solicitations.

Provided the work has been sufficiently advertised to meet the usual expectations, the attempt to solicit interest from a wide area of availability constitutes open competition, or at least satisfies the requirements of publicly providing the opportunity.

### O.3 Sole Source Contracts for Phased Work Assignments

There are circumstances when it makes sense to end a contract at the finish of one phase of work, or in the middle of a project, and keep the firm available for the next phase of the work. Under certain conditions, a “sole source” contract can be executed, provided precautions are observed. This means using more than one contract for the life of the same project.

Following are the circumstances where a sole source contract is allowable without a determination of an emergency requirement:

1. One phase of work ends and another begins with the same consultant.
2. Overlapping phases require a new contract to start before work ends on the last phase.
3. Design support is needed during construction.
4. The contract payment type changes during the course of the work.
5. An expert witness is needed
6. There is a legislative exemption for expert or review panels (A&E).
In each of the first three cases above, the issue of potentially awarding the next phase of work to the consultant who has been authorized to do the first and possibly successive phases must be addressed in the announcement soliciting for the original work.

A statement similar to the following must be prominently displayed within the Request for Qualifications (RFQ) or Request for Proposal (RFP), and subsequently contained in any contract entered into where this option may be exercised:

*The state reserves the right to authorize subsequent phases of work to the consultant within the scope of this project as described herein. Should the state exercise this right, the state may choose to supplement the existing contract or the state may choose to close the existing contract and negotiate a new contract, at its option.*

**Note:** Notification before entering into a separate contract for phased work is mandatory. It must be addressed in the solicitation for Statements of Qualifications (SOQs), not after the project gets through one phase and is ready to start the next. Otherwise, the next phase would have to be advertised soliciting new SOQs. It should be further noted that this applies to A&E project-specific contracts. Indefinite-delivery contracts (IDC) cannot be “sole sourced.”

Should a firm produce a significant portion of work for a project under a task order document (TOD) authorized from an on-call contract under an emergency determination, and the contracting authority determines that it is appropriate to have that consultant “on-call” during construction, a “sole source on-call during construction contract” should be negotiated for that firm. Otherwise, no “sole sourcing” should be done from work started, or performed under an on-call contract task order. For more information on IDCs, see Appendix I, Contract Types.

### O.3.1 Changing the Contract Type or Payment Method During the Course of the Work

Changing contracts during the course of the work most often happens when a transition is made from design work (PS&E) to a design support during construction contract. Usually, a cost-plus-fixed-fee (CPFF) contract is used for design work. However, a CPFF contract is difficult to work with during construction.

A separate contract needs to be executed based on negotiated hourly rates. Quite often during a construction contract, work is assigned by letter or email because any other method could cause delay to the contract, adding possible increased costs. Design support during construction contracts are covered in Appendix I, Contract Types.

Occasionally, the wrong type of contract may be used for a project or work and it becomes necessary to change the contract type during the course of the work. This cannot be done by supplementing the existing contract. The HQ Accounting and Financial Services Office will not allow it. When executing the replacement contract, care must be taken not to change or modify the limits or general scope of the original solicitation.
Note: There is a distinction between task assignment contracts (TACs) and on-call task order contracts (TODs), both of which are currently in use. Under the TAC, the master contract is funded to the maximum covered by the contract or subsequent supplements. Under the on-call contract, no funding is committed until the individual task order documents are executed and work orders are set up for each particular TOD. Request memos or emails need to be written and approved for task orders. See the Second Tier Competition Process in Appendix Y.

For those circumstances where prior approval of the consultant services includes an option to the state to add additional phases of work within the boundaries of the project, the responsible ACL should check with the CSO manager to verify the existence of the option for the particular phase in question and discuss the potential contract type, possibility of supplementing the existing contract, and other parameters related to the progress of the project. This would be similar to the pre-solicitation meeting covered in 410.03.

O.4 Request Memo

For any contract to be entered into under this appendix, a request memo must be prepared and submitted to the CSO. Justification must be provided, along with all other pertinent project data. The request memo for consultant use is available from the CSO’s intranet website (www.wsdot.wa.gov/consulting). If not available, the CSO can be contacted for a current request memo form. All request memos should be assembled by the appropriate ACL, or at least discussed with the ACL prior to completion and submittal.

For some requests, the information will be simple, such as the on-call during construction-type contracts. Reference should be made to prior approvals, such as a prior request memo for the original consultant solicitation and contract and the solicitation where the option to have the consultant provide such services was covered.

For obvious immediate emergency requests, see Chapter 600, Emergency Consultant Contracts. Where the emergency is less obvious, full justification and documentation should be covered in the request memo and attached thereto. When this occurs, the appropriate executive-level authority should be the name in the “from” block, and that person must initial the request. An appropriate executive-level authority would be the Regional Administrator or a similar position within Headquarters.

To the degree appropriate, the instructions set forth in 410.02 regarding the request memo instructions for A&E project-specific selection are to be followed.

Once the request memo is received by the CSO, it will move to the CSO manager for review and recommendation for approval. If the memo is properly documented, the manager will meet with the contracting authority to obtain approval. With approval of the request, the contract process can begin. The proposed consultant should be notified and an RFP prepared and sent to the consultant.
O.5 Notification and Request for Proposal

The instructions in this section assume that the services being requested do not fall under Chapter 600, Emergency Consultant Contracts, but do fall under the noncompetitive negotiations process.

Once appropriate approvals have been received, the CSO manager should notify the intended firm of its selection and the state’s intent to enter into a negotiated contract. Notification by phone and follow-up letter should be made to the firm, including an explanation of the process to be used for negotiations and contract award. In addition, the project manager and lead negotiator (contract officer) should be notified of the selection and provided with the necessary data and information for the scoping and/or negotiations process.

WSDOT uses two methods for establishing the detailed scope. In the first, WSDOT writes the statement of work (SOW) from internal scoping sessions. The second, the Managing Project Delivery (MPD) process, involves project personnel, support personnel, and the consultant firm meeting for SOW developmental sessions as described in Appendix N, Negotiations, Statements of Work, and Managing Project Delivery. The method used and the approach to negotiations will be determined by the nature of the work required.

If the state has a detailed SOW, it should be submitted to the firm with a request that the firm prepare and submit its proposal. As appropriate, the importance of the time element should be discussed along with a time frame for submission of the firm’s response to the RFP.

If the state intends to use the MPD method, the notification should address the process and establish a time and location for the initial meeting. Any further data the state needs from the firm should be requested at this time. In either case, a general outline and synopsis of the services needed should be included with the RFP and notification.

Note: The only time a consultant is compensated for SOW development is through the MPD process where the CSO is directly involved in the process.

O.6 Negotiations and Notice to Proceed

It is important to establish how the state ensures “fair and reasonable cost” when there is no second or third firm waiting to be hired, should the “sole source” firm and the state not reach agreement on cost for the work.

Generally, most firms that the state seeks to acquire services from have audited Indirect Cost Rates rates and established labor rates within their organizations. The profit portion of an all-inclusive billing rate is subject to negotiations based on the factors covered within the WSDOT Audit Guide for Consultants. The negotiations will mainly be centered on the number of hours required for the work.

Occasionally, there may be a need to acquire the services from a highly specialized firm that has typically provided services at market rates. It will be up to the chief negotiator to determine “fair and reasonable” for the state. Discussions with project management prior to the actual negotiations need to occur. The negotiator needs to become familiar with the budget and target pricing before starting the actual negotiations.
For details on negotiations and the MPD process for SOW development, including the MPD flow chart and narrative, see Appendix N, Negotiations, Statements of Work, and Managing Project Delivery.

After negotiations have concluded and the state and the consultant have reached agreement on all issues, the contract will be assembled and circulated for approvals and execution. As appropriate to the work, a notice to proceed (NTP) will be issued to the consultant with details regarding the project manager, where the invoices are to be sent, when the first meeting with project management is scheduled, and any other details the consultant may need regarding the contract.

In cases where there is a time constraint, a limited notice to proceed (LNTP) may be issued after the negotiations have concluded. The notice will cover what work the consultant may start based on the negotiations. The notice will also cover all limiting factors and state when full NTP can be expected.

If the time factor is such that the work must start before negotiations can occur, an emergency will be declared by the contracting authority and an LNTP will be issued. The LNTP will cover any limiting factors, clearly state that the work is subject to final negotiations, and provide for specific rates and terms limited to the time frame up to conclusion of negotiations.

Under most circumstances, the administration of the contract will follow the provisions of Chapter 500, Administration of Contracts.
Appendix P  Organizational Conflict of Interest

P.1 Organizational Conflict of Interest (OCOI)

An organizational conflict of interest may occur when an individual or firm:

- Is unable to render impartial assistance or advice.
- Is unable to be objective in the performance of the contract work.
- Has an unfair competitive advantage.
- Displays the appearance or potential for any of the above conditions.

49 CFR 18.36(b)(3) addresses organizational conflicts of interest where a contractor’s performance of a contract gives the contractor access to information that is not readily available to the public and that may give the contractor a competitive advantage. Access to proprietary information could occur when the contractor: is providing systems engineering and technical direction; is preparing specifications or work statements; is participating in development and design work; and/or gains access to the information of other companies in performing advisory and assistance services for the government.

The potential for an organizational conflict of interest to occur and the process for identifying and mitigating OCOIs apply to all agreements for professional services related to WSDOT projects. While the applicability is not limited to any particular type of acquisition, OCOIs are more likely to occur in agreements involving management support services; consultant or other professional services; contractor involvement in technical evaluations; and design, systems engineering, and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

P.1.1 Roles and Responsibilities Related to OCOI

The ultimate responsibility for avoiding, managing, neutralizing, or mitigating organizational conflicts of interest rests with the individual consultant or consulting firm that is potentially conflicted. An OCOI may occur in any number of different circumstances. All consultants proposing or bidding on solicitations for agreements may be impacted, including those applying as a design-build team, whether submitted on a Request for Statement of Qualifications or a Request for Proposal.

This section applies to all business configurations, including a joint venture and the individual entities that make up a joint venture; parent and subsidiaries comprising one entity; entities resulting from acquisitions and mergers; and employees of consultants who move from one firm to another. Actual or potential conflicts of interest are carried from one firm to another in the course of completing a business transaction.

WSDOT employees have the responsibility to identify and manage potential, actual, or perceived OCOIs as the employees become aware of them. The goals in managing potential conflicts of interest are to prevent the existence of conflicting roles that might bias a contractor’s judgment and to prevent unfair competitive advantage. Therefore, it is preferable that potential conflicts be identified as early
as possible in the acquisition process. The federal regulations require that each individual contracting situation be examined on the basis of its particular facts and the nature of the proposed agreement. Employees engaged in the contracting process must exercise common sense, good judgment, and sound discretion in determining whether a potential conflict of interest exists, and, if so, the appropriate means of resolving it.

WSDOT retains the sole discretion to determine, on a case-by-case basis, whether an OCOI exists and whether actions may be appropriate to avoid, neutralize, or mitigate any actual or potential conflict or the appearance of any such conflict. Any determination by WSDOT regarding the existence of an actual or potential OCOI or whether the OCOI may be avoided, neutralized, or mitigated is based solely on the facts made available at the time the determination is made. Unknown facts or a change in the facts over time can necessitate a reevaluation of the original conclusion. Risks associated with a successful legal challenge to an OCOI are the sole responsibility of the person or firm potentially conflicted.

Note: WSDOT reserves the right to reassess and revise any determination made regarding an OCOI at any time. WSDOT also recognizes that its concern with an OCOI must be balanced against the need to promote competition in the procurement process and not to unnecessarily restrict the pool of potential consultants or constructors available to perform needed work.

### P.1.2 Evaluating OCOIs and Determining a Course of Action

The HQ Consultant Services Office’s (CSO’s) evaluation process parallels the one prescribed in the 2009 *Organizational Conflicts of Interest Manual* relating to construction contracts. The CSO has adopted these procedures for use on all agreements administered by the CSO, whether or not they are federally funded. Because it is possible that the same individuals and/or consulting firms will seek to be involved in one or more phases of a project (predesign, design, and construction), it is important that the department implements a coordinated approach to evaluating and addressing OCOIs. This is particularly relevant to the CSO’s solicitations, because potential proposers of early predesign and design phases of a project must be made aware of the potential OCOIs that can arise as later phases go out to proposal or bid. As an initial step in identifying OCOIs, the Organizational Conflict of Interest Disclosure and Avoidance/Neutralization/Mitigation Plan (see Exhibit P-1) and the Organizational Conflict of Interest Certification (see Exhibit P-3) will be included in all relevant CSO solicitation documents, along with instructions for their use.

The following guidelines are intended to enhance pertinent federal and state statutes regarding ethics and OCOIs, as referenced and discussed earlier in this section. In general, the CSO will evaluate the following on a case-by-case basis:

- Whether or not an OCOI exists.
- Whether or not the OCOI can be avoided, neutralized, or mitigated.
- The appropriate steps to be taken to avoid, neutralize, or mitigate the OCOI.
P.1.3 Making the Determination

The CSO uses the following legal framework as the basis for making such determinations:

**Chapter 42.52 RCW**, Ethics in Public Service, applies to all state officers and employees, as well as former officers and employees who may become private consultants. For the purposes of OCOIs, these statutory provisions will be construed to apply to all employees of consultants and/or subconsultants who perform work on WSDOT projects.

**Chapter 18.43 RCW** includes prohibitions on conduct related to the practice of engineering. Conflicts of interest are referenced in RCW 18.43.105(6). Similarly, the Board of Registration, tasked with the oversight of engineers and land surveyors in accordance with **Chapter 18.43 RCW**, has promulgated a set of rules of professional conduct and practice that addresses conflicts of interest (WAC 196-27A-020-2(i)).

Federal rules in which the Federal Highway Administration addresses OCOIs in relation to federally funded highway projects include:

- [49 CFR 18.36](#)
- [23 CFR 636.109(b) 6 & 7](#) for the NEPA process as it relates to design-build
- [23 CFR 636.116 & 117](#) for design-build projects

WSDOT adopts these rules for use on all WSDOT design-build contracts, whether federally funded or not.

Initial considerations in the determination of a mitigation strategy would likely include a review of potential bidders/proposers who have requested the solicitation and a review of their teaming partners, including design professionals who may be more likely to have an OCOI. For those identified, a key factor would be previous work done by the individual or firm on the project or in the planning phases of the solicitation.

Mitigation plans may include contract clauses prohibiting some subsequent or related work by the contractor; restrictions on the specific work the contractor or subcontractor will be allowed to perform; nondisclosure and confidentiality agreements; and exclusion of specific individuals or business units from participation in the project.
P.1.4 OCOI Situations That Cannot Be Avoided, Neutralized, or Mitigated

The following situations are considered to result in a conflict of interest that cannot be avoided, neutralized, or mitigated due to the level of involvement in the project and the access to special knowledge and proprietary information.

Note: These restrictions apply only to the circumstances described.

1. For design-build projects, firms that act as the General Engineering Consultant (GEC) or Major Consultant, or key staff employed by the GEC or Major Consultant, will not be allowed to join a design-build team that submits a bid or proposal for a contract that is part of the project for which the individual or firm acted in the capacity of a GEC or Major Consultant, or key staff employed by the GEC or Major Consultant.

2. For design-build projects, a consultant (individual or firm) and/or subconsultant (individual or firm) that assists WSDOT in preparing a Request for Qualifications or other solicitation document, or assists in establishing selection criteria, will not participate in any capacity on a design-build team related to the same contract.

3. For design-build projects, individual consultants or subconsultants will not be allowed to do the actual scoring of a Statement of Qualifications (SOQ) or a proposal. Consultants or subconsultants may be allowed to act as discipline-specific advisory experts to identify the strengths and weaknesses of an SOQ or a proposal.

4. For design-build projects, if the National Environmental Policy Act (NEPA) process has not been completed prior to issuing the Request for Proposal (RFP), a consultant and/or subconsultant that has responsibility to prepare the NEPA document will not participate in any capacity on a design-build team for the same project. A subconsultant to the preparer of a NEPA document\(^1\) may be allowed to participate on a design-build team provided that:
   a. WSDOT releases the subconsultant from further responsibility on the NEPA document no later than the issuance of the RFP, and
   b. There is no other basis for an OCOI with said subconsultant.

5. For design-bid-build projects, firms that act as WSDOT’s GEC or Major Consultant will not participate as a constructor nor as a consultant or subconsultant on a constructor’s team on a construction contract developed under its supervision.

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\(^1\) NEPA documents include the Environmental Assessment, Environmental Impact Statement, Finding of No Significant Impact, Record of Decision, and Categorical Exclusion.
P.1.5 Procedures for Addressing OCOIs

Because the CSO contracts process most often precedes the design-build or construction phase of a project, it is the initial point at which a consultant is encouraged to consider any potential OCOI. In addition, consultants becoming subconsultants should consider whether being a subconsultant could preclude their working on contracts related to their prime’s work product due to the potential appearance of an OCOI. Consultants and subconsultants should investigate and manage potential OCOIs well in advance of forming teams or considering proposals/submissions in a solicitation. A firm or individual considering whether to enter into an agreement as a consultant or subconsultant on a WSDOT project should consider contacting the CSO regarding whether its proposed scope of work may create an OCOI if in the future the firm or individual chooses to participate with a proposer on a contract related to the firm’s or individual’s work product.

The CSO will include a provision in the solicitation document regarding any OCOI that could potentially occur in the solicitation, along with the method for the consultant to respond to the potential OCOI, and a process for imposing a restraint on eligibility for future contracting activities, as appropriate. The provision will also state whether or not the terms of the agreement and the application of the provision to the agreement are subject to negotiation. This process will most often be relevant to architectural and engineering (A&E) solicitations for predesign and design services related to a project that is eventually going to design-build or construction.

1. Prior to submitting an SOQ or a proposal on a CSO solicitation, each submitter/proposer will conduct an internal review of its current affiliations and will require its team members to identify potential, real, or perceived OCOIs relative to the anticipated procurement. Potential submitters/proposers will be notified that existing and/or future contractual obligations relative to the proposed procurement may present an OCOI and these may require avoidance, neutralization, or mitigation.

2. If a potential, real, or perceived OCOI is identified or if there is any question regarding an OCOI, the potential submitter/proposer will submit an Organizational Conflict of Interest Disclosure and Avoidance/Neutralization/Mitigation Plan (see Exhibit P-1), along with other pertinent information, to the project manager and the area consultant liaison (ACL) or CSO staff. The project manager and the ACL/CSO will evaluate the plan following the provisions in P.1.2, propose changes to the plan as appropriate, and forward their recommendations regarding the plan to the CSO manager for review.

3. The CSO manager, in consultation with the State Construction Engineer, when relevant, will review the recommendations and issue a final written response to the consultant.

   a. WSDOT, at its sole discretion, will make a determination regarding any potential OCOI and the entity’s ability to avoid, neutralize, or mitigate such a conflict.
b. If the CSO manager determines that an actual or potential OCOI exists and cannot be avoided, neutralized, or mitigated, a written response will be issued indicating that the individual or firm that has been determined to have an OCOI will not be allowed to participate as a team member or as a contractor for that particular agreement. Failure to abide by WSDOT’s determination in this matter may result in an SOQ or a proposal being declared nonresponsive.

c. If the CSO manager determines that the actual or potential OCOI can be avoided, neutralized, or mitigated, a written response will be issued indicating concurrence or stating that corrections and resubmittal of the plan are required.

**P.1.6 Appeal Procedures**

The consultant will have the right to appeal a finding of an actual or potential OCOI. The CSO manager’s determination, reflected in the response to the plan, may be appealed to the WSDOT Assistant Secretary for Engineering and Regional Operations, whose decision will be final, subject to further review only as provided for by state law.

**P.1.7 Certification**

For submittals or proposals in response to an A&E solicitation where there is potential for an OCOI to exist, an Organizational Conflict of Interest Certification (see Exhibit P-3) will be required to be included with the SOQ or proposal.

It is expected that most, if not all, potential or real OCOIs will have been identified and reviewed by the department prior to the submission of the SOQ or proposal. However, if a potential, real, or perceived OCOI is identified or if there is any question regarding an OCOI, the submitter/proposer will submit an Organizational Conflict of Interest Disclosure and Avoidance/Neutralization/Mitigation Plan (see Exhibit P-1), along with other pertinent information, as attachments to the OCOI Certification. If a previously submitted and approved plan is still applicable, it should be included with the CSO manager’s response as an attachment to the OCOI Certification. The submissions and responses will be evaluated in accordance with the criteria described in P.1.2 to P.1.4.

**P.1.8 Contract Provisions**

All relevant consultant services contracts are to include a reference to and require compliance with the provisions in this chapter related to OCOI and with the Secretary’s Executive Order E 1059. In addition, the OCOI Acknowledgement for Consultant Contracts (see Exhibit P-2) is to be included in all relevant CSO contracts.
Organizational Conflict of Interest Disclosure and Avoidance/Neutralization/Mitigation Plan

This disclosure statement and plan outlines potential organizational conflicts of interest, either real or perceived, that result in the following:

• Cause the individual consultant or firm to be potentially unable to render impartial assistance or advice to WSDOT; and/or
• Cause the individual consultant or firm to otherwise be impaired in its objectivity in performing the work; and/or
• Cause the individual consultant or firm to have an unfair competitive advantage.

Section I: Describe the potential organizational conflict of interest, as defined in federal and state law, in the WSDOT Secretary's Executive Order E-1059.00, and in Chapters 900 and 920 of the Consultant Services Manual.

a. Name of person or firm potentially conflicted.
b. Name of project solicitation relevant to this submittal.
c. Description of potential conflict of interest (include role in current and future projects and scopes of work as appropriate).

Section II: Describe the proposed management plan for avoiding, neutralizing, or mitigating the potential organizational conflict of interest as described in Section I.

Acknowledgement:
I acknowledge that the Washington State Department of Transportation (WSDOT) may require revisions to the management plan described in Section II of this disclosure statement prior to approving it, and that WSDOT has the right, at its sole discretion, to limit or prohibit my involvement in the project as a result of the potential conflict(s) of interest described in Section I of this disclosure statement and plan.

Signed ___________________________ Date__________________

Printed Name and Title__________________________________________________________________________
Organizational Conflict of Interest Acknowledgement
for Consultant Contracts

By my signature below, I acknowledge that the Washington State Department of Transportation (WSDOT) has a policy on organizational conflicts of interest that is implemented in accordance with the Secretary's Executive Order E 1059 and the Consultant Services Manual. As the consultant and the authorized signatory, I agree to abide by WSDOT’s policies as described therein for this contract and for any project or agreement related to this contract. I acknowledge that this provision on organizational conflicts of interest is required to be implemented in all subconsultant contracts, at all tiers.

Signed ______________________________________________    Date__________________

Printed Name and Title__________________________________________________________
Organizational Conflict of Interest Certification

Name of Submitter: ____________________________________________________________

My signature below certifies that, prior to submitting this (SOQ) (Proposal), I have conducted an internal review of (Submitter’s) (Proposer’s) current affiliations and have required (Submitter’s) (Proposer’s) team members to identify potential, real, or perceived organizational conflicts of interest relative to the anticipated procurement, in accordance with the Secretary’s Executive Order E 1059 and the WSDOT Consultant Services Manual, Chapter 920.

I further certify that the “Organizational Conflict of Interest Disclosure and Avoidance/Neutralization/Mitigation Plan” forms are attached, as listed below, for all real or potential organizational conflicts of interest as defined in the Consultant Services Manual for all (Submitter) (Proposer) team members.

(To be signed by authorized signatory of (Submitter) (Proposer)):

Signed ___________________________ Date_________________

Printed Name and Title _________________________________________________________

List of attachments by name of person or firm potentially conflicted:
_______________________________________________________________________________
_______________________________________________________________________________
_______________________________________________________________________________
_______________________________________________________________________________

Organizational Conflict of Interest Certification
Exhibit P-3

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Appendix Q

Vacated
S.1 Introduction

The following is a guide provided by the Department of Enterprise Services (DES) for the types of services generally considered Professional Services. The HQ Consultant Services Office (CSO) will determine whether an agreement should be classified as Professional Services or architectural and engineering and, if it is Professional Services, whether it should be processed by the CSO or referred to the Administrative Contracts Office (ACO) for further action.

S.1.1 Professional Services Categories

- Accounting
- Actuarial
- Analysis and assessment of processes, programs, etc.
- Appraisal
- Artwork
- Auditing
- Business analysis and assessment
- Business process re-engineering
- Communications (design and development of printed and audio/visual materials)
- Conference and trade show coordination
- Consultation on programs, plans, and systems
- Counseling employees
- Curriculum development
- Economic analysis and consultation
- Environmental planning (except when a small part of an architectural/engineering agreement)
- Evaluation of processes, programs, and systems
- Executive recruitment
- Expert witness services for litigation/testimony
- Facilitation for groups, projects, and retreats
- Facilities planning/coordination
- Feasibility studies (except when a small part of an architectural/engineering agreement)
- Financial services
- Fundraising
- Grant writing
- Graphic design
- Guest speakers
- Information Technology services (see S 1.2 below)
• Investigations (personnel related)
• Investment advisors and management
• Labor negotiations and labor relations
• Legal and paralegal services
• Legislative liaison services
• Lobbying services
• Management consulting
• Marketing services
• Mediation, negotiation, and arbitration
• Medical and psychological services
• Needs assessment (except when a small part of an architectural/engineering agreement)
• Operational assessments
• Organization development
• Outreach services
• Peer review
• Planning services (except when small a part of an architectural/engineering agreement)
• Policy development and recommendations
• Productivity improvement
• Program development, assessment, implementation, coordination, and evaluation
• Public involvement services and strategies (brochures, newsletters, surveys, coordination of open houses, public meetings, and stakeholder meetings)
• Public relations
• Publications development
• Quality assurance/quality control services (dependent on the area of service – could be either personal services or architectural and engineering)
• Recommendations on processes, products, projects, systems, etc.
• Research services (social, environmental, technical)
• Retreat and workshop planning and coordination
• Scientific and related technical services
• Strategic planning
• Speech and report writing
• Statistical analysis
• Studies (development and conduct)
• Surveys (development, conduct, and analysis)
• Temporary employment service for professional services, including architects and engineers
• Trade development
• Training (offered to specific categories or classes of employees; or offered to all or most agency employees in the fiscal year)
S.1.2 **Examples of Information Technology Professional Services**

- Acquisition planning and technology assessment
- Business and technology planning
- Business process re-engineering
- Development of project definition and scope requirements
- Disaster recovery planning
- Feasibility studies
- Needs assessment and consultation with user on system requirements
- Performance assessment
- Project management
- Quality assurance services
- Systems analysis (design and implementation)
- System architecture (analysis and design of complex requirements)
- System development, implementation, integration, and migration
- System deployments (Adaptive Signal Control Systems, road weather information systems, surveillance systems, other sensors [non-invasive]), including design, installation and testing
- System enhancements; adding new functionality
- Technical writing
Appendix T

Request Memo Process

T.1 Introduction

Whenever project managers determine that consultant services are required, a request memo must be written and submitted to the HQ Consultant Services Office (CSO) as the first step toward contracting with a consultant. For consultant use, the formal request should cover issues such as the type of involvement, the duration of need, the criteria for selection, and any of the other pertinent issues covered herein. After these issues have been discussed with the area consultant liaison (ACL) and the CSO, a request memo becomes the beginning of the formal selection process.

It is important to note that state law prohibits anyone from committing the state to a potential financial obligation for which funds are not available, have not been appropriated, or are not yet authorized through appropriate channels in program management. There are penalties that could include fines and/or imprisonment for breaking this law.

In order to assure the CSO that appropriate verifications have been done and that WSDOT is in a position to contract for A&E and Professional Services, WSDOT uses the formal request memo.

The request memo is the start of the formal process for consultant involvement in WSDOT work. It provides the basis for and the beginning of the documentation “audit trail.” It is the expectation of the CSO that the request memo will be initiated by the project manager responsible for the work that will involve the use of a consultant. It is further anticipated that the request memo will pass through an approval process with the responsible funding manager, such as the region program manager, Regional Administrator, or other designated person who can vouch for the need and the appropriate funds’ availability.

Project managers or designated individuals responsible for preparing the request memo should meet with their appropriate ACL as early as possible to discuss the work for which a consultant is going to be needed. It is important for project managers to keep in mind that the selection process can take from three weeks to two months or more, depending on workloads at the CSO, the complexity of the proposed work, and the level of involvement by the project personnel. Potential involvement by outside entities like Sound Transit, ports, or cities can further lengthen the process.
Because time is a factor, it is critical to the process that the following be addressed in the memo:

- The appropriate ACL.
- The point of contact for the project.
- The start date when a consultant is needed.
- Budget and funding source(s); federal funds are subject to Disadvantaged Business Enterprise (DBE) or Small Business Enterprise (SBE) goals.
- Duration of the anticipated work.
- Project title.
- Documentation, including a list of the attempts and/or contacts made, verifying that no WSDOT or other public resources are available to perform the services.
- Charge codes to pay for ads.
- Boundaries of the project or limits of the work.
- Attached scope of work and the state’s independent estimate.

Unanswered or unexplained items may delay the process.

### T.1.1 Determining the Contract Type

The CSO will determine the type of contract to be used and whether the statement of work falls within architectural and engineering parameters or will need to be Professional Services. In making these determinations, the CSO will take into account input from the requesting office. The CSO’s Disadvantaged Business Enterprise officer will work with the project to determine the appropriate DBE or SBE goals based on the scope of work.

In nearly all cases where a consultant team will be hired to provide most or all of the project services, a project-specific competitive selection process will be used. In most cases where larger work efforts are required on specific categories of work, a category-specific competitive selection process should be used, as the competitive process encourages a better product at a more reasonable price to the state.

Project-specific or category-specific project support solicitation and selection are used for things like route development studies, NEPA/SEPA processes EIS/EA, design, and larger category-specific efforts in support of projects. These might include the larger efforts like geotechnical, structural design, surveying, program management, and others where they are part of a consultant solicitation and Statement of Qualifications response based on the known quantity and delivery needs.

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1 The National Environmental Policy Act (NEPA) [42 U.S.C. 4321 et seq.] was signed into law on January 1, 1970. The Act establishes national environmental policy and goals for the protection, maintenance, and enhancement of the environment, and it provides a process for implementing these goals within the federal agencies.

The State Environmental Policy Act (SEPA) specifies the policies to be followed for state projects when federal funding is not involved or NEPA does not apply.

Environmental Impact Statement (EIS) is the formal documentation of the NEPA/SEPA process that ultimately culminates in a published document available to the public. It is done in two phases. The Draft EIS (DEIS) is published as a draft and circulated for comment from both regulatory agencies and the public. The Final EIS (FEIS) is the final document incorporating the results of the comment period and any changes to the DEIS.

Environmental Analysis (EA) is done when a full EIS is not anticipated. It is based on steps provided in the NEPA regulations for use when a project is expected to have little impact on the environmental elements covered in the regulation.
For smaller efforts (short-term, category-specific, or small design efforts),
consideration should be given to either task orders or letting small contracts in
accordance with the WSDOT plan for encouraging small business participation.

For immediate-need efforts, where time is short and the work may be category-
specific, task order contracts will be the preferred process. Chapter 410 covers the
processes involved with specific contract types, selection issues, and task order
development. Appendix Y covers the Second Tier Competition Process which is
required for most task orders.

After the request memo is received by the CSO, it is logged in and sent to the
assistant manager for review and recommendation for approval. Any questions
regarding the request will most likely occur at this point. Upon recommendation
for approval, the request memo will go to the CSO manager for approval.

Items that will need to be determined include:

- The main emphasis of the consultant involvement in the project (full project or
  specific work).
- Key scoring factors (key personnel experience or project manager experience).
- Any incentives or disincentives that might be included.
- Anticipation of short list interviews (separate evaluation factors?).
- Scoring panel and interview panel make-up.
- If the project is on the Interstate System, coordination with the State Design
  Engineer and the Federal Highway Administration (FHWA).
- If the total project is anticipated to exceed $500,000,000, coordination with the
  State Design Engineer and FHWA.
- Other factors that could affect the outcome.

**T.1.2 Federal Highway Administration (FHWA) Approval**

The project manager and the ACL are responsible for providing additional
information to the CSO if the project is part of, or impacts, the Interstate System, or
if the project is not on the Interstate System but is on the National Highway System
(NHS) and the anticipated total cost of the project exceeds $500,000,000. In these
instances, approval by FHWA is required before a consultant contract can be
awarded. Details of these requirements are found in 23 CFR 172.9 and 23 USC 106
(c&h). The CSO manager will coordinate with the Assistant Secretary Engineering
& Regional Operations Chief Engineer in obtaining approvals from FHWA.

When federal funds are involved and the services of a consultant will include
management duties on the project, FHWA approval is required prior to execution
of the contract. Management duties falling under this provision are those where
a consultant makes decisions on behalf of WSDOT that would, or could, commit
government funds or directly impact the progress of the project, or where the
consultant would be exercising direct control over WSDOT employees. The
project manager and the ACL will coordinate with the CSO manager and the
Assistant Secretary Engineering & Regional Operations Chief Engineer to obtain
FHWA approval.
Appendix U

Solicitation/Selection Process

U.1 Solicitation

U.1.1 Introduction

The solicitation for consultant Statements of Qualifications (SOQs) specific to a project is critical to the success of the project. Simply establishing a set criteria group that is used for every solicitation does not address the needs of the project. Further, it fails to meet the requirements of state policy.

Solicitations for a specific project need to address the full spectrum of services that might be needed in a single contract. For category-specific work, the solicitation would need to address entirely different issues specific to that category for work deliverables. The solicitation process is addressed in U.1.2.

There are occasions when the amount of work necessary may be small and/or the amount of time available for a full solicitation process is limited, yet it is not an emergency. If the amount and type of work meets the other requirements for small purchase acquisition, and the anticipated costs are below the simplified acquisition threshold, then the small purchase solicitation process may be approved by the CSO manager. Details are provided in J.3, U.1.3, and U.2.7.

U.1.2 Solicitation Process for Project-Specific and Category-Specific Contracts

RCW 39.80.010 states that governmental agencies are to publicly announce requirements for architectural and engineering services, and negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required.

In order to meet the requirements of this “for the type of professional services required” specification, the solicitation has to be specific to the type of services being sought. Therefore, the scoring criteria must address the type of services needed. This starts with the focus of the work. For example:

1. Are we seeking a consultant because we need a strong manager who will deliver a full spectrum of services, such as an EIS or an interchange design?

2. Do we need the services of a specialized geological team to deliver a rock face stabilization contract bid document for the I-90 or SR 20 roadway? (In this case, the active project manager may be a WSDOT employee.)

The reason behind the use of a consultant in each example is very different; thus, scoring factors need to be different. For the first example, the consultant’s proposed project manager’s strengths and abilities, together with team make-up, are keys to the success of the project. This may be a team made up of a number of subconsultants. The project manager’s ability to work with diverse groups, manage schedules, and deliver on time without scope creep is of utmost importance.

In the second example, key personnel and past performance in the specialized field will be the major factors for selection. That is where the weight of the scoring should be.
Federally Funded Projects

49 CFR 18.36(i) provides contract provisions that are required in the contracts of federal-aid recipients on projects with federal funding. Special attention is noted for Parts (12) and (13), which have not been included in past versions of the CSO manual. WSDOT does not have separate boilerplate contracts for federally funded projects and state-only funded projects. Therefore, these provisions will be included in all consultant contracts where appropriate.

Consultant Evaluations

Past performance in the appropriate areas covered by 49 CFR 18.36(i) are a factor in the evaluations of consultants who are awarded contracts. The new consultant evaluation forms and instructions include consideration of a firm’s attention to energy conservation, recycling of existing materials, pollution prevention, and waste reduction, where applicable.

Scoring

The CSO, Area Consultant Liaison (ACL), and project representatives will meet and work together to establish the category weights for scoring, which will be in the solicitation used. In addition, the consultant evaluation form’s rating categories will be reviewed and established.

The project and the CSO will finalize the total scores for the consultants proposing by combining the scores received from the evaluation board. The CSO will develop a ranked list of the firms and, along with the ACL and project office, determine if interviews need to be conducted with the top-ranked firms. Therefore, prior to soliciting proposals, either under advertising or Second Tier, the important selection factors and the method of scoring the interviews should be developed. The questions and scoring factors should not be the same as the first round and should be specific to the anticipated work. The questions used in the interview process may be modified prior to the interviews to focus them better if needed.

The interview panel should also be discussed and the interviewers nominated. The final selection of the scorers and the interview panel will be determined by the CSO.

Any informational documents, flow charts, data, preliminary reports, or other materials that may be necessary to the proposal process should be provided to the CSO at this meeting, along with a discussion of the materials’ applicability to the consultants’ submittals. Some of these materials may be posed with the solicitation if deemed necessary to aid the consultants in providing their best proposals.

Incentives/Disincentives

Finally, consideration of potential incentives or disincentives needs to take place at this point, must be covered in the solicitation announcement, and must be clearly covered in any subsequent contract as a separate compensation item.

- Incentives are any financial consideration made available to a consultant, as a separate compensation for specific, defined performance above, and in addition to, the performance obligation of the contract. This specific, defined performance must provide additional benefit to the state of significant value to justify the incentive.
Incentives, if considered, are to be on a case-by-case basis, with final determination of the viability of an incentive being determined by the WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer. Incentives cannot be contrary to state regulations, WSDOT policy, or federal regulations, and they cannot be added after the contract solicitation has been closed. No incentives will be made a part of any sole source or emergency contracts, and they will not be added by contract supplement to any contract where the incentive was not fully described in the original solicitation.

- Financial disincentives will not be considered for A&E consultant work.

After these items are covered, the Request for Qualifications will be scheduled for advertisement.

**Project Announcement**

RCW 39.26.120 and 39.80.030 states that each agency shall publish in advance that agency’s requirement for Professional Services and A&E services. The announcement shall state concisely the general scope and nature of the project or work for which the services are required and the address of a representative of the agency who can provide further details. An agency may comply with this section by (1) publishing an announcement on each occasion when the Professional Services or A&E of a consultant are required by the agency, or (2) announcing generally to the public its projected requirements for any category or type of Professional Services or A&E services.

For project-specific solicitations, WSDOT, through the CSO, adheres to number (1) in the RCW. Number (2) is applied more often to the Task Order master contract/on-call process (see Appendix I, Contract Types).

The full solicitation will be posted on the CSO’s website and will provide a complete description of the project or work effort being announced. Included will be a description of the selection process and the scoring criteria, turn-in dates, preproposal meetings, proposal formats, and expected additions or exceptions to the contract, if any. Also included is all pertinent information on the project boundaries/limits; deliverables; time of anticipated notice to proceed; duration of the work effort; synopsis of the statement of work; Disadvantaged Business Enterprise (DBE) or Small Business goal requirements; whether or not a short list will be created with secondary interviews; and any other information necessary for firms to make complete proposals.

Each solicitation will also be advertised in the Seattle Daily Journal of Commerce and/or other appropriate media that provides the broadest coverage reasonably possible, in synopsis form, with a link to the solicitation on the CSO’s website. Additional information will be provided in this ad as to how those who do not have access to the Internet or those who have alternative needs may receive the full solicitation.
Smaller Projects

For smaller projects and category-specific announcements, the duration of the open ad can be as little as three weeks. At least two ads should be run, preferably on consecutive weeks. For larger projects, the duration of the open ad may be six to eight weeks, depending on how broad a reach is needed. For projects where the anticipated services may be multimillions of dollars (like a GEC contract), advertising may need to be done in national media, which will require some lead time.

If the Request for Qualifications (RFQ) is for a Statement of Qualifications (SOQ) in a narrative résumé-style format, consideration needs to be given to limit the size, page count, font size, graphics, and anything else that may cause difficulty for those scoring the SOQs. The CSO generally requires SOQs in electronic format, and that requirement will be published in the announcement.

Additionally, the publication will clearly state that alternative methods for receiving RFQ materials are available for those who need them.

The designated representative for all advertisements is the CSO manager. All questions related to the announcement or the project should be through the CSO manager or a designated responder. The CSO will field questions about the project and retrieve responses from the project representative.

Note: All processes related to the RFQs for A&E projects and Professional Services at WSDOT are the responsibility of the CSO. No other groups within WSDOT will publish the RFQ or additional information related to the RFQ without the direct permission of the CSO manager. This includes prior to official publication of the announcement, concurrently with the announcement, or subsequent to the announcement.

Fair and Impartial Treatment

State and federal regulations require that all consultants be treated fairly and impartially. The same regulations require a contracting entity to provide information to all potential responders that may materially affect the responses to the RFQ. If firms ask questions about projects that the consultant may respond to in future solicitation(s), care must be taken regarding the responses.

Prior to the formal announcement, it is quite common for firms to contact WSDOT personnel seeking information on upcoming work. Any information project personnel may have that is not readily available to all potential responding firms should not be given out without first speaking to the CSO manager.

After the announcement, no consultant should contact project personnel about the project. The CSO will publish the requirements regarding questions as part of the RFQ. The one exception is an organized presubmittal meeting where all interested firms may ask questions regarding the project during the formal presentations and the Q&A session. Questions asked during the session and the answers given will be captured during the session and posted on the CSO’s public website (www.wsdot.wa.gov/business/consulting), with the solicitation materials available to all firms.
Any questions during the advertisement period outside the formal presubmittal meeting are to be directed to the CSO. Answers, if deemed necessary to the potential responses, will be posted on the CSO’s public website with the other RFQ material.

**Solicitation Responses**

All solicitations will have a designated turn-in time and date for responses. All responses to an advertisement are requested in PDF format sent to the CSO via email to a specific CSO address. Alternate methods of response will be published in the advertisement as needed.

All responses to RFQs shall be received by CSO personnel. Instructions in the announcement should specify that the CSO is to receive SOQs. Submittals arriving after the stated time and date will be considered nonresponsive (see the specific ad for more details). All materials received that are not in the proper format, as published in the announcement, will be considered nonresponsive. Exceptions will be made where necessary to comply with the Americans with Disabilities Act (ADA) and/or DBE or SBE requirements.

No restrictions as to media and format of submittal packages are to be made by the project or the CSO that would unfairly restrict any group of responders based on ethnicity or gender.

The CSO will catalog all responses and see that the materials are distributed to the scoring team, along with uniformly formatted scoring sheets and scoring instructions.

**U.1.3 Solicitation Process for Simplified Acquisition (Small Purchase)**

The small purchase acquisition process is provided as a faster, less costly alternative to the standard solicitation process when the anticipated overall costs of the services are less than the simplified acquisition threshold. It is WSDOT’s intent that when this occurs, the small purchase process will provide a mechanism for smaller or more specialized firms to compete with firms of similar size and/or specialized focus, in a manner that is cost-efficient for both the competing firms and WSDOT.

The following are requirements for small purchase contracts:

- The total contract, including supplements and changes, cannot exceed the simplified acquisition threshold as specified in 41 USC 403(11), which is currently $100,000.
- Public solicitations will occur annually for firms to express their interest in being considered for small purchase contracts.
- Firms’ data, qualifications, past performance, and interest in small purchase contracts will be maintained in the WSDOT Consultant Services Office database.
- There must be a sufficient number of firms qualified and capable of performing the contracted services to provide adequate competition, as attested to by the WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer.
• The consultant will not hold more than one small purchase contract at any
given time. However, the consultant can hold more than one small purchase
contract at a time if the aggregate of the contracts together do not and will not
exceed the simplified acquisition threshold.

• No consultant will receive, or be considered for, follow-on or additional
contracts for work related to the project on which they have previously received
a small purchase contract (for example, next-phase services).

• Projects or category-specific work will not be broken into smaller sizes simply
to avoid the full solicitation process.

Project personnel who wish to utilize the simplified acquisition, small purchase
process will work with their appropriate ACL to prepare a request memo specifying
“small purchase.” The CSO manager will review the number of firms in the
database (see J.3) that have expressed interest in small purchase for the type of
services being requested and will provide that information to the WSDOT Assistant
Secretary Engineering & Regional Operations Chief Engineer. The Chief Engineer
will determine whether sufficient competition exists.

If the Assistant Secretary Engineering & Regional Operations Chief Engineer
determines that there is not sufficient competition, then the full project-specific or
category-specific solicitation process will need to be implemented.

Upon approval of the small purchase request, the project manager (or designee),
the ACL, and the CSO manager (or designee), will meet to cover the selection
criteria (see U.2.7) and board selection process (if an ad hoc board is to be used).
After the board selection and selection criteria determination, the list of firms, with
their qualifications and the selection criteria, will be forwarded to the board chair.

U.2 Selection Process

A&E contracting is a unique process wherein WSDOT seeks to find the most
highly qualified firm for the type of architectural and engineering services
required in order to start the process of negotiating a contract for those services.
There is no guarantee that after going through the process of selecting the “most
qualified firm,” agreement will be reached regarding “fair and reasonable” cost.
For that reason, state and federal regulations require at least three firms “in
the order of preference” to be carried forward to the negotiation phase. Here, order of
preference means “in the order of rank” from the scoring and the interviews.

This section describes the process and the legal basis for the evaluations; short-
listing and interviews; the need for and requirements of one or more selection
boards; ownership of the overall process; and the importance and means of
documenting the proceedings.
Appendix U Solicitation/Selection Process

U.2.1 Selection Procedure

40 USC 1103, of the Brooks Act, specifies the following selection procedures:

1. These procedures are applicable to the procurement of architectural and engineering services.

2. The agency shall encourage firms to submit annually a Statement of Qualifications and performance data.

3. For each proposed project, the agency shall evaluate current Statements of Qualifications and performance data on file with the agency and statements submitted by additional firms regarding the proposed project.

4. The agency shall conduct interviews with at least three of those firms that demonstrated the highest qualifications.

5. From those firms interviewed, the agency shall select, in order of preference, at least three firms that the agency considers most highly qualified to provide the services required.

6. Selection shall be based on criteria established and published by the agency.

U.2.2 Selection Board(s) Make-Up

The selection of the most qualified firms to go forward into negotiations shall be accomplished by one or more permanent or “ad hoc” boards. Where one board is used, it is generally known as the selection board. Where two boards are involved, the first is known as the preselection, slating, or evaluation board; the second is known as the selection board.

An ad hoc board is typically used for the occasional selection of a consultant for a long-term project or one with highly specialized requirements. The ability to select board members that have specialized areas of knowledge directly related to the work requirements of the firm that will be contracted with may be an important consideration.

Ad hoc boards require more involvement and oversight by the CSO. With each assembly of a board, instructions and review of the necessary processes must be done by the CSO manager or someone in the CSO. Where ad hoc boards are used, the CSO manager will appoint someone from the CSO to either sit as a member or to facilitate the process.

A permanent board is typically chosen when there are larger volumes of solicitations and CSO resources are at a premium. Generally, one session with the group should provide the necessary instructions and provide for more efficient use of resources. A properly selected group will cover the requirements necessary to meet state and federal regulations and ensure the integrity of the selection process.

The following choices for the make-up of the evaluation or selection board are available to the CSO manager by regulation:

- A single permanent board, which does the preliminary evaluations and determines the top firms to interview, then does the interviews and makes the final recommendations to the CSO manager.
• Two permanent boards as above, one doing the preselection evaluations and one conducting the interviews and making the final recommendations.
• A single ad hoc board selected as needed. The board would do the evaluations, determine the top firms for interviews, conduct the interviews, and make recommendation to the CSO manager.
• Two separate ad hoc boards selected as needed: one responsible for the evaluations and screening to a short list recommendation and one conducting the interviews and making recommendations to the CSO manager.
• A single permanent board that does the evaluations and screening to a short list recommendation that is subsequently sent to an ad hoc board for interviews and final recommendations.
• A permanent selection board that receives the short list of candidates for interviews from an ad hoc evaluation board made up of individuals with strong backgrounds in the area in which consultant services are needed.

U.2.2.1 A Single Permanent Board

A single permanent board works under the general direction of the CSO manager or the manager’s appointee. Up to twelve members would be appointed on a statewide basis, with three “sitting” as active during any given period. They would rotate monthly or quarterly, whichever fits the needs of the department. During each period, one would act as chairperson, ensuring the integrity of the process, arranging for any necessary meetings and note taking, and attending to the documentation and recommendations to the CSO manager.

Additional persons could be added to any particular selection, as needed, such as outside stakeholder participation. The single permanent board would first evaluate the data from the database and any additional submittals of general information received from firms via the solicitation and announcement, in accordance with 410.03.

After going through the prescreening process, documenting the reasons for eliminating any firms from further consideration, the board will then move to evaluating the solicitation-specific information included with the firm’s submittal. They will need to document the elimination process followed, establishing that the selection criteria advertised were the criteria used for the scoring and elimination of firms dropped from further consideration.

The board will then submit its documentation to the CSO manager, with recommendations for firms to be interviewed. Upon approval of the recommendations, the chairperson will make arrangements for interviews of the top-rated firms. Upon completion of interviews, the board will finalize the ranking and make recommendations to the CSO manager of the top three firms to carry into negotiations.

It is recommended that two alternate or additional members be added, for a total of five members, when a single board performs both the evaluations and final selection processes, especially for the interview portion.
### U.2.2.2 Two Permanent Boards

Two permanent boards will work under the general direction of the CSO manager or the manager’s appointee. As with the single permanent board, up to twelve members will be appointed on a statewide basis. The difference is that three will be active at any given period on the evaluation board and will then rotate to the final selection board. Upon completion of service on these two boards, the members will rotate off for the appropriate period of time before rotating back on again.

As with the single permanent board, outside parties will be added as needed to either board. These extra members will be outside stakeholders, alternate supplemental persons, project advocates, or executive-level members at the chair level.

The first board would act as the evaluation board, prescreening firms’ available data and any general data submitted with the proposal packets. This first board would go through the prescreening process, documenting the reasons for eliminating any firms from further consideration.

Board number one would then evaluate solicitation-specific information included with the firms’ submittals. The board will need to document the elimination process followed, establishing that the selection criteria advertised were the criteria used for the scoring and elimination of firms dropped from further consideration.

The board would then submit its documentation to the CSO manager, with recommendations for the firms to be interviewed.

Upon approval of the recommendations, the CSO manager will then submit the short list to the chairperson of board number two, who will make arrangements for interviews with the top-rated firms. Upon completion of the interviews, the board will finalize the ranking and make recommendations to the manager regarding the top three firms to carry into negotiations.

During each period, the group will select someone to act as chairperson, ensuring the integrity of the process, arranging for any necessary meetings and note taking, and attending to the documentation and recommendations made to the manager.

### U.2.2.3 A Single Ad Hoc Board

A single ad hoc board will work under the general direction of the CSO manager or the manager’s appointee. The only difference in this board’s duties and that of the single permanent board is that this board will be made up of nominees as needed for one specific project selection. As previously stated, it is recommended that there be at least five total members of the board when a single board is used for the full selection process, or at least for the interview process.

### U.2.2.4 Two Separate Ad Hoc Boards

Two separate ad hoc boards will work under the general direction of the CSO manager or the manager’s appointee. Both boards will be made up of nominees as needs arise for one specific project selection. The duties of board one and board two will be the same as that of each of the boards where two permanent boards are maintained.
U.2.2.5 A Single Permanent Board Performs Evaluations; An Ad Hoc Board Conducts Interviews

Each board will work under the general direction of the CSO manager or the manager’s appointee. The permanent (evaluation) board will consist of up to twelve board members that would “sit” in active status on a rotational basis as discussed in the single permanent board section above. This board will be responsible for the evaluations and screening of firms’ general information and the subsequent scoring of firms’ data in their submittal packages. This board will document the process and recommend the short-listed firms to the CSO manager for interviews.

If the short list is acceptable to the CSO manager, the interview board, made up of individuals selected specific to this project, will receive the list; select a chairperson; possibly meet with the project and the CSO area consultant liaison to get input on potential questions; review the documentation package from the evaluation board with the short-listed firms’ qualifications data; and make arrangements for the interviews.

Upon completion of the interviews, the ad hoc selection board will finalize the ranking of firms, document the processes followed, and submit a final recommendation of the top three firms, in ranked order, to the CSO manager.

U.2.2.6 An Ad Hoc Evaluation Board and a Permanent Selection Board

Each board will work under the general direction of the CSO manager or the manager’s appointee. The duties and the steps involved for each board are as described previously.

U.2.3 Selection Process Expectations

Special emphasis on the importance of the selection process needs to be made to ensure all participants meet the requirements of the Brooks Act regulations. The amount of time needed to do a thorough job depends on the scale of the project for which consultant services are being sought. Board members will need to be able to make the necessary time commitment required to do a thorough job.

Projects will need to cover the expenses of note takers and/or facilitators and, in some cases, travel for board members.

U.2.4 Evaluation Board Process

The evaluation process will be done by the board as a group, rather than individually at separate locations. Evaluation of the data is an iterative process and is best accomplished through discussions among the members. A project representative may need to be available for clarification of project needs as the process starts, but will not be active in the actual evaluation of data.

The CSO will develop a process packet for use by each board that explains the importance of the process and the expectations and documentation needed by the CSO, and covers the required issues of fair and impartial treatment of prospective firms. Templates for the evaluation process, interview process, and recommendation transmittals that go back to the CSO manager should be included.
The evaluations by the appropriate board can be either verbal or numeric, as long as detailed documentation is accomplished. Evaluations must be based on the criteria published in the RFQ and should include, but not be limited to, the requirements of 49 CFR 18.36 (as appropriate to the solicitation).

During the evaluation process, three areas must be considered:

1. Initially, the chairperson establishes the method and the baseline the group will use for evaluating firms in each area. Consideration must be given to the firms’ general data, making sure that firms are appropriate for the type of work the project requires. Past performance is the next consideration, and only scores or performance evaluations on similar work should be considered. For example, performance data on a hydraulics design should not be considered when the work is for a traffic study.

2. Next is the evaluation of data supplied by the firm for the specific project. By this time, a number of firms may have already been eliminated from further consideration, depending on the number of submittals and the type of work. At this point, consideration has to be given to any proposed subcontractors, going back through an evaluation of their qualifications for the proposed work. Each step must be documented, with reasons given for decisions made, not just a statement saying that a firm was dropped.

3. Finally, the evaluation board will document the basis of its determination regarding the firms recommended for interviews. The number recommended is not specific, but should be at least three. The evaluation board needs to be satisfied that it is recommending the best potential firms based on all data considered. The chair of the board should prepare the recommendation report and submit it to the CSO manager.

Upon approval of the short list recommendation by the CSO manager, the manager will submit the appropriate data package to the selection board (whether the same group or a new group) for the interview phase. The CSO will notify firms that are on the short list and follow up with written letters. The other firms will be notified that they are no longer under consideration for the project. Refer to 410.05 for information on notification and debriefing.

### U.2.5 Selection Board Process

Adherence to the Brooks Act, 40 USC 1101–1104, requires “discussions” with at least three firms to consider their anticipated concepts and compare their alternative methods of approach for furnishing the services needed on a project. The selection board is responsible for engaging those firms recommended for interviews to determine the best qualified for the project. The term “discussions” is often used interchangeably with the term “interviews” under this requirement.

The selection board will schedule interviews with the firms on the short list, making sure there is an appropriate amount of time allowed for each session. It is important to provide adequate time for board members to make an informed decision regarding each firm. Neither the board members nor the consultant team should be rushed.
U.2.6 Interview Process

A determination should be made prior to scheduling the interviews as to the format, the number people the consultant team should bring, and whether audiovisual equipment is allowed. When scheduling with the consultant firms, after covering the board’s requirements, questions should be asked of the firm regarding any ADA accommodations that may be necessary.

Under most circumstances, a two-hour time frame should be allotted for each firm’s session. Presentations and question and answer (Q&A) sessions should be covered in one and a half hours, with a thirty-minute time frame between for board discussion after the consultant team vacates the room. Additional time may be needed for set up and preparation prior to the start of each session.

During the interviews, a project representative (project advocate) may be present, but does not have a vote in the selection.

Interviews should be conducted in person whenever possible. However, allowance can and should be made when key persons from the consultant’s team cannot be physically present for the session. Presence by phone or video conference is the alternative.

If the board chooses to do so, interviews can be done by phone or video conference as a whole. This should be measured against the size of the project and the type of work involved. This choice may be best suited to smaller work requirements of shorter duration. However, as travel costs rise and technology improves, consideration for remote interviews may become more appropriate.

For the Q&A session, the board may provide the questions to the firms prior to the interviews or the questions may be reserved until the time of the interviews. With the exception of the need to clarify some specific item of information provided by the firm in its submittal, questions are to be the same for all firms. Individual questions may be asked about a firm’s presentation, but care must be taken not to lead a firm to a response.

Subconsultants are often proposed on more than one team. When the same subconsultant is proposed on more than one short list team, they are to be excluded from any interviews. The prime will need to address the manner in which that sub will be used on the project. Each main firm needs to be made aware that the sub will not participate in the interviews.

Upon completion of the interview process, the board reviews its collective results. If any clarifications are needed, phone calls are to be made to the contact person listed in the firm’s proposal. Care must be taken not to provide any information not already given to all firms. If any questions are to be asked, they are only to relate to answers given in the submittal or the presentation and must not be leading in any way.

After reviewing the results, the board makes the final compilations and organizes all the documentation. The chair then submits the full package with the names of the top three firms in order of preference to the CSO manager. If the manager is satisfied that all necessary steps have been taken and all factors have been considered, the manager will notify the top three firms of the name of the top-rated
firm and explain the process steps through negotiations. At this point, all three firms are still in the running. Negotiations will now begin with the top-rated firm (see 410.05).

Neither the CSO manager, nor the manager’s appointee, may add to or remove from any list, short list, or board recommendation. If the manager is not satisfied that the process followed was appropriate, or that the board missed or did not consider all appropriate information, the manager can return the recommendations to the appropriate board for further work, along with an explanation. This is true for both the evaluation and selection phases.

As a final note, evaluation and selection boards are to be made up of members who have a broad background covering the potential areas in which services are being sought. Strong consideration should be given to upper-level managerial candidates and at least one executive who would sit as chairperson. Project managers from design, construction, and the discipline being sought are potential candidates (when specialized or supportive in nature).

### U.2.7 Small Purchase Selection Under the Simplified Acquisition Threshold

Under the simplified acquisition, small purchase process, there are two additional options (below) for board evaluation and selection. If the project is not expected to exceed the current simplified acquisition threshold set in 41 U.S.C. 403(11), currently $100,000, the selection of the top three firms, in ranked order, is done by a single board rather than through a two-board process.

**Option 1** – Whether a permanent or an ad hoc board, the single board evaluates general data, past performance information, and project-specific criteria. The board conducts interviews as appropriate and selects the top three firms. The board makes its final report and submits the top three firms in order of preference to the CSO manager. The selection report is accepted as final and negotiations begin with the top-rated firm, following the process to contract award.

**Option 2** – Whether a permanent or an ad hoc board, the single board decides it (the board) is not needed and the chair makes the decision, ranking the top three firms, preparing the selection report, and submitting it to the CSO manager. The selection report is accepted as final and negotiations begin with the top-rated firm, following the process to contract award.

**Note:** For simplified acquisition (small purchase) under federal guidelines, the dollar cap is fixed in 41 U.S.C. 403(11) and is adjusted every five years. Adjustments are made based on the current Cost of Living Index. An adjustment to the dollar threshold is anticipated during 2010.
V.1 Introduction and Narrative

Even though a significant amount of time and effort is spent on defining such things as the statements of work (SOWs), project schedules, delivery efforts, and project controls, there will be times when unavoidable changes will occur. It is the responsibility of both the management team and the administrative team to have a unified change management plan in place that defines the processes involved. The plan must include the involvement of the designated area consultant liaison and, where necessary, the WSDOT HQ Consultant Services Office (CSO).

Many audit findings involve needed changes to the work effort described in the SOW. Most often those changes are not documented, are handled improperly, or are done without following the administrative procedures until well after the change has occurred. It is very problematic when a consultant is inappropriately given verbal authorizations. Supplements to the contract must be written for all changes that materially affect the contract, whether or not there is a change in the dollar amounts or in the time frame of the contract.

There are also times when supplements to the contract are planned. This often occurs on longer-term contracts where funding occurs on a biennial basis or becomes available in “pieces.”

Supplements can be written and changes can be made only to the work within the scope of the original project as publicly described. Work outside the parameters of the advertised project or synopsized descriptions cannot be added to the contract. For project-specific contracts, this means the project limits, both physically and categorically.

Federal regulations do not allow firms that do the studies to subsequently do the design. Firms that do the design cannot participate in the construction effort, nor can they provide construction oversight on their own design.

Where phased work is allowed, a supplement cannot be written to add subsequent phases of work to the contract unless that has been covered in the original solicitation and subsequently included in the contract.

V.2 Contract Supplement Process

Contract supplements require approval from the CSO prior to starting negotiations. The process starts with a “request to supplement” provided on the proper request memo. The request memo form includes questions, because the CSO is responsible for reporting architectural and engineering activity to Department of Enterprise Services (DES).

The request memos include the following information in accordance with the requirements of DES.
V.2.1  **Documentation Needed for a “Supplement for Time Extension Only”**

1. Provide the project manager’s name, phone number, and org code.
2. Identify and fully describe why the additional time is needed. Include any explanations regarding delays that may have been caused by the department or those completely out of the consultant’s control.
3. Explain why the time was not included in the terms of the original contract.
4. Explain what conditions have changed since the award and provide other applicable information that clearly justifies the decision to supplement the contract.
5. Are rates the same as those negotiated under the original contract? If no, explain.
6. Identify the start date of the proposed supplement and duration of the supplemental work.
7. List the area consultant liaison’s name and phone number.

V.2.2  **Documentation Needed for a “Supplement for Changed Conditions”**

1. Provide the project manager’s name, phone number, and org code.
2. Identify and describe the problem, requirement, or need that the supplement is intended to address and that makes the supplement necessary. Explain how WSDOT determined that the services under the proposed supplement are critical or essential to agency responsibilities or operations and/or whether the services are mandated or authorized by the Legislature. Also, identify and explain in detail why this supplement is of an emergent nature. Emergent supplements include:
   - Those related to public safety and those that would prevent material loss of or damage to property, bodily injury, or loss of life if action is not taken.
   - Contracts that stem from court orders or are required under the law.
   - Contracts that secure the receipt of federal or other funds or that may be an integral part of a revenue-generating enterprise.
   - Contract supplements that reduce contract dollars and/or zero cost supplements that extend a contract end date. Supplements to finalize projects close to completion will be considered on a case-by-case basis. All other supplements should be carefully evaluated as to whether it is in the best interest of the state to move forward.
   - Mission-critical information technology contracts without which a system can fail, a project will encounter costly delays, or key deadlines will be missed and penalties will be incurred.
3. Explain how the agency concluded that sufficient staffing or expertise is not available within the agency (not just within the agency division) to perform the services.
4. Explain what effort has been taken to conclude that other public resources are not available to perform the services more efficiently or more cost-effectively.

5. State whether the original contract was competitively procured or awarded as a sole source, and explain when the contract was awarded, the cumulative dollar amount of the original contract, and any subsequent supplements prior to this supplement.

6. Explain why the services under the proposed supplement were not included in the terms of the original contract or in the solicitation document. Include any conditions that have changed since contract award and other information that supports the decision to supplement the contract.

7. State the rationale for executing a supplement to the existing contract rather than competitively procuring the services and awarding a new contract. Include whether the new services are within the scope of the original contract or solicitation document and how the supplement can most effectively achieve the department’s purpose.

8. Provide an explanation of the consultant’s qualifications, abilities, or expertise to meet the agency’s specific needs for the services under the supplement.

9. Provide a written state estimate of the cost of additional work, including direct labor rates, overhead, profit, subconsultant costs, and reimbursables.

10. Provide the funding source for the project. Include the program identification number (PIN), work order number, and the organization code for the work order. Also, include the federal-aid number and participation percentage on federally funded projects. Provide assurance that the appropriate program management office has reviewed and approved the funding.

11. List the area consultant liaison’s name and phone number.
Appendix W  Task Order Documents

W.1 Introduction

RCW 39.80.030(1&2) states that an agency may satisfy the requirements of 39.80.030 by publishing an announcement on each occasion when A&E services provided by a consultant are required by the agency, or announcing generally to the public its projected requirements for any category or type of A&E services.

The above RCW allows for a second method to meet the requirements of the Brooks Act in announcing WSDOT’s service needs. However, it does not go on to provide specific methods of accomplishing this second part. It has been left to the agencies to define their processes for accomplishing this methodology while holding to the intent of the remainder of Chapter 39.80 RCW.

On-call task order architectural and engineering (A&E) agreements are covered in Chapter 410, Acquisition Process. On-call task order agreements most commonly use task order documents (TODs) as the method of assigning work for specific “tasks.” When TODs are used in agreements, the master agreement must clearly state that the type of agreement being used is a task order agreement. This is done on the cover plate (front sheet) of the agreement. When a task order agreement is used, no other method of assigning work under the agreement is allowed.

Conversely, in agreements that are not designated as task order agreements and do not use task order documents (in other words, nontask agreements), TODs cannot be used for parts of the work. Agreement types cannot be mixed.

Only approved TODs can be used in agreements, and they may be assigned or issued only through the HQ Consultant Services Office (CSO) by its designees. The CSO owns the document form, the template, and the associated database for all WSDOT A&E agreements. The CSO can provide the appropriate form.

There have been times where the task order document has been used on project-specific agreements, such as some general engineering consultant (GEC) agreements. In these cases, the TOD was used as a method of managing work that had to be scoped, negotiated, and “tasked” immediately. This was usually on very large preliminary engineering, Environmental Impact Statement (EIS) work, and other services in preparation for very large design-build contracts or multiple design-bid-build contracts along one highway system.

For managing work assignments, funding, and work order issues, see the administration section in Chapter 500. Examples of alternative documents for use under these circumstances are provided as part of the agreement administration.
W.2 The Task Order Document (TOD)

The task order document is currently a FileMaker form generated from the database maintained by the CSO. It is a legal document that cannot exist outside of the parent agreement, which is called the master agreement by the HQ Accounting & Financial Services Office (see Appendix I, Contract Types). Task order documents have a parent-child relationship with the master agreement. Since multiple TODs can be generated from a master agreement, some form of control over the execution of TODs is required.

TODs are a contractually binding portion of a master contract. The form used has been reviewed “as to form” by the Attorney General’s Office and is considered a boilerplate form for task order authorizations. No one may execute a TOD on behalf of the state who does not have the proper authorization to do so. Authorizations are done in accordance with state policy, in writing, through the delegation of authority process. Authorization to execute TODs on A&E agreements derives from the CSO manager under the manager’s chain of authority.

Master agreements have a general scope of work that outlines the types of activities that may be contracted for under that agreement. The scope of work on a master agreement is merely an outline, or synopsis, with specified boundaries. TODs will contain specifically defined statements of work covering deliverables, negotiated costs, and expectations. The TOD formalizes the process of selection, scope agreement, and cost proposal (as covered in Chapter 410) between WSDOT and the consultant.

TODs that have federal funding must identify any Disadvantaged Business Enterprise (DBE) or SBE goals that may be required based on the current Federal Highway Administration-approved WSDOT DBE plan. The CSO manager or the manager’s designee is responsible for tracking and reporting DBE information to the WSDOT Office of Equal Opportunity. Refer to Chapter 700 for more detailed information on DBE/SBE goal setting, requirements, attainment, and reporting.

Under certain circumstances, a statewide goal or a race and gender-neutral goal may be in place. If actual goals are required on federally funded TODs, then goal establishment is done during the firm-selection process for the work to be assigned under the task order (see 410.02 and 410.03).

When authorized to do so, the regional or assigned area consultant liaison (ACL) will generate the task order document with the appropriate information and submit two originals to the consultant for the firm’s signature. Upon receiving the signed documents from the consultant, the ACL will make sure all appropriate documents are included and submit the TODs to the CSO for review and approval.

Task order documents are to include the following:

- Completed TOD form.
- Detailed statement of work, which includes deliverables and appropriate schedules.
- Summary sheet of the negotiated costs.
- Detailed cost breakdowns.
• Listing of subconsultants, with authorized dollar amounts.
• Budget summary sheet for each subconsultant.
• Detailed cost breakdowns for each subconsultant.

Boxes in the form must be filled in as completely as possible. No task order will be executed on behalf of the state if information is omitted. Especially important is the task order start date, expected end date, dollar limit, funding work order number(s), task manager, consultant contact, agreement number, and task number. The other requested information should also be included, and a statement of work and cost estimate are encouraged to be attached to the final TOD.

The CSO is responsible for review and approval of all A&E TODs for which the CSO is the agreement manager. The CSO manager will establish a formal process for review and approval of TODs and task order amendments. The process will include an approval process for those A&E agreements that are not directly managed by the CSO, but that originated through the CSO. The CSO will also establish a uniform method of distribution of TOD originals and copies.

The process for selection, scoping, and negotiations for task order work is covered in the on call contracts section in Appendix I, Contract Types. Documentation covering the processes, if not already provided, should accompany the TOD when it is submitted to the CSO for approval. Before approval, the CSO manager will verify that the record of selection, a summary of the scoping process used, and a record of negotiations is in the agreement file.

The project manager will verify with region program management that funds are available and have been authorized for the amounts in the TOD and will communicate this to the CSO manager. The TOD must contain all work order information, including any federal participation. The project manager shall update the task order database to reflect any funding changes during the life of a task order. A copy of the work order authorization (WOA) shall accompany all task order documents/amendments.

No authorizations to start work prior to execution of the master agreement are to occur unless the work falls specifically under the emergency agreement process described in Chapter 600. No work will be authorized prior to execution of the TOD, known as a limited notice to proceed (LNTP), without prior approval by the CSO manager. In no case will authorization be given prior to scoping and negotiations for the TOD.

W.2.1 Task Order Amendments

Whenever there are contractual changes that materially affect a TOD, the TOD requires an amendment. The same process is to be followed for scoping and budget negotiations on amendments as for the original TOD. There are a number of reasons why a task order may need to be amended. Project personnel and the appropriate ACL will need to provide adequate justification for any amendment to a task order.
Requests for time extensions; additions, changes, or substitutions to subconsultant(s) authorizations; added or subtracted work; and dollar increases for already authorized work all need to be justified and documented to the satisfaction of the CSO manager.

Prior to starting the process of amending a TOD where the dollar amount or time changes, the project, through its assigned ACL, needs to submit a task order amendment request to the CSO for verification of agreement capacity. Preliminary justification for the changes should be provided to the CSO at this time.

No preliminary authorizations to start work prior to execution of the task order amendment (LNTP) should be given without discussion with the CSO manager or the assigned ACL. In no case should any early authorization be given prior to the completed scoping and negotiations of the task order amendment.

Documentation and process flow is the same as that of the original TOD.

### W.2.2 Task Order Closeout Process

The task order closeout process is similar to the process for closing project-specific agreements, with the exception that the agreement itself is not closed, only the task order.

When the project is satisfied that all terms of the task order, including amendments, have been met, the task order is to be formally closed out following the process described in Chapter 530. Each task order is to be treated like a self-contained contract whose terms are governed by the terms of the master agreement.

Under the terms of the task order, the consultant is to submit a letter to the project manager notifying WSDOT that the consultant has determined that all terms of the task order have been met. Upon verification from the project, the consultant is to submit a final invoice that states that, upon payment of the invoice, there are no outstanding claims or remaining charges on the TOD.

If the project manager (PM) agrees the terms have been met, the project manager will notify the CSO that the task order is complete and can be accepted and closed. If the project manager disagrees with the consultant, then the WSDOT PM will notify the consultant PM, in writing, that there are items not yet complete. The ACL is also to receive a copy of the written notice. If disagreement continues regarding the terms of the contract having been met, then the consultant is to start the claims process in accordance with Chapter 510.

If there are project funds remaining unspent in the task order after the final invoice is paid, the ACL will initiate a task amendment that reduces the TOD to actual dollars spent and request execution by the consultant. The CSO manager or a designee will then send a letter notifying the consultant that all terms have been met and that the task order is closed. The letter should remind the consultant that acceptance of the work does not relieve the consultant of responsibility for undiscovered errors or omissions.

The CSO manager will verify that the consultant evaluation form has been completed and all signatures have been obtained.
Appendix X

Disadvantaged Business Enterprise (DBE)

X.1 Introduction

One of the key components of the DBE program is the methodology for setting and achieving goals on federally funded projects. There are actually two methodologies involved:

- The first is the process used to establish a state’s overall tri-annual jurisdictional goal and annual updates. This process is covered in detail in 49 CFR 26.45 and the Disadvantaged Business Enterprise Program Participation Plan. WSDOT’s Office of Equal Opportunity (OEO) is primarily responsible for working with the department’s contracting and grants recipient functionaries to establish a statewide goal acceptable to the Federal Highway Administration (FHWA), Federal Transit Authority (FTA), and Federal Aviation Division (FAA), per this federal regulation.

- The second methodology is the one that establishes goals on specific projects that work toward helping a state accomplish its overall jurisdictional goal. For architectural and engineering (A&E) and project-related consultant contracts, the process is covered in this appendix.

X.2 Annual Solicitation for Statements of Interest

Each year, at a time determined by the WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer, the HQ Consultant Services Office (CSO) publishes an announcement soliciting statements of interest from individual consultants and consultant firms that want to be considered for WSDOT-let consultant contracts. Consultants are encouraged to submit information on their qualifications, recent contract awards, and past performance ratings, regardless of whether their interest is in receiving contracts as a prime consultant or a subconsultant.

Consultants that are already in the WSDOT consultant database are encouraged to update any of their information that may not be current.

As part of the annual solicitation, the WSDOT CSO will contact all certified DBE firms on the Washington State Office of Civil Rights database that show North American Industry Classification System (NAICS) classifications for work historically performed on consultant contracts let through the CSO. If there are any NAICS categories not previously covered, but for which work is anticipated to be let through the CSO in the current budgetary cycle, the CSO will contact those certified firms identified in those NAICS categories, as well.

DBE firms and all non-DBE firms will be encouraged to submit documentation on their qualifications in specific NAICS categories. Consultants that respond to the annual solicitation for statements of interest will be entered into the WSDOT consultant database or have their existing information updated. Details on the annual solicitation for statements of interest are covered in 410.01 and Appendices J and N.
X.3 Goal-Setting Process

49 CFR 26 requires states to maintain a database of DBE firms that have expressed an interest in contracting with the government. 40 USC 1101–1104 (The Brooks Act), 49 CFR 18, and RCW 39.80 require WSDOT to maintain data regarding all firms that express an interest in performing work for WSDOT. The CSO will maintain a method that tracks and is able to report the following:

- DBE availability in accordance with the specifications of 49 CFR 26.
- DBE certification status in accordance with the requirements of the Office of Minority and Women’s Business Enterprises.
- DBE firms awarded contracts or subcontracts where federal funds are involved.
- DBE goals set on awarded contracts where federal funds are involved.
- Verification of executed subcontracts between primes and DBE firms.
- Certification requirements of primes’ prompt payments to DBE subs by each subconsultant.
- Verification of DBE subconsultant performing commercially useful function (see Chapter 140).
- Goal attainment on completed contracts where federal funds are involved.

The CSO will maintain a data retrieval process that meets these requirements in accordance with the DBE Program Plan approved by FHWA.

Pursuant to 49 CFR 26.51(e)(1), WSDOT shall only set contract goals on projects that contain subcontracting opportunities. WSDOT shall not set individual contract goals on projects less than one hundred thousand dollars ($100,000).

The CSO will work with the OEO to utilize the availability data contained within the National Economic Research Associates (NERA) report “Race, Sex and Business Enterprise: Evidence from the State of Washington,” current census data, CSO data gathered from its annual requests for statements of interest, and CSO data from past performance evaluations. This will first be accomplished by assigning DBE availability from the NERA report for the separate categories and NAICS classifications covering the type of work WSDOT contracts to consultants.

The following describes the steps involved in determining DBE goals on a consultant-designed project. These steps are applicable whether the contract is for Planning/Route Development Studies, Environmental Impact Statements (EIS), Preliminary Design, or Plans Specifications & Estimates packages for ad.

X.3.1 Consultant Contract Goals for WSDOT Projects

The CSO utilizes two types of contracts using task order documents: project-specific and on call task order contracts. The master on calls could have multiple project-specific task orders. The DBE Program Plan requires the application of DBE goals on task orders that include federal participation, in the same manner as project-specific contracts.

The methodology employed by WSDOT and the CSO in determining consultant project goals uses the “DBE Participation Calculation Worksheet for Consultant Services,” shown as Exhibit X-1. The steps are as follows:
1. **Project-Specific Contracts**

If the contract includes federal funds, it will be subject to the DBE race-conscious goal-setting process. If the original contract amount meets and/or exceeds $100,000, an individual supplement amount meets and/or exceeds $100,000, and/or the cumulative contract amount meets and/or exceeds $100,000, then a race-conscious goal-setting process will be utilized to determine DBE participation, provided there are subcontracting opportunities within the scope of work.

Following are examples using this process:

- **Example 1**

  The original contract amount is $100,000: the entire contract amount is subject to race-conscious goal setting. In addition, all supplements would be subject to race-conscious goal-setting consideration because the cumulative contract amount met or exceeded $100,000.

- **Example 2**

  The original contract amount is $200,000: this amount is subject to race-conscious goal setting. The supplement amount is $50,000: this amount would also be subject to race-conscious goal-setting consideration. In addition, all subsequent supplements would be subject to race-conscious goal setting because the cumulative contract amount met or exceeded $100,000.

The dollar threshold amount for specific projects will be analyzed on a yearly basis to determine whether race-conscious goals are being met. Based on this analysis, the dollar threshold amount for implementing DBE race-conscious goal setting may need to be modified and included in the yearly plan update.

The DBE race-conscious participation will be based on the “DBE Participation Calculation Worksheet for Consultant Services” (see Exhibit X-1).

2. **Race-Conscious Goal-Setting Methodology**

- Determine the total estimated dollar amount of the contract. This will be provided by the WSDOT office requesting the use of a consultant.

- Utilizing a Work Breakdown Structure or master deliverables list (MDL), identify each logical work type or deliverable category that could be done by subcontract. Determine the percentage and dollar value of each work element in relation to the total contract amount.

- Starting with the largest work component and working down until the minimum mandatory prime performance percentage is reached or exceeded, identify the work components qualifying for mandatory prime performance percentage (a minimum of 30%). Note that WSDOT requires the prime consultant to perform quality assurance/quality control (QA/QC) for the major components of the project. Therefore, the engineers’ estimate for this item of work will always be part of the 30% prime portion used for establishing DBE goal percentages.
• Deduct the mandatory prime percentage from the total percentage used to calculate the DBE participation.

• From the remaining work elements, identify the work elements with subcontractable possibility without having a detrimental impact on the delivery of the project.

• Calculate the dollar amount and percentage and round the numbers.

• Determine the ratio of eligible certified DBE firms to the total of all firms qualified to perform the work of each category.

• Multiply this ratio, expressed as a percentage, by the percentage of the project this category of work represents, to get the DBE participation percentage for this category.

• Sum the DBE participation percentages for all the categories to establish the DBE goal for the project.

• Coordination with the CSO and the Office of Equal Opportunity (OEO) is required for this step.

3. DBE Participation

A. As part of the solicitation advertisement, the following statement must be included:

_The department has an overall Disadvantaged Business Enterprise (DBE) goal. The DBE goal for participation for this project will be obtained through a combination of race-neutral/race-conscious means as outlined in WSDOT’s “Disadvantaged Business Enterprise Program Plan.”_

DBE goals on federally assisted projects will be set utilizing the criteria outlined in the plan and the “DBE Participation Calculation Methodology Worksheet for Consultant Services.” The department encourages disadvantaged and minority- and women-owned consultant firms to respond.

B. In many project-specific contracting opportunities, the initial review by the selection committee will be of firms’ qualifications already in the CSO database (having been received in response to the annual solicitation for statements of interest), together with the qualifications of those firms responding to the specific solicitation. Presentation of subconsultant team members and their anticipated work assignments is generally part of each prospective prime’s approach to the project, which is part of the second-tier competition. Therefore, a firm’s responsiveness to a stated DBE goal in a contract solicitation will be determined as part of the second-tier competition as well as in any final negotiations.
Firms that wish to be considered for federally funded contracts must make a commitment to adhere to the requirements of 49 CFR 26 and the WSDOT Disadvantaged Business Enterprise Program Participation Plan as part of their statement of interest when submitting their qualifications. Firms must demonstrate a commitment to presenting the best qualified team they can that meets or exceeds DBE goals established for any contracts they wish to be considered for.

Goal attainment, or fully substantiated good faith efforts (as determined by the WSDOT OEO) on past work performance, will be used as a selection criterion on project solicitations and as an evaluation criterion on work performance. The value of this selection criterion will not exceed 10% of the total value of all selection criteria.

On project solicitations where WSDOT specifically asks for full teams as part of the initial request for qualifications (RFQ), the consultant will include the “Submittal Information Packet,” which identifies potential subconsultants, both DBE-certified and non-DBE firms. The information packets for both primes and subconsultants are available from the CSO’s public website: [www.wsdot.wa.gov/business/consulting](http://www.wsdot.wa.gov/business/consulting)

After execution and delivery of each contract, contract supplement, or task order document to the consultant, the CSO, in coordination with the OEO, will obtain written verification from each subconsultant designated to perform work within the consultant’s contract, that they do in fact have a contract with the consultant to perform the work specified in the consultant contract. A copy of each written verification received from a qualifying DBE on the contract will be forwarded to the OEO for its records.

C. The following clause is required to be included in each contract signed with a consultant and each subcontract the prime consultant signs with a subconsultant:

> The consultant, subrecipient, or subconsultant shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The consultant shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the consultant to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

X.4 DBE Utilization Report Instructions

The workbook has been developed to limit the number of times the following data will need to be inputted. These reports, shown as Exhibits X-2a, X-2b, X-2c, and X-2d, must be submitted to the CSO in an Excel form, which is provided by the ACL at the project kickoff meeting. Questions are to be directed to the CSO.

Workbook Instructions:

1. Region/Division: Write in the name of your region/division (such as Northwest Region, Environmental Affairs, Bridge, or WSF).
2. Reporting Period: This is based on the federal fiscal year of October 1 through September 30. The reporting period is broken in half, with the first half from October 1 through March 30, and the second half from April 1 through September 30.

3. Federal Fiscal Year: Indicate the year in which the end of each half takes place.

4. Contract Number: This is the “Y” number being reported. Report only on those contracts that were executed during the reporting period being covered.

5. Supplement Number: The supplement number to the contract being reported. Report only on those contracts that were executed during the reporting period being covered.

6. Task Order Document Number: If the contract is an IDC/on-call contract, complete the form for each federally funded task order. Report only those task orders that were executed during the reporting period being covered.

7. Amendment Number: If the task has been amended, indicate the amend number. Report only those amends to tasks that were executed during the reporting period being covered.

8. Amount: Write in the dollar amount of the contract/supplement/task order/amendment.

9. Project Title: Write the complete project title (such as SR 520 or Bridge Design).

10. Prime Consultant: Provide the full name of the prime consultant.

11. DBE: Is the prime a certified DBE firm?

12. DBE Certification Number for the Prime: The prime may need to be contacted or the information can be looked up by name on the OMWBE DBE website (www.omwbe.wa.gov). Look for the Directory of Certified Firms under the “Certification” heading.

13. If Prime is DBE Certified: If the prime is a certified DBE firm, show the dollar amount allocated for the prime’s participation only. Do not include subconsultants or purchased goods and services.

14. Federal-Aid Number: List the federal-aid number for the funding source for this project. If you do not know it, contact your program management personnel for assistance.

15. Funding Source: Indicate the federal funding source: FHWA, FTA, or FAA.

16. Percent Participation: Report the percentage of federal funding based on the funding source. Contact your program management personnel for assistance.

17. Subconsultants: List all DBE-certified subconsultants for this project. Include their certification number(s) and the amount(s) allocated. Report only those subs that are part of a contract/supplement/task order/amendment that was executed during the reporting period covered.
### DBE Participation Calculation Worksheet Example for Consultant Services

#### Exhibit X-1

<table>
<thead>
<tr>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
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<tr>
<td></td>
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<td></td>
<td><strong>Total Estimated Dollar Amount of Project</strong></td>
<td><strong>$2,600,000</strong></td>
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<td>2</td>
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<td>Minimum Mandatory Prime Performance 90% of Contract Deliverables</td>
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<td>Deliverables Subject to Goal Setting</td>
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<tr>
<td>5</td>
<td>Elements of Work (or Work Breakdown Structure):</td>
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<td>NAICS Codes</td>
<td>Dollar Estimate</td>
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<tr>
<td>6</td>
<td>A A1 Environmental Studies</td>
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<td></td>
<td></td>
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<tr>
<td>7</td>
<td>A2 Air / Noise</td>
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<td><strong>$300,000</strong></td>
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<tr>
<td>8</td>
<td>A3 Biological Assessment</td>
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<td>9</td>
<td>A4 Hydraulics Analysis and Report</td>
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<td>A5 Hazardous Waste</td>
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<td>11</td>
<td>A6 Draft Stormwater Site Plans</td>
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<td>A8 Archeological Assessment</td>
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<td>A9 Prepare Environmental Document (CEIS, EA, etc.)</td>
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<td><strong>$90,000</strong></td>
<td><strong>3.8%</strong></td>
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<td>15</td>
<td>B Traffic</td>
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<td>B1 Compile Traffic Data</td>
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<td><strong>8.8%</strong></td>
<td></td>
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<td>28</td>
<td>C Structure</td>
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<td><strong>$675,000</strong></td>
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<td>29</td>
<td>C1 Bridge / Footings and Approaches</td>
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</table>

*Go To Page 22*
### DBE Participation Calculation Worksheet for Consultant Services

**Appendix X**

**Exhibit X-1 (continued)**

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<thead>
<tr>
<th>A</th>
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<td><strong>DBE Participation Calculation Worksheet Example for Consultant Services</strong></td>
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<tr>
<td>2</td>
<td></td>
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<td><strong>Based on Engineers Estimate of Cost - Page 2</strong></td>
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</tr>
<tr>
<td>3</td>
<td><strong>Step 1:</strong> Identify the work elements with the highest percentage to achieve an administratively reasonable percentage of DBE participation. Once the 30% has been reached, you may add other work elements to increase the % of DBE participation.</td>
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<tr>
<td>4</td>
<td>QA/QC: Always included in prime's calc</td>
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<td>5.0%</td>
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<td>5</td>
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<td>Geotech and Soil Report</td>
<td>$200,000</td>
<td>8.0%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td><strong>Sub Total</strong></td>
<td></td>
<td></td>
<td>$750,000</td>
<td>31.0%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td><strong>Step 2:</strong> For the remaining work elements, determine the ratio of certified DBE firms eligible for DBE participation to the total number of firms eligible in each category. This provides the criteria of DBE firms to allow firms eligible to perform work in this category. Multiply this ratio times the category percentage of work for each category to arrive at the DBE % of each category. The sum of these is the DBE goal.</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>9</td>
<td>Categories - from Page 4</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>10</td>
<td>NAICS</td>
<td>Certified DBE Eligible for Category</td>
<td>All Firms Eligible for Category</td>
<td>% of DBE Firms to All Firms of each Category</td>
<td>DBE % of each Category</td>
<td>Percentage of Job</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Environmental Studies</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>12</td>
<td>Air/Noise</td>
<td>2</td>
<td>8</td>
<td>25%</td>
<td>0.30%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>Biological Assessment</td>
<td>0</td>
<td>2</td>
<td>0%</td>
<td>0.00%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>Hydraulics Analysis and Report</td>
<td>3</td>
<td>10</td>
<td>30%</td>
<td>0.72%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>Hazardous Waste</td>
<td>1</td>
<td>5</td>
<td>20%</td>
<td>0.28%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>Draft Stormwater Site Plans</td>
<td>5</td>
<td>16</td>
<td>31%</td>
<td>2.00%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>Historical Research</td>
<td>2</td>
<td>8</td>
<td>25%</td>
<td>0.80%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>Archeological Assessment</td>
<td>0</td>
<td>3</td>
<td>0%</td>
<td>0.00%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>Prepare Environmental Document (EIS, EA, etc.)</td>
<td>3</td>
<td>30</td>
<td>10%</td>
<td>0.30%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>Traffic</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>Compile Traffic Data</td>
<td>2</td>
<td>12</td>
<td>17%</td>
<td>0.33%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>Traffic Modeling</td>
<td>1</td>
<td>4</td>
<td>25%</td>
<td>1.00%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>23</td>
<td>Prepare Traffic Analysis</td>
<td>5</td>
<td>24</td>
<td>24%</td>
<td>0.17%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>24</td>
<td>Public Involvement</td>
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<td>8</td>
<td>36%</td>
<td>3.00%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>25</td>
<td>Design File</td>
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<td>20</td>
<td>25%</td>
<td>0.47%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>26</td>
<td>Engineering Estimates</td>
<td>8</td>
<td>32</td>
<td>25%</td>
<td>0.80%</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>27</td>
<td>Right of Way Plans</td>
<td>2</td>
<td>10</td>
<td>12%</td>
<td>0.45%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>28</td>
<td>Photogrammetry</td>
<td>0</td>
<td>2</td>
<td>0%</td>
<td>0.00%</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>29</td>
<td>Surveying</td>
<td>3</td>
<td>14</td>
<td>25%</td>
<td>0.80%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>30</td>
<td>Base Map Preparation</td>
<td>7</td>
<td>20</td>
<td>25%</td>
<td>0.92%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>31</td>
<td>Access Decision Report</td>
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<td>32</td>
<td>22%</td>
<td>0.70%</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>32</td>
<td>Structures</td>
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</tr>
<tr>
<td>33</td>
<td>Retaining Walls</td>
<td>8</td>
<td>33</td>
<td>24%</td>
<td>1.70%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>34</td>
<td><strong>Sub Total</strong></td>
<td></td>
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<td>$750,000</td>
<td>31.0%</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>35</td>
<td><strong>Final</strong></td>
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</tr>
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</table>

**DBE Participation Calculation Worksheet for Consultant Services**

**Exhibit X-1 (continued)**
Prior to negotiating and executing task orders for services under the On Call agreements, the need for a second-tier competition must be conducted as shown below. In the event of unusual circumstances, only the CSO Manager, or designee, may grant an exception to this process.

- $0 - $10,000 Customer may select directly from the list
- $10,001 - $20,000 Customer must document discussions with at least 3 firms prior to selection
- $20,001 and higher Customer must engage in the formal process outlined below

** Dollar amounts shown above represent the TOTAL task order value including amendments

**FORMAL PROCESS – Task Orders of $20,001 and higher:**

1. Customer (Purchaser) develops a “draft scope of work” outline, including a cost estimate for the work scoped.

2. Customer, in consultation with either the Area Consultant Liaison (ACL) or HQ CSO determines appropriate On Call Roster (Type of Work) to be utilized. A complete listing can be found at the following: [www.wsdot.wa.gov/Business/Consulting/Agreements/default.htm](http://www.wsdot.wa.gov/Business/Consulting/Agreements/default.htm)

3. Customer and ACL reviews On Call Consultant roster and selects an appropriate number of related consultants for competition.

   **Multiple firms.** Customer(s) shall solicit responses from “multiple firms” in selecting a consultant. “Multiple” firms mean a reasonable number of parties considering such factors as type of services needed, schedule, and availability. The offer is to be issued to, at a minimum, not less than 50% of the firms on the list. If fewer than 50% of the firms are contacted, an explanation is to be included in the contract file as to why more firms were not invited to participate.

   **Note:** if there are 6 or fewer qualified firms on the roster/list, the customer and ACL shall solicit all firms.

4. ACL and Customer develop Request for Additional Information (RFAI) documentation. For Task Orders estimated less than $200,000, the page limitation for RFAI response should not exceed 3 written pages. For Task Orders estimated more than $200,000, the page limitation for the RFAI response should not exceed 7 written pages. Exceptions may be requested through written request to the HQ CSO office.

   **Note:** Examples and Templates are available from HQ CSO if needed.
5. ACL and Customer formally communicate, via email, the 2nd Tier Competition opportunity. The appropriate Request for Additional Information (RFAI) documentation shall be attached to the outgoing email.

*Recommended that HQ CSO staff be included as a cc.*

6. Consultants submit Responses to ACL/Customer via email by the Response Due Date & Time, as specified by the RFAI documentation.

7. ACL and Customer conduct evaluation of all responding consultant Responses and make selection.


9. Consultant performs work and submits proper invoices to Customer for payment, per the Payment terms outlined in the Master On-Call Services Agreement.

Consultant Services Staff Contact Information
Attention: CSO Manager
Email: CSOSubmittals@wsdot.wa.gov
Phone: (360) 705-7104
www.wsdot.wa.gov/business/consulting

**Second Tier Selection Processes – Recommended Process Hints**

First, check with the ACL and CSO to determine which on call list is appropriate for the project, and what the project total cost limits are on that list. All lists have maximum project amounts allowable for any work to be assigned. For example, the Transportation Design PS&E lists have limits for the Under $500,000 firms at $150,000 for the total project amount including all amendments. The Over $500,000 list has a limit of $1,500,000 total project amount including all amendments. Anything needed from this particular set of lists that is expected to exceed $1,500,000 must be advertised. For most on call agreements, the task orders are limited to projects at $1,500,000 or less. The CSO must also be notified that a Second Tier selection process is expected for the project along with the methods, list of firms to be invited, and criteria expected to be used.

Second, the ACL and CSO can help with structuring the information for the consultants and developing the Request for Additional Information (RFAI). The process may include meetings between the project office and the ACL to ensure as much project information is available as possible for the consultants to understand it. A draft scope is recommended for the work to be provided by the consultant, along with a draft state’s estimate of total consultant services cost. Decisions regarding whether ties between firms responding or very close scores will need a second process must be made to ensure the consultants know the full selection process in the RFAI. A schedule will need to be provided for the project including the selection process dates. The scoring of the criteria (point system) and a list of scoring staff will be developed. Note that for A&E selections, cost of the consultant services is not a criteria for selection, though the State needs to estimate their project costs using average consultant rates to ensure the $1,500,000 maximum is not going to be exceeded.
Third, the process is to be managed by the ACL or CSO rather than the project office to provide a more neutral, one person contact point for the process. All documents from the consultants should be received by the ACL or CSO person in charge of the process. Questions during the RFAI will be asked, and a process for answering them to all consultants needs to be available within the invitation to the consultants.

Fourth, the due date and time and email address of the receiver (the ACL or CSO person) must be clearly stated. Criteria must be in accord with the project. For those projects under $200,000, the page limitation is three (3) pages for the submittals and for those over $200,000, the page limitation is seven (7) pages. Requests to CSO for the process should include whether the project demands more pages than the limitation and the reasons behind the request. The CSO has final decision authority on the parameters of the proposed process.

During the process, the project office does not contact any consultants, and if any consultants contact the project office, the ACL or CSO person managing the process should be notified immediately. A decision will be made regarding whether the consultant in question will be eliminated from the process or if the situation can be repaired in some way to not give that consultant an advantage.

After all proposals have been received (do not expect all invited consultants to respond with a proposal) on the date and by the time noted, the scorers are provided with a score sheet and the received proposals with a deadline for returning their scores to the process manager, the ACL or the CSO designee. Scorers should be expected to also provide a listing of the strengths and weaknesses noticed on the various proposals to allow for debriefings. The ACL will compile all scores on a combined score sheet and provide the results to the scorers with a recommendation to either select (a consultant has scored much higher than the rest) or to do the secondary selection process (certain firms are too close in score to determine best team), as outlined in the RFAI request document.

After the consultant is selected for the project, all consultants who responded will be notified of the selection. Debriefings are appropriate to offer to the non-selected firms. The debriefings need to be done by the ACL or CSO based on information received from the scoring team. Debriefings can be by phone or in person. Debriefing and Protest procedures are outlined in Appendix AA. Should the negotiations with the selected firm fail, the process for working with the second firm is outlined in Chapter 410 of the manual.

Costs or pricing components cannot be considered for A&E projects during the process until negotiations begin with the selected Consultant.

For Professional Services Second Tier processes, cost or pricing may be considered, along with Best Value. The Second Tier solicitation would include these elements, if desired, as part of the criteria for selection, and the Cost Analysis and Price Reasonableness form (see Appendix Z) will be used to help compare the proposing consultants’ proposals.
COST ANALYSIS AND PRICE REASONABLENESS DETERMINATION

WSDOT

RFP / RFQ Proposal Title:

I hereby determine the estimate quoted by [name of firm] for this proposal to be fair and reasonable based on the following analysis:

- Comparison of price components against current industry standards, such as labor rates, dollars per pound, dollars per square foot, etc., to justify the price reasonableness of the whole. Attach the analysis which supports the conclusions drawn. Show the summary of the consultant and state estimates in the matrix below.

- Comparison of proposed pricing with an in-house independent cost estimate for the same or similar item. Complete the matrix below, attach the signed in-house estimate, and explain factors influencing any differences found.

Show the summary of the consultant and state estimates in the matrix below.

**Summary Matrix**

<table>
<thead>
<tr>
<th>Consultant Name</th>
<th>Consultant Estimate</th>
<th>State/WSDOT Estimate</th>
</tr>
</thead>
<tbody>
<tr>
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<td></td>
</tr>
</tbody>
</table>

Additional comments and information:
Supporting documents are attached. This analysis and determination will be filed in the project Procurement History file.

________________________________________________
Signature

________________________________________________
Title

________________________________________________
Date

Attachments:
App A-01  Debriefing Conferences

It is necessary to provide the opportunity for unsuccessful proposers responding to either an advertisement for a single project agreement or to a Second Tier Competition to participate in a debriefing conference. The debriefing is held after the apparently successful consultant is selected, and it must be scheduled within the time limits and terms established in the solicitation document. In general, a debriefing conference is required prior to submission of a formal protest. (A protest is a written objection by an interested party to the solicitation or award of a contract.)

The debriefing conference is generally performed by the HQ Consultant Services Office (CSO) or their designee. The CSO may contact those individuals who scored the consultant submittals to obtain additional information necessary for the consultant debriefing. In a debriefing, the discussion should be limited to the requesting consultant’s proposal only. Feedback is provided to assist the consultant in developing future proposals that may be more effective and competitive. The CSO representative will explain the scoring methodology for the proposal so the consultant fully understands that their proposal received a fair and objective evaluation.

Debriefing may be conducted in person or by telephone and may be time-limited.

App AA-02  Debriefing Protests

To allow sufficient response time, all post-debrief protests must be received by CSO no later than 3:00 p.m. PST of the second (2nd) business day following the debrief. If the protest is mailed before the Post-Debrief protest deadline, the Proposer/protestant shall immediately notify CSO’s Manager by telephone, or some other means of rapid communication, that a protest has been made.

CSO shall consider all the facts available to it, and issue a decision in writing within five (5) business days after receipt of the protest, unless more time is needed. The Proposer/protestant and the Proposer(s) against whom the protest is made will be notified if a longer time is necessary and, if the additional time required affects the Final Proposal Due Date or the selection date, all Proposers shall be notified.

CSO’s decision shall be final and conclusive. Selection of the successful Proposer, if any, will be postponed until after CSO has issued its decision.
App AA-03 Complaints Regarding the Solicitation

A complaint regarding the solicitation may be made if the consultant believes that the solicitation unduly constrains competition, or contains inadequate or improper criteria. If the complaint is received prior to the due date of the solicitation response, the CSO will consider the complaint, reply to the consultant with a proposed solution, and make resulting official changes to the solicitation and process. The solicitation process will continue while the complaint is being considered. The solicitation document will include the timeframe and procedures by which a complaint regarding the solicitation itself can be filed should the complaint be made after the solicitation due date.

For all solicitation complaints, the CSO shall consider all the facts available to it, and issue a decision in writing within five (5) business days after receipt of the solicitation protest, unless more time is granted by CSO manager. If the complaint is received after the solicitation due date, the Proposer/protestant and the Proposer(s) against whom the protest is made will be notified if a longer time is necessary and, if the additional time required affects the Final Proposal Due Date or the selection date, all Proposers shall be notified.

CSO’s decision shall be final and conclusive. Selection of the successful Proposer, if any, will be postponed until after CSO has issued its decision.

App AA-04 Protests

All protests regarding any contents or portion of a Request for Qualifications must be submitted to WSDOT Headquarters Consultant Services Office (CSO) as soon as possible after the Proposer/protestant becomes aware of the reason(s) for the protest. All protests must be in writing and signed by the Proposer/protestant or an authorized agent. Such writing must state all facts and arguments on which the Proposer/protestant is relying as the basis for its action. Such Proposer/protestant shall also attach, or supply on demand by CSO, any relevant exhibits referenced in the writing. Copies of all protests and exhibits shall be mailed or delivered by the Proposer/protestant to the Proposer against whom the protest is made (if any) at the same time such protest and exhibits are submitted to CSO. All protests shall be directed to:

Manager, Consultant Services Office
Washington State Department of Transportation
310 Maple Park Avenue SE
PO Box 47323
Olympia, WA 98504-7323
Phone: 360-705-7106
Fax: 360-705-6838
In the event of a formal protest, the CSO follows the process established in the Federal Acquisition Regulations, Part 33, Subpart 33.1.

Procedures and timelines for filing a formal protest must be included in the solicitation document, and they must be followed in the event an unsuccessful proposer protests a procurement. The protest must be related to procedural matters and is generally based on an issue of fact concerning bias, discrimination, or conflict of interest on the part of an evaluator; errors in computing the evaluation scores; or lack of compliance with procedures described in the solicitation document or department policy. Protests that are not based on procedural matters will not be considered.

Protests may be made after WSDOT has announced the apparently successful consultant and after the protesting consultant has had a debriefing conference with the CSO. The protest must be submitted in writing, signed by a person authorized to bind the consultant to a contractual relationship, and addressed to the CSO manager, with a copy to the CSO solicitation coordinator. WSDOT must receive the written protest within five business days after the debriefing. Upon receipt, WSDOT must postpone further steps in the acquisition process until the protest has been resolved.

At a minimum, the protest must contain the following information:

1. Contact information for the protester (name, address, phone, and fax).
2. Name of solicitation or contract being protested.
3. Detailed statement of grounds for the protest, including a description of the resulting prejudice to the protester.
5. Description of relief or corrective action requested.

The protest will be reviewed and evaluated by the Assistant Secretary, Engineering and Regional Operations, or the Assistant Secretary Engineering & Regional Operations Chief Engineer, or a designee. In all cases, the reviewer must be a qualified individual within WSDOT who was not personally involved in the procurement process. WSDOT will deliver its written decision to the protester within five business days after receiving the protest. If additional time is needed, the protester will be notified.

When a formal protest is filed, work under the agreement may not proceed until the protest process is concluded. In the event the agreement was filed with the Department of Enterprise Services (DES) prior to submission of a formal protest, WSDOT must notify DES immediately of the protest. DES will hold the agreement filing without processing until the department notifies DES that the protest review has been concluded, and informs them about the outcome of the review. For A&E contracts, the CSO will hold on executing the agreement until the protest is resolved.

CSO’s decision on a protest shall be conclusive unless otherwise appealed in accord with terms and conditions of the contract.
Evaluator Conflict of Interest and Confidentiality Statements

EVALUATOR
CONFLICT OF INTEREST AND
CONFIDENTIALITY STATEMENTS

Conflict of Interest Statement
To ensure a fair procurement process and to guard against protest by unsuccessful proposers, I have carefully evaluated my position with regard to possible conflict of interest. I certify that I am not aware of any issue which would reduce my ability to participate on the evaluation team in an unbiased and objective matter, or which would place me in a position of real or apparent conflict of interest between my responsibilities as a member of the evaluation team and other interests. In making this certification, I have considered all financial interests and employment arrangements (past, present, or under consideration). I certify that I do not have any potential Conflict of Interest with any entity pursuing this Project.

Confidentiality Statement
In anticipation of my participation in the evaluation process used to evaluate proposals, I certify that I will not disclose any information about the evaluation of this RFP/RFQ/Second Tier during the proceedings of the evaluation process or at any subsequent time, to anyone who is not also authorized access to the information by law or regulation.

Name of RFP/RFQ or Second Tier Project

______________________________

Signature of Evaluator

Date

Printed Name
Consultant Fee Calculation Worksheet

This technique will ensure consideration of the relative value of the appropriate factor in the establishment of a fee objective in the conduct of negotiating and provide a basis of documentation of the fee objective.

In negotiating a fee as an element of price, a reasonable fee shall be negotiated or determined for each agreement by using the following procedure as a guide:

<table>
<thead>
<tr>
<th>Factor</th>
<th>Rate</th>
<th>Weight</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Degree of Risk</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Relative Difficulty of Work</td>
<td>20</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Size of Job</td>
<td>15</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Period of Performance</td>
<td>15</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assistance by the State</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Sub-consulting</td>
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<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Based on the circumstances of each agreement and/or supplement, each of the above factors shall be weighted from .17 to .35 as indicated below. The value shall be obtained by multiplying the rate by the weight. The value column, when totaled, indicate the fair and reasonable fixed fee and/or profit percentage of the direct (raw) labor costs for the agreement and/or supplement.

**Degree of Risk:** Where the design involves no risk or the degree of risk is very small the weighting should be .17; as the degree of risk increases, the weighting should be increased up to a maximum of .35. Agreements with options will have, generally, a higher weighted value than contracts without options for which quantities are provided. Other things to consider: nature of design, responsibility for design reasonableness of negotiated costs, amount, and type of labor included in costs, amount of executive management/principal time required.

**Relative Difficulty of Design:** If the design is most difficult and complex, the weighting should be .35 and should be proportionately reduced to .17 on the simplest of jobs. This factor is tied in, to some extent, with the degree of risk. Some things to consider: the nature of the design, what is the time schedule; etc.; and rehabilitation of new work.